

2009

# Jensen v. Cunningham : Brief of Appellee

Utah Supreme Court

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No. 20090277

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**IN THE UTAH SUPREME COURT**

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PARKER JENSEN, a minor by and through his parents/guardians Barbara  
and Daren Jensen; BARBARA JENSEN, individually; and DAREN  
JENSEN, individually,

Plaintiffs-Appellants,

vs.

KARI CUNNINGHAM, in her individual capacity; RICHARD  
ANDERSON, in his individual capacity; LARS M. WAGNER, in his  
individual capacity; KAREN H. ALBRITTON, in her individual capacity;  
and SUSAN EISENMAN, in her individual capacity,

Defendants-Appellees.

---

Answer Brief of State Appellees on Appeal from Order Granting Summary  
Judgment of the Third District Court, Judge Joseph C. Fratto, Jr., presiding

---

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**FILED**  
**UTAH APPELLATE COURTS**

**IN THE UTAH SUPREME COURT**

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## TABLE OF CONTENTS

Table of Authorities .....	iii
Statement of Jurisdiction .....	1
Issues Presented .....	1
1. Issue Preclusion/Law of the Case .....	1
Standard of Review .....	2
2. No Broader State Constitutional Rights .....	2
Standard of Review .....	3
3. No Flagrant Violation .....	3
Standard of Review .....	3
Preservation of the Issues .....	3
Determinative Constitutional Provisions .....	4
Statement of the Case .....	4
Nature of the Case .....	4
Course of Proceedings and Disposition Below Case .....	4
Statement of the Facts .....	5
Summary of the Argument .....	30
Argument .....	31
Conclusion .....	70

Certificate of Service .....	70
------------------------------	----

Addendum A	Memorandum Decision and Final Judgment and Order
------------	--

Addendum B	Article I, Utah State Constitution
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Addendum C	Memorandum Decision and Order Granting Summary Judgment and Remanding State Law Claims
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Addendum D	Plaintiffs' Consolidated Memorandum in Opposition to Defendants (1) Cunningham; (2) Anderson; (3) Wagner & Albritton; and (4) Eisenman's Motions for Summary Judgment
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# TABLE OF AUTHORITIES

## CASES

### FEDERAL CASES

Albright v. Oliver, 510 U.S. 266, 277-78 (1994) .....	66
Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007) .....	66
Briscoe v. LaHue, 460 U.S. 325, 330-35 .....	68
Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993) .....	68
Burns v. Reed, 500 U.S. 478, 489-90, 492 (1991) .....	68
Burrell v. Armijo, 456 F.3d 1159, 1172 (10th Cir. 2006) .....	40
Butz v. Economou, 438 U.S. 478, 512 (1978) .....	67
Cleavinger v. Saxner, 474 U.S. 193, 200 (1985) .....	67
Graham v. Connor, 490 U.S. 386, 364 (1989) .....	44
Holland v. Harrington, 268 F.3d 1179, 1189 n.13 (10th Cir. 2001) .....	62
McIlravy v. Kerr-McGee Coal Corp., 204 F.3d 1031 (10th Cir. 2000) .....	41
Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976) .....	67, 68
Monroe, 398 F.3d 700, 710-11 (5th Cir. 2005) .....	42
North Carolina v. Alford, 400 U.S. 25 (1970) .....	29
Payne for Hicks v. Churchich, 161 F.3d 1030, 1037-38 (7th Cir. 1998) .....	41

Spielman v. Hildebrand, 873 F.2d 1377, 1380-85 (10th Cir. 1989) .....	63
Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365 (8th Cir. 1996) .....	35

