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

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| ELIZABETH MORT and ALEX RODRIGUEZ,<br><br>Plaintiffs,<br><br>v.<br><br>LAWRENCE COUNTY CHILDREN AND YOUTH SERVICES; LAWRENCE COUNTY; CHRISSY MONTAGUE, Lawrence County Children and Youth Services Caseworker; and JAMESON HEALTH SYSTEM, INC.<br><br>Defendants. | ) | Civil Action No. 2:10-cv-01438-DSC |

**BRIEF IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANT JAMESON HEALTH SYSTEM, INC.**

Plaintiffs Elizabeth Mort and Alex Rodriguez, by and through their undersigned counsel, submit this Brief in Opposition to the Motion to Dismiss filed by Defendant Jameson Health System, Inc. ("Jameson"), in which Jameson seeks dismissal of Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, this Court should deny Jameson's Motion to Dismiss.

## I. Introduction

On April 26, 2010, Plaintiff Mort consumed an "everything" bagel from Dunkin' Donuts containing, among other ingredients, poppy seeds. Amended Complaint, ¶ 34. Plaintiff Mort was admitted to Jameson for labor and delivery two hours later, and shortly afterwards she submitted to a urine drug screen ("UDS") pursuant to Jameson's written policy which requires all obstetrical patients admitted to maternity care to submit to a UDS ("Jameson's Policy"). Amended Complaint, ¶¶ 17, 35 and 36. According to Jameson's Policy, a UDS is considered

positive for opiates if the level of opiate metabolites detected in the urine is 300 nanograms/mL or above – which is 1700 nanograms/mL less than the "cut-off" concentration levels for drug tests used in federal workplace drug-testing programs. Amended Complaint, ¶¶ 19 and 22.

The results of Plaintiff Mort's initial UDS indicated the presence of opiates in her system at a level greater than 300 nanograms/mL. Amended Complaint, ¶¶ 38 and 22. Pursuant to its Policy, Jameson then performed a confirmatory test on Plaintiff Mort's original urine sample, which indicated the presence of morphine at a level of 501 nanograms/mL, approximately 1500 nanograms/mL lower than the aforementioned federal guidelines. Amended Complaint, ¶¶ 38 and 22. The amount of morphine in Plaintiff Mort's system was entirely consistent with the amount of morphine expected to be found in a urine sample within hours of eating foods containing poppy seeds. Amended Complaint, ¶ 42. The results of Plaintiff Mort's urine tests routinely taken throughout her pregnancy were negative for the presence of drugs, and her obstetrician, Nicole Carlson, M.D., did not believe her to be a drug user. Amended Complaint, ¶ 41.

No one at Jameson informed Plaintiff Mort that the ingestion of foods containing poppy seeds could affect the results of the UDS or asked Plaintiff Mort whether she had eaten any foods containing poppy seeds. Amended Complaint, ¶ 37. Jameson never informed Plaintiff Mort of the allegedly positive drug tests or questioned her about drug use or her ability to care for Baby Rodriguez. Amended Complaint, ¶¶ 51-52. Instead, and pursuant to its Policy, Jameson reported the results of Plaintiff Mort's UDS to caseworkers from Defendant Lawrence County Children and Youth Services ("CYS"), an agency which is operated, managed and supervised by Defendant Lawrence County ("Lawrence County") (CYS and Lawrence County will sometimes be collectively referred to as "LCCYS"). Amended Complaint, ¶ 25.

Plaintiff Mort delivered a healthy baby girl, Isabella Rodriguez ("Baby Rodriguez") on April 27, 2010. Amended Complaint, ¶ 31. Pursuant to the Policy, Jameson performed a drug test on Baby Rodriguez, which was negative for all illicit substances. Amended Complaint, ¶ 48. Jameson discharged Plaintiff Mort and Baby Rodriguez on April 29, 2010. Amended Complaint, ¶ 53.

One day after Plaintiff Mort and Plaintiff Rodriguez, the father of Baby Rodriguez, arrived home from the hospital with their daughter, caseworkers from LCCYS and a police officer arrived unannounced at Plaintiffs' door with a court order to remove Baby Rodriguez. Amended Complaint, ¶¶ 1 and 3. The sole basis for the removal was Jameson's report to LCCYS that the UDS it performed on Plaintiff Mort was positive for opiates. Amended Complaint, ¶ 55. LCCYS took Baby Rodriguez and held her in an undisclosed location for five days until admitting that it had made a mistake. Amended Complaint, ¶¶ 1, 67, 86.

