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

ELIZABETH MORT and ALEX RODRIGUEZ, Plaintiffs, vs. LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES; LAWRENCE COUNTY; CHRISSY MONTAGUE, Lawrence County Children and Youth Services Caseworker; and JAMESON HEALTH SYSTEM, INC. Defendants.	Civil Action No. 2:10-cv-01438-DSC JUDGE DAVID S. CERCONE ***Electronically Filed*** **JURY TRIAL DEMANDED**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants, LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES, LAWRENCE COUNTY anc CHRISSY MONTAGUE, file the within Brief in Support of their Motion to Dismiss as follows:

I. QUESTIONS PRESENTED

A. SHOULD THE PLAINTIFF'S AMENDED COMPLAINT BE DISMISSED AS TO CHRISSY MONTAGUE BECAUSE SHE IS ENTITLED TO ABSOLUTE AND QUALIFIED IMMUNITY FOR ALL OF THE PLAINTIFFS' STATED CLAIMS?

Suggested Answer: Yes.

B. SHOULD THE PLAINTIFF'S CASE AGAINST LAWRENCE COUNTY AND LAWRENCE COUNTY CYS BE DISMISSED BECAUSE THERE IS NO PROPER ALLEGATION OF ANY UNCONSTITUTIONAL CUSTOM, POLICY OR PRACTICE AND NO RESPONDEAT SUPERIOR LIABILITY CAN EXIST?

Suggested Answer: Yes.

C. SHOULD THE PLAINTIFFS' DUE PROCESS CLAIM AGAINST LAWRENCE COUNTY, LAWRENCE COUNTY CYS AND CHRISSY MONTAGUE BE DISMISSED BECAUSE THE ALLEGATIONS, EVEN IF BELIEVED, DO NOT RISE TO THE LEVEL OF "CONSCIENCE SHOCKING?"

Suggested Answer: Yes.

D. DOES THE AMENDED COMPLAINT FAIL TO STATE SUFFICIENT FACTS TO ESTABLISH CONSPIRACY TO VIOLATE THE PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS?

Suggested Answer: Yes.

II. INTRODUCTION

This action arises out of the efforts of Lawrence County CYS and one of its employees to protect the welfare of a newborn child after CYS had been advised by the hospital at which the child was born that the child's mother had twice tested positive for opiates. Upon receipt of this information, these defendants took the necessary action to assure the safety of the child by seeking a Court Order to remove the child from the potentially dangerous situation. Now, CYS and the caseworker, Chrissy Montague, are being sued for those actions in protecting the infant.

On April 27, 2010, the plaintiff, Elizabeth Mort, gave birth to a child at Jameson Hospital. Pursuant to the Hospital's policy, Ms. Mort was given a drug screening test. The purpose of the test is to identify newborns with potential to demonstrate symptoms of drug withdrawal which would dictate additional treatment.

Ms. Mort's drug screen was positive for opiates. Pursuant to Hospital policy, a follow-up test of the urine sample was conducted, which was also positive. Jameson Hospital advised Lawrence County CYS of the positive test results. Thereafter, complying with her statutory duties

to protect the welfare of the newborn child, Lawrence County caseworker Montague presented an oral petition to the Court of Common Pleas of Lawrence County seeking an ex parte order permitting CYS to take the child into protective custody. After hearing the information which Ms. Montague had, the Court granted the Petition and, on April 30, 2010, CYS took the child into protective custody pursuant to the emergency order.

Following the emergency removal of the child, the plaintiff sought another drug test from her obstetrician. The result of that test, which took place on the date the child was removed and four days after the initial positive test, was negative for opiates.

A hearing was scheduled for May 3, 2010, but was then postponed until May 6, 2010 by agreement of the parties. On May 3, 2010, at the time scheduled for the hearing, Ms. Mort and her father met with Ms. Monatgue and advised the caseworker that they believed the positive test result from Jameson Hospital was the result of Ms. Mort's having eaten a bagel containing poppy seeds on the day prior to her admission. After receiving this information and the information of the negative drug screen conducted on the date of the child's removal, on May 5, 2010, CYS advised the plaintiffs that it was dismissing the action and returning the child on that date, which, in fact occurred.

The plaintiffs now seek recovery against these defendants based upon the emergency removal of the child after CYS was advised that the mother had tested positive for opiates. To that end, the plaintiffs have filed claims based upon the alleged violation of their substantive due process rights and for conspiracy to deprive them of their civil rights. For the reasons set forth below, these defendants are entitled to dismissal of all claims against them.