## STATE CASES

American Bush v. City of South Salt Lake, 2006 UT 40, ¶ 12, 140 P.3d 1235 ..	51
Bailey v. Bayles, 2002 UT 58 .....	32, 58, 67, 69
Bailey v. Utah State Bar, 846 P.2d 1278, 1280 (Utah 1993) .....	67, 69
Black v. Clegg, 938 P.2d 293, 296 (Utah 1997) .....	67, 68
Block v. Schwartz, 76 P. 22, 24-5 (1904) .....	54
Bott v. DeLand, 922 P.2d 732, 738 (Utah 1996) .....	64
Brigham City v. Stuart, 2005 UT 13, ¶ 10, 122 P.3d 506 .....	59
Brown v. Glover, 2000 UT 89, ¶ 23, 16 P.3d 540 .....	35, 70
Chen v. Stewart, 2004 UT 82, ¶ 68, 100 P.3d 1177 .....	63
Cline v. State, 2005 UT App. 498, 142 P.3d 127 .....	63
Cooke v. Cooke, 248 P. 83, 108 (Utah 1926) .....	57
Dexter v. Bosko, 2008 UT 29, ¶ 5, 184 P.3d 592 .....	3, 48
Foote v. Utah Bd. of Pardons, 808 P.2d 734, 734-35 (Utah 1991) .....	55
Gildea v. Guardian Title Co., 2001 UT 75, ¶ 9, 31 P.3d 543 .....	46
Golding v. Schubach Optical Co., Inc., 70 P.2d 871, 875 (Utah 1937) .....	54

Haase v. R & P Indus. Chimney Repair, Co., 409 N.W.2d 423, 426-27 (Wis. Ct. App. 1987) .....	42
Hicks v. Hicks, 176 S.W. 2d 371, 374-75 (Tenn. Ct. App. 1943) .....	41
IHC Health Servs., Inc. v. D & K Mgmt., Inc., 2008 UT 73, 196 P.3d 588 ....	31
In re Adoption of B.O., 927 P.2d 202 (Utah Ct. App. 1996) .....	54
In re Black, 283 P.2d 887, 894 (Utah 1955) .....	56, 67, 68
In re CFB, 497 S.W.2d 831, 835 (Mo. App. 1973) .....	57
In re J.P., 648 P.2d 1364 (Utah 1982) .....	56, 57, 64
In re Tony Tuttendario, 21 Pa.D. 561 (Pa. Q. 1912) .....	58
Jaskolski v. Daniels, 905 N.E.2d 1, 13 (Ind. Ct. App. 2009) .....	42
Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶ 56, 82 P.3d 1076 .....	2
Lovell v. House of the Good Shepherd, 37 P. 660 (WA. 1884) .....	58
Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶ 17, 16 P.3d 1214 .....	2
Matter of Hofbauer, 393 N.E.2d 1009, 1014 (N.Y. 1979) .....	58
Mill v. Brown, 88 P. 609, 613 (Utah 1907) .....	57
Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 31, 194 P.3d 165 ...	5, 31, 32, 39-40, 43
Sanders v. Leavitt, 2001 UT 78, ¶ 19, 37 P.3d 1052 .....	67
Sims v. Collection Div. of Utah State Tax Comm'n, 841 P.2d 6, 10 (Utah 1992) .....	59
Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah 1993) ...	48, 52
Spackman v. Board of Education, 2000 UT 87, ¶ 20, 16 P.3d 533 ...	58, 60, 62-68

State ex rel. Div. of Consumer Protection v. Rio Vista Oil, Co., 786 P.2d 1343, 1349 (Utah 1990) .....	47
State v. DeBooy, 2000 UT 32, ¶ 32, 996 P.2d 546 .....	57, 59
State v. Kent, 432 P.2d 64, 69 (Utah 1964) .....	6, 55
State v. Larocco, 794 P.2d 460, 464-71 .....	60
State v. Orr, 2005 UT 92, ¶ 25 n.7, 127 P.3d 1213 .....	55, 63
State v. Parker Corp., 297 P. 1013 (Utah 1931) .....	54
State v. Perricone, 181 A.2d 751 (N.J. 1951) .....	57
State v. Ramirez, 817 P.2d 774, 780 (Utah 1991) .....	55
State v. Stilling, 856 P.2d 666 (Utah Ct. App. 1993) .....	29
State v. Thompson, 810 P.2d 415 (Utah 1991) .....	59, 60
State v. Watts, 750 P.2d 1219, 1221 (Utah 1998) .....	59, 60
Thacker v. City of Hyattsville, 762 A.2d 172, (Md. Ct. Spec. App. 2000) .....	42
Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995) .....	45, 46
Untermeyer v. State Tax Comm’n, 129 P.2d 881, 885 (Utah 1942) .....	55
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994) .....	54