Plaintiffs' Amended Complaint asserts claims for conspiracy to violate Plaintiffs' civil rights (Count II), negligence (Count III) and invasion of privacy (Count IV) against Jameson. On December 30, 2010, Defendant Jameson filed a Motion to Dismiss these claims. As discussed below, Jameson's Motion must be denied.[1]

## II. The Standard for Granting a Motion to Dismiss

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court may look only to the facts alleged in the complaint and its attachments. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept

[1] Plaintiffs do not contest Jameson's motion to dismiss Count IV of the Amended Complaint but request that Count IV be dismissed without prejudice so that Plaintiffs may amend their complaint if they learn during discovery that Jameson publicized the results of Plaintiff Mort's drug test.

as true all well-pleaded allegations of the complaint and view them in the light most favorable to the plaintiff. *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). "In considering whether the complaint survives a motion to dismiss, we review whether it contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Montville Twp. v. Woodmont Builders*, LLC, No. 05-4888, 2007 U.S. App. LEXIS 18825, at *2 (3d Cir. August 8, 2007) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007)). Allegations in the complaint must be "sufficiently detailed to put Defendants on fair notice of the claims against them and to permit Defendants to frame an adequate responsive pleading." *DiNicola v. DiPaolo*, 945 F.Supp. 848, 857 (W.D.Pa. 1996).

Because the Amended Complaint more than satisfies the requisite pleading requirements, the Court must deny Jameson's Motion to Dismiss, as discussed below.

## III. Argument

### A. Plaintiffs' allegations that Jameson and LCCYS had a pre-arranged plan to subject obstetrical patients to drug tests so that LCCYS could remove newborns from their parents based solely on the results of those tests state a claim against Jameson under 42 U.S.C. § 1983.

A private party may recover under § 1983 "against any person acting under color of state law who deprives the party of his or her constitutional rights." *Collins v. Christie*, No. 06-4702, 2007 U.S. Dist. LEXIS 61579, *7-8 (E.D.Pa. August 22, 2007). For a private actor to be considered to have acted under color of state law, the actor "'must be deemed to have engaged in a conspiracy with state actors, **or** to have been willful participants in joint activity with them in order to be subjected to suit under 42 U.S.C. § 1983.'" *Sershen v. Cholish*, No. 3:07-CV-1011, 2008 U.S. Dist. LEXIS 15678, at *13 (W.D.Pa. February 29, 2008) (quoting *Beckerman v. Weber*, No. 1:06-CV-1334, 2007 U.S. Dist. LEXIS 58092, at *5 (M.D.Pa. Aug. 9, 2007)

(emphasis added) (noting that although joint activity and "conspiracy" are often both present in the same case, the two tests for state action are distinct). Under either test, "'[t]he inquiry is fact-specific.'" *Id.* (quoting *Groman v. Twp. of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995)); *see also Crissman v. Dover Downs Entm't Inc.*, 289 F.3d 231, 234 (3d Cir. 2002) (en banc) (noting that "the facts are crucial").

Here, the Amended Complaint meets either test: Plaintiffs sufficiently state a claim against Jameson for acting under color of state law under 42 U.S.C. § 1983 through either conspiracy or joint action with LCCYS.

**1. Plaintiffs adequately state a claim for federal conspiracy.**

Jameson's sole argument with respect to Plaintiffs' conspiracy claim is that Plaintiffs fail to allege that Jameson conspired with LCCYS to actually remove Plaintiffs' child from their custody. Jameson's contention is short-sighted and misunderstands the nature of Plaintiffs' conspiracy claim as well as the requirements under federal pleading standards. In order to plead a conspiracy sufficient to establish state action, a plaintiff must plead only "enough factual matter (taken as true) to suggest that an agreement was made," or, stated otherwise, "plausible grounds to infer an agreement." *Twombly*, 550 U.S. at 556. The complaint must allege facts relating to joint rather than unilateral action. *See Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178-179 (3d Cir. 2010); *Sershen*, No. 3:07-CV-1011, 2008 U.S. Dist. LEXIS 15678, at *23.