III. RELEVANT FACTS FROM AMENDED COMPLAINT

This case arises from the removal of the plaintiffs' child from their custody on April 30, 2010. (Amended Complaint, ¶¶ 1, 61). The plaintiff, Elizabeth Mort, had given birth to a child on April 27, 2010, at Jameson Hospital. (Amended Complaint, ¶ 31). Prior to giving birth, The plaintiff was given a urine drug screen pursuant to Jameson Hospital's policy. (Amended Complaint, ¶ 36). The purpose of the drug screen was to identify newborns with potential to demonstrate symptoms of drug withdrawal so that those infants can be observed and treated. (Amended Complaint, ¶ 17).

Ms. Mort's initial drug screen was positive for the presence of opiates. (Amended Complaint, ¶ 38). Because of the positive result, a confirmatory test was performed which, again, was positive for the presence of opiates and, specifically, morphine. (Amended Complaint, ¶ 42). At that time, Jameson Hospital informed Lawrence County CYS of the positive result. (Amended Complaint, ¶ 45).

Upon receipt of information from Jameson Hospital that a child had been born to a mother who had twice tested positive for the presence of opiates, CYS case worker, Chrissy Montague, orally petitioned the Court of Common Pleas of Lawrence County for an *Ex Parte* Emergency Order permitting Lawrence County CYS to take the child into protective custody. (Amended Complaint, ¶ 54). Following the presentation of the petition by Ms. Montague, the Court of Common Pleas entered an order permitting Lawrence County CYS to take the child into protective custody. (Amended Complaint, ¶ 60). On April 30, 2010, two Lawrence County CYS case workers, along with Neshannock Township police officers arrived at the residence of the plaintiffs and took custody of the child. (Amended Complaint, ¶¶ 61, 68).

Following the emergency removal of the child , and at the behest of her father, the plaintiff requested a urine drug screen be conducted by her obstetrician, Dr. Carlson. (Amended Complaint, ¶¶ 69, 72-74). The result of that urine drug screen of April 30, 2010, was negative for the presence of any drug. (Amended Complaint, ¶ 74).

The required 72 hour hearing following the taking of custody of the child was scheduled for May 3, 2010, at 1:30 p.m. (Amended Complaint, ¶ 75). At that time, the plaintiff and her father met with case worker Montague and advised of their belief that the positive test was the result of the plaintiff's ingestion of a poppy seed bagel on the day prior to her admission to the hospital. (Amended Complaint, ¶ 79). For unspecified reasons, the informal hearing of May 3, 2010, was rescheduled until May 6, 2010, at 1:30 p.m. (Amended Complaint, ¶ 82).[1]

On May 4, 2010, the plaintiffs arrived at the offices of Lawrence County CYS to visit with the child. (Amended Complaint, ¶ 84). While at the office of Lawrence County CYS, the plaintiffs were advised of the result of the April 30, 2010, urine drug screen conducted at the office of the plaintiff's obstetrician and that the result was negative. (Amended Complaint, ¶ 85). Ms. Montague was advised of the result on that date. (Amended Complaint, ¶ 85). The next day, May 5, 2010, Lawrence County CYS contacted the plaintiffs and advised them that it intended to file a Motion to Dismiss the Dependency Petition and that the child would be returned to their custody, which did occur on that date. (Amended Complaint, ¶ 86).

[1]Although it is not alleged, these defendants believe that the postponement was agreed upon by all parties.

IV. ARGUMENT

Standard applicable to Motions to Dismiss.

In Williams v. Hull, 2009 WL 1586832,(W.D. Pa. 2009), this Court explained the motion to dismiss standard of review, as annunciated by the Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and as refined in Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), as follows:

> The issue is not whether the plaintiff will prevail at the end but only whether he should be entitled to offer evidence to support his claim. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)]; Scheuer v. Rhodes, 419 U.S. 232 (1974). A complaint must be dismissed pursuant to Rule 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (rejecting the traditional 12(b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). *See also* Ashcroft v. Iqbal, ___U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (specifically applying Twombly analysis beyond the context of the Sherman Act). The court must accept as true all allegations of the complaint and all reasonable factual inferences must be viewed in the light most favorable to plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985). The Court, however, need not accept inferences drawn by plaintiff if they are unsupported by the facts as set forth in the complaint. *See* California Pub. Employee Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir.2004) citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir.1997). Nor must the court accept legal conclusions set forth as factual allegations. Twombly, 550 U.S. at 556, citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "**Factual allegations must be enough to raise a right to relief above the speculative level**." Twombly, 550 U.S. at 556. **Emphasis added**. Although the United States Supreme Court does "not require heightened fact pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." Id. at 570.