## FEDERAL STATUTES

28 U.S.C. § 1291 .....	32, 33
------------------------	--------

## STATE STATUTES

Utah Code Ann. § 62A-4a -105 (6) (West 2004) .....	69
Utah Code Ann. § 62A-4a-113(2) .....	14, 24
Utah Code Ann. § 76-5-301.1 (West 2004) .....	25
Utah Code Ann. § 78A-5-102 (West Supp. 2008) .....	46
Utah Code Ann. §§ 62A-4a-105(6) .....	69
Utah Code Annotated § 78A-3-102(j) (West Supp. 2008) .....	1

## FEDERAL RULES

46 Am.Jur.2d Judgments § 515 (1994) .....	43
---	----

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John J. Flynn, Federalism and Viable State Government – The History of Utah’s Constitution, 1966 Utah L. Rev. 311, 317 .....	51-52
Paul G. Cassell, Search and Seizure and the Utah Constitution, The Irrelevance of the Antipolygamy Raids, 1995 B.Y.U. L. Rev. 1, 13 .....	52, 53, 60
Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union, 1868 Leonard W. Levy, ed., De Capo Press , 36-37 .....	48,50
Christine Durham, Daniel J.H. Greenwood, and Kathy Wyer, Utah’s Constitution, Distinctly Undistinctive, 2008 published in The Constitutional States of America, 654-61 .....	50

No. 20090277

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**IN THE UTAH SUPREME COURT**

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individual capacities.

Defendants-Appellees.

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**STATE DEFENDANTS' ANSWER BRIEF**

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State Defendants/Appellees Kari Cunningham, Richard Anderson, and  
Susan Eisenman respectfully submit this answer brief.

**Jurisdictional Statement**

This Court possesses subject matter jurisdiction over this appeal under Utah  
Code Annotated § 78A-3-102(j) (West Supp. 2008).

**Issues Presented**

**1. Issue Preclusion/Law of the Case**

Issue preclusion bars relitigation of issues decided by a prior, final  
judgment. Law of the case, in turn, contemplates the termination of issues when



they arise again in the same case. In this action removed to federal court, Judge Ted Stewart dismissed Plaintiffs' federal claims, finding Defendants Cunningham and Eisenman absolutely immune; and finding that Defendants Cunningham and Anderson violated no constitutional rights of which a reasonable person would have known. Did the trial court correctly conclude that the federal court's final order precluded it from relitigating the issues underlying Plaintiffs' dismissed federal claims?

### **Standard of Review**

Whether issue preclusion bars this action presents a question of law that this Court reviews for correctness. *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 17, 16 P.3d 1214. Next, whether a trial court correctly interpreted a prior judicial decision constitutes a questions of law, also reviewed for correctness. *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 56, 82 P.3d 1076.

### **2. No Broader State Constitutional Rights.**

Plaintiffs sued State Defendants for violations of Plaintiffs' inherent state constitutional rights. The federal court dismissed Plaintiffs' similar claims under the United States Constitution. Because Plaintiffs failed to establish under the unique posture of this case that the Utah Constitution afforded them broader constitutional protections, did the trial court err when it awarded State Defendants summary judgment?

### **Standard of Review**

Interpretation of the state constitution presents a question of law reviewed de novo with no deference to the trial court. *Dexter v. Bosko*, 2008 UT 29, ¶ 5, 184 P.3d 592.

### **3. No Flagrant Violation**

An individual government employee is not liable for money damages under the state constitution unless a plaintiff establishes that he suffered a flagrant violation of a constitutional right. Plaintiffs must show that State Defendants violated Plaintiffs' "clearly established" constitutional rights of which a reasonable person would have known. If Plaintiffs' allegations establish violations of the Utah Constitution, were those violations flagrant?

### **Standard of Review**

The standard of review for this issue is the same as set out for issue two above.

### **Preservation of Issues**

State Defendants raised these issues in their motions for summary judgment and supporting memoranda. R.947-1082, 1086-1129. The district court's final order granting those motions is attached as Addendum A. R. 4199-4210.

## **Determinative Constitutional Provisions**

Article I of the Utah Constitution is attached as Addendum B. Sections 1, 7, and 14 being determinative.