Plaintiffs allege that Jameson is a state actor for the purposes of their Section 1983 action because Jameson willfully participated in a joint conspiracy with LCCYS to violate parents' Fourteenth Amendment substantive due process rights. While merely furnishing evidence of a patient's positive urine drug screen to LCCYS would not rise to the level necessary to transform

Jameson into a state actor, the Amended Complaint includes "enough factual matter (taken as true) to suggest that an agreement was made," or stated otherwise, "plausible grounds to infer an agreement," between LCCYS and Jameson whereby Jameson created and carried out a policy, in coordination with LCCYS, of drug-testing all obstetrical patients and reporting positive results to LCCYS in order to further LCCYS' unconstitutional policy of separating newborns from mothers who test positive for illicit substances. *Twombly*, 550 U.S. at 556. More specifically, the Amended Complaint alleges that:

- Jameson has a policy of subjecting all obstetrical patients to urine drug tests that is not required by any state or federal law (¶¶ 17-18);
- Under that policy, Jameson notifies LCCYS whenever an obstetrical patient tests positive for an illicit substance (¶¶ 25-26);
- Jameson's policy of reporting all maternity patients with confirmed positive drug-test results to LCCYS is not required under any federal or state law or regulation (¶ 27);
- Jameson has a working relationship with LCCYS through its affiliation with the Children's Advocacy Center, which is based at Jameson's South Campus (¶ 30);
- Jameson's policy of subjecting all obstetrical patients to drug tests and informing LCCYS of positive results was created and carried out in cooperation with LCCYS (¶ 28);
- The purpose of Jameson's drug-testing policy is to further the goals of LCCYS, not provide medical care to patients (¶ 4);
- Jameson was aware that it was LCCYS' policy to remove a newborn whenever Jameson disclosed to LCCYS that a prenatal drug test of the infant's mother was positive (¶ 29); and
- The joint actions of LCCYS and Jameson in developing such Policy and performing drug tests at cut-off concentrations outside of recognized levels and in notifying LCCYS of any positive result "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." (¶¶ 17-30, 101).

Viewed as a whole and taken as true, the allegations of cooperation, understanding and agreement between Jameson and LCCYS in the development and implementation of Jameson's Policy, drug-testing procedures and notification procedures demonstrates that Plaintiffs have pleaded "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 553. Therefore, the Amended Complaint appropriately pleads a conspiracy under § 1983 against LCCYS and Jameson and that by acting pursuant to such agreement with LCCYS, Jameson acted under color of state law. *See Abbott v. Latshaw*, 164 F.3d 141, 147-48 (3d Cir. 1998) ("a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts 'under color of state law' for purposes of § 1983"); *see Croft v. Westmoreland County Children & Youth Svcs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) (absent objectively reasonable suspicion of abuse justifying degree of interference with parents' rights, governmental intrusions into parent-child relationship are arbitrary abuses of power).

In an analogous case from the Western District of Pennsylvania cited by Defendant Jameson, *DiNicola v. DiPaolo,* 945 F.Supp. 848, 857 (W.D.Pa. 1996), a complaint sufficiently alleged conspiracy through "specific facts to withstand dismissal" where it contained allegations that a private individual/hypnotist cooperated with police officers to implant a false memory in the mind of a potential witness to a crime for which the plaintiff was the primary suspect, in order to use the information to bring criminal charges against the plaintiff. *DiNicola*, 945 F.Supp. at 853. The complaint specifically alleged, *inter alia*, that: (1) the police officers cooperated with the hypnotist and gave information and instructions to the hypnotist prior to the hypnosis; (2) the hypnosis session was "highly suggestive and otherwise done in violation of generally accepted standards of hypnosis of witnesses for forensic purposes"; and, (3) as a result

of the hypnosis, the witness adopted a new memory of the events, which was the "product of hypnosis and the plan and agreement among the defendants to bring false criminal charges against the plaintiff." *Id.* at 857. Relying on these allegations, the *DiNicola* court held that the complaint was "sufficiently detailed to put Defendants on fair notice of the claims against them and to permit Defendants to frame an adequate responsive pleading." *Id.* Further, the court noted that it would be premature to dismiss the claim at such an early stage in the proceedings and added that further development of the record would be beneficial. *Id.*