In conducting the requisite analysis of a Motion to Dismiss, a Court may consider the allegations in the Complaint, exhibits attached to the Complaint, and matters of public record. Shuey v. Schwab, 2010 WL 479938 at *3 (M.D. Pa. Feb. 4, 2010) (citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir.1993). In addition, a court "may also

consider 'undisputedly authentic' documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss." Id. (Citing Pension Benefit Guar. Corp., 998 F.2d at 1196).

A. CHRISSY MONTAGUE IS ENTITLED TO BOTH ABSOLUTE IMMUNITY AND QUALIFIED IMMUNITY FOR ALL OF PLAINTIFFS' CLAIMS.

1. ABSOLUTE IMMUNITY

The Third Circuit has held that CYS caseworkers "are entitled to absolute immunity for their actions in petitioning, and in formulating and making recommendations to the state court." Ernst v. Child and Youth Services of Chester County, 108 F.3d 486, 493 (3d. Cir. 2007); Bowser v. Blair County Children and Youth Services, 346 F. Supp.2d 788 (W.D. Pa. 2004) (Gibson, J.). This immunity includes "acting as an advocate in judicial proceedings" and "is broad enough to include the formulation and presentation of recommendations to the court in the course of such proceedings." Ernst, 180 F.3d at 495. It does not encompass "'investigative or administrative functions outside the context of a judicial proceeding.'" Ernst, 180 F.3d at 497 n.7 (quoting Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) (holding that pre-adjudicatory investigative activities by child welfare workers are entitled only to qualified immunity).

The Third Circuit explained that public policy supports absolute immunity for such child welfare workers because their actions are closely analogous to those of prosecutors. Ernst, 180 F.3d at 496. As the Third Circuit explained, "[c]ertainly, we want our child welfare workers to exercise care in deciding to interfere in parent-child relationships. But we do not want them to be so overly cautious, out of fear of personal liability, that they fail to intervene in situations where children are in danger." Id. (citations omitted). "[A]lternative mechanisms other than the threat of §1983 liability

protect the public against unconstitutional conduct by child welfare workers. First, the judicial process itself provides significant protection." Ernst, 180 F.3d at 497 (Emphasis added)..

Turning to the facts of this case, it is clear that plaintiffs' claims against Ms. Montague are barred by absolute immunity.

a. Chrissy Monatgue is entitled to absolute immunity for her reliance upon the Hospitals report of the mother's suspected drug use.

Part of plaintiffs' contention is that Ms. Montague violated plaintiffs' civil rights by pursuing the emergency ex parte order of court of April 30, 2010. These claims are clearly barred by the absolute immunity enjoyed by the caseworker defendants.

Initially, it should be noted that there is no dispute that Jameson Hospital made a report of suspected drug use to Lawrence County CYS. (Amended Complaint, ¶ 45). Further, there is no dispute that the results of the drug tests conducted at Jameson Hospital were accurately reported. (Amended Complaint, ¶¶ 38, 42). Rather, the plaintiff essentially concede the accuracy of the tests by their position that the positive test was the result of the ingestion of a poppy seed bagel. (Amended Complaint, ¶ 79).

Seeking the April 30, 2010 ex parte court order cannot support liability in any case. Requesting such an order clearly is "petitioning" the court, and providing any testimony constitutes "making recommendations to the state court" and/or "acting as an advocate in judicial proceedings" for which Ms. Montague is absolutely immune. Ernst, 108 F.3d at 493 (3d. Cir. 2007).