## **Statement of the Case**

### **Nature of the Case**

Plaintiffs sued State Defendants, among others, for damages allegedly suffered when the Division of Child & Family Services instituted action in Utah's juvenile court to promote the best interests of P.J., a pediatric cancer patient.

### **Course of Proceedings and Disposition Below**

On July 18, 2005, Plaintiffs sued State Defendants and others in Utah's Third District Court for violations of the Utah and U.S. Constitutions, and for the common law torts of wrongful initiation of process and intentional infliction of emotional distress. R.1-70. The action was removed to federal court. R. 106-08.

There, State Defendants filed motions for summary judgment, with supporting memoranda that Plaintiffs opposed. U.S. District Judge Ted Stewart dismissed Plaintiffs' federal claims and remanded their state claims to state court.

*Memorandum Decision and Order Granting Summary Judgment and Remanding State Law Claims (D & O)*, 2008 WL 4372933 (D. Utah, Sept. 22, 2008), attached as Addendum C. Plaintiffs appealed to the Tenth Circuit Court of Appeals, where the case is pending.

On remand, State Defendants again filed motions for summary judgment that Plaintiffs opposed. R. 947-1082, 1086-1129, 1271<sup>1</sup>. The trial court granted each motion, and Plaintiffs timely appealed. R 4199-4210, 4211-4213.

## **Statement of the Facts**

Plaintiffs take their facts from the Statement of Additional Facts that Plaintiffs filed in the state court.<sup>2</sup> See R. 1130-1270. Conversely, State Defendants draw their facts largely from the federal court's preclusive determination of the material and undisputed facts.<sup>3</sup> See *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 31, 194 P.3d 165, 965.

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<sup>1</sup> The record index provides that Plaintiffs' Consolidated Memorandum is contained at pp. 1271-3826. But the record contains only the caption page of that memo. R. 1271. The remaining pages contain exhibits that Plaintiffs submitted below. R. 1272-3826. State Defendants attach a copy of that memorandum at Addendum D and submits a Stipulated Motion to Supplement the Record.

<sup>2</sup> Plaintiffs filed a consolidated statement of additional facts in the district court. Utah R. Civ. P. 7(c)(3)(B). State Defendants responded in detail to those additional facts, many of which are misstated or unsupported. Those responses are set out in full at R. 3843-3885; 3893-3917; 4006-4189.

<sup>3</sup> Rule 7 mandates that "[a] memorandum opposing summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted . . .," *id.* at 7(c)(3)(B), and deems admitted each fact set forth in a moving party's memorandum "unless controverted by the responding party." *Id.* at 7(c)(3)(A). Plaintiffs offered no dispute to Defendants Eisenman's and Anderson's verbatim restatement of facts that Judge Stewart recognized as material and undisputed in the federal court proceedings. Compare R. 956-974; 1093-1102 with R. 1272-1286; 1451-1476. Those facts are thus deemed admitted and this Court should strike Plaintiffs' assertions here that lack conformity with the federal court's determination. Utah R.Civ. P. 7(c)(3)(A).

On April 30, 2003, 12-year-old P.J. had a small growth removed from the floor of his mouth by an oral surgeon named Dr. Christensen. Dr. Christensen sent the excised tissue to Laboratory Corporation of America in Kent, Washington for analysis. LabCorp determined that the sample was malignant and informed Dr. Christensen, who referred P.J. to Dr. Harlan Muntz at Primary Children's Medical Center (PCMC). [R. 515 (Doctors' Ex 5, Christensen Dep. pp 10, 12-16, 20-21, 24-26); R. 3285-3286, May 9, 2003 LabCorp Path. Rep.].

The Jensens met with Dr. Muntz on May 9, 2003. After examining P.J., Dr. Muntz referred him to PCMC's oncology department where he met with Dr. Lars Wagner. Dr. Wagner also met with and examined P.J. on May 9, but could not offer any diagnosis until after PCMC's pathology department completed its own testing. [R. 6 Comp. ¶ 24; R. 515 (Doctors' Ex 15, PCMC Chart Notes pp 1-3); (Doctors' Ex 16, Wagner note p 5); R. 2335-2336, D. Jensen Dep.].