Application of the holding in *DiNicola* to the present facts warrants the same result. Similar to the complaint in *DiNicola*, Plaintiffs' Amended Complaint alleges that (1) LCCYS and Jameson agreed and cooperated in developing Jameson's Policy to require the hospital to notify LCCYS of any positive prenatal drug test result regardless of whether the hospital had a reasonable suspicion of abuse or imminent abuse; (2) the drug test performed by Jameson was performed for the purpose of carrying out LCCYS unconstitutional policy of removing newborn children from their parents and not for any medical or legal reason and violated generally accepted standards by using unreasonably low cut-off concentration levels; and (3) as a result of Jameson's report of Plaintiff Mort's drug test results to LCCYS, LCCYS removed Plaintiffs' child from their custody, which was the foreseeable and intended outcome of LCCYS's and Jameson's plan to identify babies born to mothers with positive prenatal drug tests and separate them from their parents. As in *DiNicola*, these allegations are not unilateral or conclusory and are more than sufficient to place Defendants on notice of the claims against them.

The only case relied upon by Jameson, *Great Western,* is inapplicable to the present situation. In that case, as opposed to *DiNicola*, the complaint's allegations were solely conclusory describing only "unilateral action on the part of certain [state actors]" with no

allegations relating to any agreement or joint activity between the state actor and the private party. *Great Western*, 615 F.3d at 179. Here, as described above in detail, there are numerous allegations relating to an agreement and/or cooperation between Jameson and LCCYS to develop the Policy, perform drug tests of all maternity patients, and report all positive test results to LCCYS. Those actions resulted in the removal of Plaintiffs' child from their custody. Therefore, Plaintiffs' allegations are not conclusory and the Amended Complaint sufficiently pleads a claim for conspiracy against Jameson and LCCYS.

**2. Plaintiffs set forth facts sufficient to infer a claim of joint participation between Jameson and LCCYS.**

In addition to setting forth a sufficient claim for conspiracy, the Amended Complaint also sets forth the elements necessary to sustain recovery under a theory of joint participation between LCCYS and Jameson. "In considering whether the complaint survives a motion to dismiss, we review whether it contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Montville Twp. v. Woodmont Builders, LLC*, No. 05-4888, 2007 U.S. App. LEXIS 18825, at *2 (3d Cir. August 8, 2007) (citing *Twombly*, 550 U.S. at 562).

Plaintiffs have met the requirements to allege the necessary level of joint participation and collaboration between Jameson and LCCYS because they have alleged the existence of a pre-arranged plan between Jameson and LCCYS to separate newborn children from their mothers when Jameson determines that the mother has tested positive for an illicit substance. *See Cruz v. Donnelly*, 727 F.2d 79, 80 (3d Cir. 1984); *see also*, *Great Western*, 615 F.3d at 178-79 (citing *Twombly*, 550 U.S. at 556) ("plaintiff must simply plead "enough facts to raise a reasonable evidence of illegal agreement"). "[W]hen the state creates a system permitting private parties to substitute their judgment for that of a state official or body, a private actor's

mere invocation of state power renders the party's conduct actionable under § 1983." *Cruz*, 727 F.2d at 81-82. "In order to establish the necessary level of joint participation and collaboration, the plaintiff must allege: the existence of a pre-arranged plan [between the state actor and the private party] by which the [the state actor] substituted the judgment of private parties for their own official authority." *Collins*, No. 06-4702, 2007 U.S. Dist. LEXIS 61579, at *10. The critical issue is "whether the state, through its agents or laws, has established a formal procedure or working relationship that drapes private actors with the power of the state." *Cruz*, 727 F.2d at 80.

In *Cruz*, the Third Circuit considered whether the operators of a retail food store and its employees jointly participated with the police in a manner actionable under § 1983. The *Cruz* complaint alleged that the private parties accused the plaintiff of shoplifting and ordered the police to conduct a strip-search of the plaintiff, and that the police subsequently conducted the requested strip-search "without probable cause and only because of racial discrimination." 727 F.2d at 79-80. The Third Circuit held that in order to find that the private parties acted under color of state law, the complaint had to set forth allegations suggesting that "(1) the [state actor has] a pre-arranged plan with the [private party] and (2) under the plan, the [state actor] will [act] without independently evaluating the presence of probable cause." *Id.* at 81.