Here, Ms. Montague was certainly involved in requesting Court intervention in order to protect the welfare of an infant. At the time of her request, she presented the Court with the information that she had. Specifically, she offered evidence that a three day-old child was in the

custody of a parent who had tested positive for opiates while in the hospital giving birth to that child. This information came directly from the hospital, which had conducted the drug screening pursuant to its policy. Ms. Montague had a right and even an obligation to rely on that information and take the indicated action of seeking an Order from the Court to protect the child. In that there can be no dispute that all of Ms. Montague's actions were geared toward presenting the information to the Court and advocating for the issuance of an Order, activities for which immunity is clear, the plaintiffs' claims arising from Ms. Montague's actions in seeking the April 30, 2010 Order cannot support a claim upon which relief may be granted, and must be dismissed.

b. Chrissy Montague is absolutely immune from suit for presenting the postitive drug test report to the state trial court.

Plaintiffs also claim that the defendants violated their civil rights by presenting the state court with the oral petition "based solely upon a report from a hospital or other medical professional of a positive prenatal drug test of the child's mother, and without further investigation into family circumstances whatsoever... ." (Amended Complaint, ¶ 95). In essence, the plaintiffs seek to hold Ms. Montague liable because she relied upon a positive drug test administered by the hospital at which the mother gave birth.

The alleged failure to consider additional medical evidence cannot support a claim in this case. In Bowser v. Blair County Children and Youth Services, 346 F. Supp.2d 788 (W.D. Pa. 2004), this Honorable Court noted that an evaluation and consideration of evidence to be presented to a state judge is entitled to absolute immunity because it constitutes "preparing for" and "initiating" judicial proceedings. Bowser, 346 F.Supp.2d at 793-94. While plaintiffs may believe that the evidence commanded a different result or that investigation beyond the medical evidence is

warranted. The claim is based upon Montague going to Court with the information she had. The law does not permit claims relating to making such reports to a court. This is precisely the reason for the absolute immunity enjoyed by caseworkers in such situations. Every investigation conducted by CYS workers following the receipt of a report of suspected abuse or neglect requires a myriad of "judgment calls," just as any prosecutor is faced with such decisions. The federal courts have demonstrated through their opinions, as set forth above, that caseworkers should not be hamstrung in their duties by a concern or fear of possible civil liability for making these difficult decisions.

Upon examination, the facts of the instant matter provide a perfect framework for understanding the federal court's hesitation in imposing civil liability upon caseworkers. Here, CYS became involved with the child only upon receiving a report from a hospital that the child was born to a mother who had tested positive for opiates and, specifically, morphine, on two occasions. Accordingly, it became incumbent upon Ms. Montague, who was assigned the case, to follow through with this investigation. During the brief period which Ms. Montague had this case, there was never any doubt cast that the result of the drug screens were anything other than accurate. Again, the plaintiff makes no such contention.

In essence, the plaintiffs would have this Court impose liability upon the Ms. Montague despite the fact that she was advised that a child had been born to a mother who tested positive for opiates and morphine, took emergency action to protect that child, and had a Court agree that an Order was warranted and needed. It would appear that the plaintiffs contend that Ms. Montague should be civilly liable for not ignoring the accurate information received from the hospital. The plaintiffs' position would require every CYS worker to "second guess" all information received from a medical provider, ***even information that is accurate***, or risk being the subject of civil

liability. Of course, such a conclusion is ludicrous and provides abundant rationale as to why the federal courts have found CYS employees to be absolutely immune from civil liability for making such judgment calls. As stated, this case provides an ideal factual framework to understand both the reason and need for such absolute immunity and, accordingly all of the plaintiffs claims against Chrissy Montague should be dismissed with prejudice.

2. QUALIFIED IMMUNITY

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The purpose of qualified immunity is to limit the deleterious effects that the risk of civil liability would otherwise have on the operations of government. Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995). A public official loses his qualified immunity and becomes subject to liability only when he acts in a manner which is not "objectively reasonable" under the circumstances. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

It is of no small moment that neither CYS nor Ms. Montague had the authority to remove the child from the custody of the plaintiffs. Rather, Ms. Montague sought an Order from a Judge of the Lawrence County Court of Common Pleas directing the emergency removal of the infant. The Judge heard the evidence, including the results of the drug screens, and determined that he agreed that the interest of the safety and welfare of the child were best served by removing the child from a potentially harmful environment. Without the Court's approval, under these circumstances, the child would not have been removed.

In this action, no facts pled by the plaintiffs would support a conclusion that Ms. Montague acted in a manner which was not objectively reasonable. To the contrary, as set forth immediately above, the facts lead to the undeniable conclusion that Ms. Montague actions were not only reasonable but appropriate. Ms. Montague was confronted with evidence that Ms. Mort had given birth to a child while she was using an opiate, specifically morphine. The plaintiffs concede that the information regarding the test result as conveyed to Ms. Montague was factually accurate. The plaintiffs essentially contend that Ms. Montague had a duty to ignore this undisputed fact.