At PCMC's request, LabCorp sent P.J.'s tissue sample to PCMC's pathology department. On May 20, 2003, Dr. Amy Lowichik completed a pathology report on P.J.'s tissue and diagnosed the growth as Ewing's sarcoma based on immunohistochemical staining and the tumor cells' appearance. Dr. Lowichik's report indicated that P.J.'s "case was reviewed by [fellow pathologist] [Dr. Cheryl Coffin] who concurs in this interpretation." Deposition testimony indicates that both pathologists reviewed the testing and were confident in the diagnosis. Dr.

Lowichik estimated her confidence in the diagnosis to be “in the high 90 percent.” Dr. Coffin was also confident that the tumor was Ewing’s sarcoma, and testified that the diagnosis was rendered with near certainty. [R. 3292-3293, PCMC Path. Rep.; R. 2794-2795, 2804, Dr. Lowichik Dep.; R. 515 (Doctors’ Ex 3, Dr. Lowichik Dep. pp 67-68); (Doctors’ Ex 2, Dr. Coffin Dep. pp 12-14, 148)].

In addition to immunohistochemical staining, Ewing’s Sarcoma may be diagnosed through cytogenetic and molecular testing. Ewing’s cells often manifest a chromosomal translocation (an “11; 22 translocation”), which may be detected through those tests. The presence of an 11;22 translocation indicates that a specimen is Ewing’s sarcoma. Cytogenetic testing may be performed only on fresh or frozen tissue. Where a tissue sample is placed in formalin or paraffin, cytogenetic testing is not possible. Although not optimal, molecular testing can be performed on tissue samples that have been placed in formalin or paraffin. [R. 3292-3293, PCMC Path. Rep.; R. 3206-3207, Dr. Wagner Dep.; R. 2668, Dr. Johnston Dep.].

In 2003, PCMC would commonly attempt to conduct cytogenetic testing on sarcoma tissue samples that were excised at PCMC where “there was adequate sample left over after the standard pathology examination.” Molecular testing was available through an affiliated institution. In 2003, it would not have been unusual for a PCMC pathologist to send samples out for molecular testing to provide

further diagnostic information. [R. 3167-3168, 3170, 3208, 3210-3211, Dr. Wagner Dep.; R. 2730-2733, Dr. Lemons Dep.; R. 1759-1760, Dr. Coffin Dep.; R. 1500, Dr. Albritton Dep.].

Because Dr. Christensen placed the tissue in formalin or paraffin, cytogenetic testing could not be performed on that specimen. There were still tumor cells in P.J.'s mouth, which could have been extracted for this purpose, but this would have required further surgery to obtain a sample. In contrast, molecular testing could have been performed on the tissue sample obtained by Dr. Christensen. [R. 1754-1755, Dr. Coffin Dep.; R. 3163-3164, Dr. Wagner Dep.; R. 2704, Dr. Johnston Dep.].

Dr. Wagner discussed P.J.'s diagnosis with Dr. Coffin. She told him that she was confident in the diagnosis and that no further testing was needed. According to Dr. Coffin, where the cell appearance and immunohistochemical staining fit "the criteria for the diagnosis of Ewing's sarcoma," it is not necessary to perform cytogenetic or molecular testing to establish the diagnosis. [R. 3164-3165, 3175-3177, Dr. Wagner Dep.; R. 515 (Doctors' Ex 2, Dr. Coffin Dep. pp 43-44), (Doctors' Ex 17, Dr. Wagner Case Summary p 1); R. 1798, Dr. Coffin Dep.].

On May 21, Dr. Wagner met with the Jensens for more than an hour. Dr. Wagner expressed his confidence in the diagnosis and explained the need to begin chemotherapy right away. Dr. Wagner further explained the difference between

localized and non-localized Ewing's sarcoma. Specifically, Dr. Wagner informed the Jensens that the cure rate for localized disease – where there is no evidence of cancer in places other than where it was discovered – was approximately 70% when treated with the recommended chemotherapy, but that the cure rate for non-localized – metastatic – disease was as low as 20%. Thus, Dr. Wagner explained the necessity of beginning treatment right away to prevent the cancer from spreading throughout P.J.'s body. [R. 515 (Doctors' Ex 17, Wagner Case Summ. pp 1-2), (Doctors' Ex 23, Wagner Aff. pp 1-2, and ¶¶ 4, 6-7), (Doctors' Ex 11, D. Jensen Dep. pp 47-57, 138-140), (Doctors' Ex 14, B. Jensen Dep. p 142), (Doctors' Ex 16, Wagner note p 7); R. 3382, PCMC Chart Notes; R. 3607-3609, Wagner Aff].