The Amended Complaint sets forth allegations suggesting that LCCYS and Jameson had a pre-arranged plan. Amended Complaint, ¶¶ 3, 4, 17-30, 128, 100-09. The Amended Complaint also sets forth allegations that, under Jameson's Policy, LCCYS would routinely remove children from the care and custody of their parents without performing its own independent investigation to establish the presence of probable cause. Amended Complaint ¶¶ 3, 44, 46, 47, 52, 54, 56-58. Therefore, the Amended Complaint has set forth allegations sufficient

to find that Jameson jointly participated with LCCYS pursuant to a combination, agreement or understanding to remove Plaintiffs' child from their home without reasonable suspicion of past or imminent child abuse, in violation of Plaintiffs' fundamental right to the care and custody of their child.

**B. Jameson is not entitled to immunity for negligently reporting the results of Plaintiff Mort's drug test to LCCYS because its conduct falls outside the scope of the Child Protective Services Law and was not made in good faith.**

Defendant Jameson argues that Plaintiffs' state law claim in Count III of the Amended Complaint should be dismissed, because Jameson is immune from liability pursuant to § 6318 of the Child Protective Services Law ("CPSL") at 23 P.S. § 6301 *et seq.* Neither Jameson's conduct relating to the creation and administration of its Policy nor its reporting the results of Plaintiff Mort's drug test to LCCYS falls within the scope of the Child Protective Services Law, because neither relates to the reporting of child abuse or suspected child abuse. Alternatively, any report allegedly made pursuant to the Law was not based on a reasonable suspicion of past or imminent child abuse, and Jameson is therefore not entitled to immunity under the Law.

Section 6318 of the CPSL does not shield Jameson from liability for Plaintiffs' state law claim in Count III of the Amended Complaint because Jameson lacked any basis for suspecting that Baby Rodriguez was an abused child. There is no law that requires hospitals to subject obstetrical patients to drug tests or to report the results of such drug tests to child welfare agencies. Jameson made the decision to undertake a maternal drug-testing and reporting policy, and it is liable for the injuries to its patients that result from its negligent conduct in performing and reporting the results of those drug tests.[2]

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[2] *Cf. Sharpe v. St. Luke's Hosp.*, 573 Pa. 90, 821 A.2d 1215, 1221 (2003) (hospital owed plaintiff duty of reasonable care with regard to collection and handling of her urine specimen, which was taken for purpose of employment-related drug testing).

Although the CPSL provides immunity from liability for state law claims to persons who are required to report child abuse,[3] that immunity applies only when the reporter has reasonable cause to suspect that the child is a victim of child abuse[4] or is involved in the delivery or care of an infant who is born and identified as being affected by illegal substance abuse or is having withdrawal symptoms resulting from prenatal drug exposure. *Id.* at § 6311, 6318, 6386; *R.A. by and Through N.A. v. First Church of Christ*, 2000 Pa. Super. 58, 748 A.2d 692, 696 (2000) (CPSL "requires reporting only where there is 'reasonable cause to suspect' abuse").

The factual allegations in the Amended Complaint demonstrate that Jameson had no reason to suspect that Baby Rodriguez was a victim of child abuse, Amended Complaint ¶ 50, and did not believe that Baby Rodriguez had been affected by illegal substance abuse or was having withdrawal symptoms resulting from prenatal drug exposure. *Id.* at ¶¶ 48-49. According to the Amended Complaint, Plaintiff Mort gave birth to a healthy baby girl at Jameson Hospital on April 27, 2010, after receiving all necessary and appropriate prenatal care. *Id.* at ¶¶ 31-32.

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[3] The CPSL is most often cited in cases relating to reports of sexual or physical abuse that has occurred prior to the child coming into contact with the reporter, and, often, when the reporter fears the abuse will happen again. *See ex Heinrich v. Conemaugh Valley Memorial*, 436 Pa. Super. 465, 648 A.2d 53 (1994) (granting immunity to hospital that reported suspected abuse based on swelling on and around infant's temple); *Player v. Singer*, 18 Pa. D. & C. 4th 505 (Ct. Comm. Pl. Clearfield Cty. 1992) (granting immunity to psychologist who reported suspected abuse based on interviews with children).