In fact, a better argument could be made that had Ms. Montague acted in any way other than that which she did, then her actions would have been unreasonable. Plaintiffs would ask this Court to find that the actions of Ms. Montague in seeking an Order to remove the child from the custody of a person that the admitting hospital had determined was using morphine was objectively unreasonable. Surely the law cannot support such a conclusion. Rather, had Ms. Montague ignored the test result and done nothing, and harm would have befallen the child, that decision may have proven to be objectively unreasonable. In this case, when confronted with a choice as to how to protect the child, this Court can easily determine, even based upon the allegations of the Amended Complaint, that Ms. Montague acted prudently, decisively, and, most important, reasonably.

B. THE FACTS SET FORTH IN THE AMENDED COMPLAINT CANNOT SUPPORT A CAUSE OF ACTION AGAINST LAWRENCE COUNTY OR LAWRENCE COUNTY CYS UNDER 42 U.S.C. § 1983 AS THERE ARE NO ALLEGATIONS OF ANY UNCONSTITUTIONAL CUSTOM, POLICY OR PRACTICE, AND RESPONDEAT SUPERIOR LIABILITY CANNOT EXIST.

"A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). Section 1983 municipal liability attaches only "when execution of 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, inflicts the injury." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990)(quoting Monell, 436 U.S. at 694). To succeed on a § 1983 claim, a plaintiff must show that the municipality "maintained a policy or custom that caused a deprivation of his constitutional rights." Doby v. DeCrescenzo, 171 F.3d 838, 867 (3d Cir. 1999).

A plaintiff must demonstrate a "plausible nexus" or "affirmative link" between the municipality's custom and the specific deprivation of the constitutional right at issue. A policy is made when a decision maker possessing final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990), quoting Pembaur v. City of Cincinnati, 475 U.S. 469 481 (1986). Custom can be established by a showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as to virtually constitute law. Bielevicz, 915 F.3d at 850. In either of these cases, it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, the custom and that as a result of policy or custom, they have suffered a constitutional deprivation.

In this case, plaintiffs allege that Lawrence County and Lawrence County CYS created a custom, practice or policy which operated to deprive parents of their substantive due process rights. Specifically, the plaintiffs contend that by CYS's policy of removing a newborn child from its parents "based solely on the report from a hospital or other medical professional of a positive prenatal drug test" violates this right. This position is untenable.

Lawrence County CYS is created and controlled by statute in the Commonwealth of Pennsylvania. 55 Pa. Code 3130.12. The statutory purpose of CYS is to protect children within the Commonwealth. Children and Youth agencies are governed by regulations of the Department of Welfare and are subject to Department of Welfare review and certifications. 55 Pa. Code § 3130, et seq.; 62 P.S. § 2205; 62 P.S. §§ 701-704.

Investigation and handling of abuse within the Commonwealth are the responsibility of the statutorily created children and youth agencies. 55 Pa. Code §168.5. Child welfare agencies are mandated by law to follow established guidelines for conducting abuse investigations and insuring the safety of children. 55 Pa. Code § 3490.3. The definition of "child abuse" as set forth at 55 Pa. Code § 3490.4 is certainly broad enough to encompass the suspected narcotic use by a mother of a newborn child, which would assuredly "create an imminent risk of serious physical injury" to the infant. See, 55 Pa. Code § 3490.4.

Contrary to plaintiffs' apparent position, a children and youth agency does not have discretion in investigating a referral of abuse. Information cannot be ignored, statute and regulation. On the contrary, a children and youth agency is required to conduct an investigation as outlined by the applicable statutes. 55 Pa. Code §3490.55(a). Investigations conducted by Lawrence County CYS

and its caseworkers in this case were not only appropriate but in accordance with the mandated regulations.

In this case, the essence of plaintiffs' claim is that some policy, practice or custom of Lawrence County CYS does not meet constitutional muster. Amended Complaint at ¶ 95. Specifically, plaintiffs alleged that "LCCYS's custom, policy, or practice under which they seek to remove newborn children from their parents based solely on the report from a hospital or other medical professional of a positive prenatal drug test of the child's mother, and without any further investigation into family circumstances whatsoever ("LCCYS Policy), violates the Fourteenth Amendment rights of parents to substantive due process... ." (Amended Complaint, ¶ 95).

The plaintiffs will be unable to point to one allegation within the Amended Complaint which would establish a policy, practice or custom of Lawrence County CYS which does not comport with constitutional requirements. Rather, the policies of CYS comply with the dictates of the statutes and regulations under which CYS was created and, as such, the claims against the governmental entities must be dismissed. The plaintiffs contend that the policy practice or custom of CYS which is violative of the Fourteenth Amendment is the removal of a child from the custody of a parent who tested positive for an illegal drug. (Amended Complaint, ¶¶ 95-96). The plaintiffs contend that acting on this information alone constitutes a constitutional violation.

The Amended Complaint is woefully lacking in specifics in this regard. The plaintiffs do not allege facts which demonstrate that no investigation occurred or that CYS failed to take any other action. The plaintiffs also fail to allege specifically which aspects of the policy in place with respect to the drug testing and reporting are constitutionally insufficient or why certain aspects of the policy are lacking.

Further, the plaintiffs fail to allege why it is that reliance upon a critical piece of data such as a failed drug test by a mother of a newborn infant renders the policy unconstitutional. Indeed, reliance upon one piece of information by CYS in making the important decisions with which it is tasked can often be crucial in protecting a child. Would anyone argue that CYS or a Court could not rely upon evidence of a cigarette burn on an infant in making a decision to seek an emergency Order removing the child from the custody of the abuser? That situation is not so different from the present set of circumstances so as to render one act appropriate and one unconstitutional. Accordingly, there is no basis to impose liability upon the governmental entities in this matter.

C. THE AMENDED COMPLAINT FAILS TO STATE SUFFICIENT FACTS TO ESTABLISH A VIOLATION OF THE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT AND SHOULD BE DISMISSED.

It is well settled in this circuit that the parents' First Amendment liberty interests in familial integrity are limited by the state's interest in preventing children from abuse. Croft v. Westmoreland County Children & Youth Serv., 103 F.3d 1123, 1125 (3d Cir. 1997). Here, although not specifically alleged, the plaintiffs' substantive due process claim must be rooted in this First Amendment right. Thus, the substantive due process claim will be addressed within this framework.

The above-referenced Croft decision involved a county social worker who received an abuse report from an anonymous caller. After interviewing the alleged perpetrator, who denied any abuse, the caseworker allegedly gave the father an ultimatum to separate himself from the alleged child victim or the child would be taken away and placed in foster care. In its analysis as to whether the father's substantive due process rights were violated, the Third Circuit balanced the parents' fundamental interest with the state's interest to protect children from abuse, holding:

> The due process clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process. In determining whether the Crofts' constitutionally protected interests were violated, we must balance the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse.

Croft, 103 F.3d at 1125.

Accordingly, the Court stated that:

> Our focus here is whether the information available to the defendants at the time would have created an objectively reasonable suspicion of abuse justifying the degree of interference with the Crofts' rights as Chynna's parents. Absence such reasonable grounds, governmental intrusions of this type are arbitrary abuses of power.

Croft, 103 F.2d at 1126.

The court noted that a child abuse investigation does not in and of itself constitute a constitutional deprivation, but such a deprivation can occur where there is no "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." Croft, 103 F.3d at 1126. The Croft court held: "[t]he right to familial integrity, in other words, does not include a right to remain free from child abuse investigations." Croft, 103 F.3d at 1125.

More recently, the Western District of Pennsylvania has applied the Croft analysis in Patterson v. Armstrong County Children and Youth Services, 141 F.Supp.2d 512 (W.D.Pa. 2001). In Patterson, on November 6, 1998, the plaintiff and her daughter had a fight at home. Patterson, 141 F.Supp.2d at 515. Thereafter, the plaintiff drove her daughter to her high school and left her there for the school day. Id. While at the school, the daughter informed the guidance counselor of the events of that morning and showed the guidance counselor various scrapes and bruises. Id.

School officials met on the matter and decided to report it to Armstrong County Children and Youth Services. Patterson, 141 F.Supp.2d at 516. A representative of Armstrong CYS appeared at the school and contacted the local police department. Throughout the day, the police department, CYS officials, and school officials consulted on the matter, ultimately deciding that the daughter should not return home with the mother that afternoon. Id. The daughter was taken into protective custody under the Juvenile Act by the responding police officer, who then immediately or even simultaneously, transferred custody to CYS. Patterson, 141 F.Supp.2d at 517.