[4] The CPSL defines "child abuse" as "(i) Any recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age; (ii) An act or failure to act by a perpetrator which causes nonaccidental serious mental injury to or sexual abuse or sexual exploitation to a child under 18 years of age; (iii) Any recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual abuse or sexual exploitation of a child under 18 years of age; or (iv) Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or the failure to provide essentials of life." 23 Pa. Cons. Stat. § 6303. A fetus is not considered a "child." *See Commonwealth v. Kemp*, 18 Pa. D. & C.4th 53 (Ct. Comm. Pl. Westmoreland Cty. 1992).

The results of drug tests on Baby Rodriguez were negative, and Jameson knew at the time that it informed LCCYS of Plaintiff Mort's positive drug-test result that Baby Rodriguez had neither been affected by illegal substance abuse nor had any withdrawal symptoms resulting from prenatal drug exposure. *Id.* at ¶¶ 48-49. Indeed, Jameson discharged Baby Rodriguez from the hospital before reporting the results of Plaintiff Mort's drug test to LCCYS. *Id.* at ¶¶ 45, 53.

Although mandatory reporters are entitled to a presumption of good faith immunity when making reports of child abuse, that immunity is not absolute. The CPSL should not be construed to "protect the defendants where the statements [to Child and Youth Services] were made negligently, in reckless disregard as to their truth or falsity, or with a malicious purpose." *Rauch v. Spotts*, 20 Pa. D.&C. 4th 152, 158 (Ct. Comm. Pleas Lycoming Cty. 1993) (analyzing immunity for reporting abuse under CPSL and other statutes). The factual allegations in the Amended Complaint demonstrate that Jameson acted negligently when it made the report regarding Plaintiff Mort's drug-test results to LCCYS. For instance, at no point did Jameson ask Plaintiff Mort if she ate any foods, such as poppy seeds, that could interfere with the results of the drug test or inform her that some foods could cause a false positive result. Amended Complaint, ¶ 37. Nor did Jameson contact Mort after learning the results of the drug test to find out if the positive result could have been caused by any food or medicine she was taking. *Id.* at ¶¶ 39, 44, 45, 51. In addition, Jameson used arbitrarily low cut-off concentration levels to determine what constituted a positive result for opiates. *Id.* at ¶¶ 19-22. Finally, Jameson did not provide any information to LCCYS about the level of opiate metabolites detected in Mort's urine sample or tell LCCYS that foods could cause a false positive result. *Id.* at ¶¶ 46-47. Given that the drug-testing of Mort was undertaken pursuant to a Policy adopted by Jameson and that Jameson knew that Plaintiffs would suffer serious consequences — the removal of their newborn

child by LCCYS — as a result of reporting a positive drug test to LCCYS, Jameson should have taken reasonable and appropriate steps to ensure that it did not make erroneous reports about positive prenatal drug tests to LCCYS. The fact that it took no such steps is strong evidence that it acted negligently.

Jameson has cited no cases that support its contention that it was required under the CPSL to report the results of what is believed to be a positive prenatal drug test to LCCYS. Instead, Jameson cites to cases in which child-abuse reporters were entitled to good-faith immunity for making reports about clear evidence of child abuse. In *Fewell v. Besner*, 444 Pa. Super. 559, 664 A.2d 557 (1995), for example, the information conveyed in the report was that the abuser in that case had admitted to killing her son. *Id.* at 563, 664 A.2d at 578. Similarly, in *Heinrich v. Conemaugh Valley Memorial Hosp.*, 436 Pa. Super. 465, 648 A.2d 53 (1994), the hospital made a report based on physical injuries its staff had observed in the patient-child. *Id.* at 467-73, 648 A.2d at 54-57.

Here, there is no specific evidence of either past or imminent abuse; there is only evidence that the concentration of opiate metabolites in Plaintiff Mort's urine sample was greater than 300 nanograms/ML and the concentration of morphine was 501 nanograms/ML. Given the fact that these concentration levels are approximately 1700 and 1500 nanograms/mL lower than the cut-off concentration levels used by the federal government for federal workplace drug-testing programs, it was not reasonable for Jameson to conclude that the drug-test results indicated that Baby Rodriguez was a victim of child abuse or had been born affected by or suffering from withdrawal symptoms as a result of prenatal drug exposure, especially when Jameson knew that Baby Rodriguez was healthy and had tested negative for any trace of drugs in her system. Amended Complaint, ¶ 48.

Jameson's Policy does not serve the purpose of the CPSL, which "is to bring about quick and effective reporting of suspected child abuse so as to serve as a means for providing protective services competently and to prevent further abuse of the children while providing rehabilitative services for them and the parents." *Heinrich*, 436 Pa. Super at 474, 648 A.2d at 53. Rather, Jameson's Policy serves to remove a child from her parents without reasonable suspicion of past or imminent child abuse, based only on the results of a negligently drafted drug-testing policy which routinely results in "false positives." *See* Amended Complaint, ¶¶ 21, 40. Because Jameson's conduct in reporting the results of Plaintiff Mort's UDS to LCCYS was negligent, recklessly disregarded the high possibility of a false report, and lacked a reasonable suspicion of past or imminent child abuse, Jameson not entitled to the qualified immunity granted by the Child Protective Services Law. Therefore, Plaintiffs' state law claim in Count III of the Amended Complaint should not be dismissed.[5]

**C. Plaintiff Mort sufficiently pleaded a claim of negligence because she alleged that she suffered harm as a result of Jameson's conduct.**

In Count III of the Amended Complaint, Plaintiff Mort sufficiently pleads a cause of action based on Jameson's breach of its duty of care to Plaintiff Mort as a patient of Jameson, and on Plaintiff Mort's resulting "harm, including, but not limited to, emotional and psychological pain and suffering and injury to her reputation." Amended Complaint, ¶ 113. While Jameson claims that Plaintiff Mort is not entitled to recover on this claim because the Amended Complaint does not contain allegations of physical injury, Plaintiffs are not required at this stage to set forth every component of their damage claim.

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[5] Jameson asserted the same argument regarding Count IV of the Amended Complaint. As previously indicated, Plaintiffs do not contest the dismissal without prejudice of Count IV.

In fact, the allegations in the Amended Complaint are broad enough to allege physical injuries. The Amended Complaint states that Plaintiff Mort suffered "**harm, including, but not limited to**, emotional and psychological pain and suffering... ." Amended Complaint, ¶ 113 (emphasis added). Under Rule 9 of the Federal Rules of Civil Procedure, the only specificity of pleading with respect to damages relates to "special damages," which is not applicable. Fed. R. Civ. Pro. 9(g). Notably, all of the case law cited by Jameson regarding the specificity of pleading required is Pennsylvania state case law, rather than the applicable federal notice pleading standard.

In the event that this Court determines that Plaintiff Mort is required to plead her damages in Count III with greater specificity, Plaintiff Mort requests leave to amend. Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, a "court should freely grant leave [to amend a complaint] when justice so requires." Fed. R. Civ. Pro. 15(a)(2). If given leave, Plaintiff Mort will amend Count III to include the following physical injuries: headaches, repeated hysterical attacks, frequent nightmares, insomnia, stress, and anxiety. "[U]nder current Pennsylvania case law, a plaintiff who can show such problems as long-term nausea or headaches, repeated hysterical attacks, nightmares, depression, stress, or anxiety which require psychological treatment has demonstrated physical injury sufficient to sustain a cause of action." *Weaver v. Univ. of Pitt. Med. Center*, No. 08-411, 2008 U.S. Dist. LEXIS 57988, at *30 (W.D. Pa. July 29, 2008). Insomnia is also a physical symptom that warrants recovery. *Armstrong v. Paoli Memorial Hosp.*, 430 Pa. Super. 36, 44-45, 633 A.2d 605, 609 (1993) (citing *Crivellaro v. Pennsylvania Power and Light*, 341 Pa. Super. 173, 180, 491 A.2d 207, 210 (1985)). These injuries are sufficient to constitute "physical injury" under Pennsylvania law.

## CONCLUSION

For the reasons above, Plaintiffs Elizabeth Mort and Alex Rodriguez request that the Court deny the Motion to Dismiss of Jameson Health System, Inc.

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February 23, 2011

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the within Brief in Opposition to Defendant Jameson Health System, Inc.'s Motion to Dismiss was served this 23rd day of February, 2011, via the Court's electronic transmission facilities pursuant to Fed. R. Civ. P. 5(b)(3) and Local Rule 5.5 upon the following:

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