While this was transpiring, the mother appeared to pick the daughter up from school. Id. She was advised of the involvement of the police and CYS and asked to give a statement. Id. She refused to do so until her attorney arrived. Id. The officials decided not to wait for the mother's attorney and took the daughter from the school. The CYS official took the daughter to the local district justice office to obtain a PFA against the mother and then took her to her father's residence. Criminal charges were also filed against the mother for assault. Id.

On November 9, 1998, the father took the daughter to get another PFA. Id. This was necessitated by the fact that he original PFA was ineffective because it was in the daughter's name and, as a minor, she was not entitled to secure one. Id. The father obtained a PFA in his name as the daughter's guardian.

On November 18, 1998, the father withdrew the second PFA. Patterson, 141 F.Supp.2d at 518. On November 23, 1998, criminal charges were withdrawn. Id. Also on that date, Children and Youth Services were provided information from Grove City Hospital that, following examination of the daughter, it was determined that she sustained no serious injuries and, therefore,

the abuse charges were determined to be unfounded. Id. Accordingly, at that time, the daughter was free to return to the mother's care. Id.

Applying the Croft standard, the Court found that the substantive due process rights of the mother were not violated. As the Court stated, citing Croft, "[t]he state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in eminent danger of abuse." Patterson, 141 F.Supp.2d at 521, quoting Croft, 103 F.3d at 1126. The Court focused on, "[w]hether the information available to the defendants ***at the time*** would have created an objectively reasonable suspicion of abuse justifying the degree of interference with the parents' rights as the child's parents." Id. ***Emphasis added.***

This standard was further developed and clarified in Miller v. City of Philadelphia, 174 F.3d 368 (3d Cir. 1999). Miller involved claims for the deprivation of substantive and procedural due process by a mother and her three children against Philadelphia and the Department of Human Services for removing the children from the family without probable cause. The Miller Court recognized that the parents had a fundamental liberty interest in the care, custody and management of their children. The Court also found that this interest had to be balanced against the state's interest in protecting the children. The Court also found that, "[o]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." Miller v. City of Philadelphia, 174 F.3d 368, 375. Under this standard, governmental action will not expose an official to liability unless it is, "so ill-conceived or malicious that it 'shocks the conscience.'" Id.

Applying this standard to the Patterson case, the Court held that the conduct of the CYS workers did not even rise to a level of "questionable, but not conscience shocking" conduct as in the Miller case. Patterson, 141 F.Supp.2d at 522. Accordingly, the Patterson court granted summary judgment to the defendant on the plaintiff's claims of a deprivation of substantive due process rights under the Fourteenth Amendment.

In order to establish a Fourteenth Amendment due process claim, the plaintiff must state sufficient facts to show that the egregious conduct "shocks the conscience." A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 579 (3d Cir. 2004). "Negligent conduct is never egregious enough to shock the conscience, but conduct intended to injure most likely will rise to the level of conscience-shocking." A.M., 372 F.3d at 579. For liability to attach under a § 1983 claim challenging a social worker's decision, "the standard of culpability for substantive due process must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed shocks the conscience." Ziccardi v. City of Philadelphia, 288 F.3d 57, 64 (3d Cir. 2002)(quoting Miller, 174 F.3d at 375-376).

Applying the above holdings, the unmistakable conclusion is that the defendants are entitled to dismissal of the plaintiffs' claims. As the Croft and Patterson courts made clear, it is the information available to the CYS workers **at the time** of the decision which will determine if there was an "objectively reasonable suspicion of abuse justifying the degree of interference with the parents' rights as the child's parents." Again, on April 30, 2010, Ms. Montague and Lawrence County CYS had information from Jameson Hospital that a child had been born to a mother who twice tested positive for morphine. Even if this information later was determined to be inaccurate, that does not change the outcome in terms of whether liability could be imposed upon CYS and its

caseworkers for earlier actions. It is the information available **at the time the decision is made** that is important.

Ms. Montague and CYS were not in possession of information from a random phone caller that Ms. Mort had been using opiates. They were not in possession of some anonymous tip. They were not in possession of information that Ms. Mort had been using drugs without any type of substantiation. Rather, they had received direct communication from a hospital that not one, **but two**, positive drug tests were administered to the mother of a newborn child. These results have not been attacked as inaccurate. The plaintiffs only disagree with the interpretation of the empirical findings. The Court, when presented with the exact same information that CYS had, agreed that the best interests of the child were served by removal from the plaintiffs' custody.

Under these circumstances and in possession of this information, it is impossible to reach any conclusion other than that an objectively reasonable suspicion of potential harm to the child existed which was sufficient not only to justify, but to require, the involvment with the plaintiffs' parental rights. This information also demands the dismissal of the substantive due process claim.

D. THE AMENDED COMPLAINT FAILS TO STATE SUFFICIENT FACTS TO ESTABLISH CONSPIRACY TO VIOLATE THE PLAINTIFFS' FOURTEENTH AMENDMENT RIGHTS AND, THEREFORE, COUNT II SHOULD BE DISMISSED.

These defendants adopt the argument and analysis set forth within the Motion to Dismiss and Brief in Support filed by Jameson Health System as to the plaintiffs' Count II sounding in Conspiracy to Violate Plaintiffs' Fourteenth Amendment Rights. Additionally, it is apparent that the reason for the assertion of Count II is the plaintiffs' effort to assert a constitutional claim against

a non-state actor, Jameson. The basis for the claim, however, must arise from some constitutional violation. As set forth above, the plaintiffs' have failed to allege that any violation of their rights secured by the Fourteenth Amendment occurred and, therefore, no conspiracy to violate them is possible.

Further, as set forth by Jameson, the plaintiffs have failed to sufficiently allege the necessary elements of a conspiracy. Beyond the mere assertion of the existence of the conspiracy, the plaintiffs fail to set forth the time frame of the conspiracy, the specific object of the conspiracy, and the specific actions of the conspirators which were taken to achieve the purpose do the conspiracy. These are all vital and absolutely necessary elements of a conspiracy and the lack of allegation regarding these is fatal to the plaintiffs' claim. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir.), abrogated on other grounds by Beck v. Purpis, 529 U.S. 494, 120 S.Ct. 1608 (2000). This is particularly true given the guidance of Iqbal and Twombly relative to the necessity of pleading a plausible claim and the insufficiency of simple conclusory allegations at this stage. Accordingly, Count II must be dismissed.

CONCLUSION

The two claims asserted against these defendants must be dismissed. Initially, the caseworker, Chrissy Montague, is entitled to absolute and qualified immunity. Further, the governmental defendants may not be held liable under a respondeat superior theory and there is no allegation of an unconstitutional policy, practice of custom. The plaintiffs' substantive due process claim is insufficient as no allegations have been set forth which would demonstrate that any defendant acted unreasonably or that any actions would "shock the conscience." Finally, the

plaintiffs have failed to sufficiently allege any conspiracy to violate their constitutional rights. Accordingly, the plaintiffs' Amended Complaint must be dismissed.

JURY TRIAL DEMANDED

Respectfully submitted,

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK, P.L.L.C.

BY: s/Marie Milie Jones
MARIE MILIE JONES, ESQUIRE
PA I.D. No. 49711

U.S. Steel Tower, Suite 4850
600 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 261-6600
Facsimile: (412) 471-2754
E-Mail: mjones@mdbbe.com

Counsel for Defendants,
LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES, LAWRENCE COUNTY and CHRISSY MONTAGUE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within BRIEF IN SUPPORT OF MOTION TO DISMISS has been served upon all parties either individually or through counsel by:

______	Hand-Delivery
______	First-Class Mail, Postage Prepaid
______	Certified Mail-Return Receipt Requested
______	Facsimile
______	Federal Express
X	Electronic Service

at the following address:

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

Sara Rose, Esquire
American Civil Liberties Union
313 Atwood Street
Pittsburgh, PA 15213
(Counsel for Plaintiffs)

John C. Conti, Esquire
Richard J. Kabbert, Esquire
Dickie, McCamey & Chilcote
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
(Counsel for Defendant, Jameson Health System)

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK, P.L.L.C.

Dated: January 17, 2011

s/Marie Milie Jones
MARIE MILIE JONES, ESQUIRE

Counsel for Defendants,
LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES, LAWRENCE COUNTY and CHRISSY MONTAGUE, Lawrence County Children and Youth Services Caseworker

P0921379.1