That same day, radiographic examinations were performed on P.J.'s neck, thorax, chest, and skull to determine whether the cancer had spread beyond the floor of P.J.'s mouth. Each exam was negative. Ms. Jensen testified that they asked Dr. Wagner "if there was any other test he could run to help confirm that it was Ewing's and he said no." "He was sure it was Ewing's." [R. 515 (Doctors' Ex 1, PCMC Lab Reports pp 6-12), (Doctors' Ex 11, D. Jensen Dep. p 127), (Doctors' Ex 15, PCMC Chart Notes pp 4-8), R. 2154-2155, B. Jensen Dep].

During that visit, the Jensens asked Dr. Wagner to have P.J.'s tissue sample sent to the Dana-Farber Cancer Institute at Harvard University for a second



opinion. Dr. Wagner informed the Jensens that insurance companies often would not pay for a second opinion and encouraged them to contact their insurance provider. Nonetheless, Dr. Wagner agreed to the second opinion and sent the tissue to Dana-Farber as requested. The Jensens ultimately cancelled the Dana-Farber consultation.

[R. 515 (Doctors' Ex 11, D. Jensen Dep. pp 34, 64-70); (Doctors' Ex 14, B. Jensen Dep. pp 96-97); (Doctors' Ex 17, Wagner Case Summ. p 2)].

The Jensens again met with Dr. Wagner on May 29, 2003. At this meeting they asked Dr. Wagner to order a Positron Emission Tomography ("PET") scan. Dr. Wagner refused to order a PET scan, explaining that it would not be useful in P.J.'s situation because there was no evidence of metastatic disease. Dr. Wagner further explained to the Jensens that a negative PET scan would not change the need for chemotherapy. The Jensens again asked Dr. Wagner if there were other tests to confirm the Ewing's diagnosis. Dr. Wagner said "no." [R. 3395, PCMC Chart Notes; R. 3218-3219, Dr. Wagner Dep.; R. (515 Doctors' Ex 11, D. Jensen Dep. pp 95-96, 103-104, 120-121)].

By early June 2003, the Jensens and Dr. Wagner differed significantly in their views regarding P.J.'s medical care. Accordingly, a meeting between the Jensens, Dr. Wagner, Dr. Richard Lemons (head of the oncology department), a PCMC social worker, and PCMC's head of quality assurance was scheduled for June 9, at

PCMC. Dr. Wagner again emphasized the need to begin treating P.J. with chemotherapy right away in order to prevent the cancer from spreading. The Jensens' statements during this meeting are disputed. The Jensens contend that they refused to consent to the proposed chemotherapy based on their desire for further confirmatory tests. Dr. Wagner contends that they refused chemotherapy because they wanted to pursue an alternative treatment called Insulin Potentiation Therapy. Regardless, the parties were unable to resolve the impasse. During the meeting, the PCMC head of quality assurance told the Jensens that a referral to the Division Child and Family Services (DCFS) might be necessary. The Jensens left the meeting, telling the PCMC representative, "You're fired." [R. 515 (Doctors' Ex 4, Dr. Wagner Dep. pp 148-149), (Doctors' Ex 17, Wagner Case Summ.); (Doctors' Ex 8, Dr. Lemons Dep. pp 91, 94-95, 106, 113-114, 123-125); R. 2761-2762, Lemons Dep.; R. 515 (Doctors' Ex 15, Social Worker Notes p 16), (Doctors' Ex 11, D. Jensen Dep. pp 178-183), (Doctors' Ex 14, B. Jensen Dep. pp 118-119, 136-148)].

At some point, Dr. Corwin of Safe and Healthy Families – a division of PCMC responsible for ensuring that patients are not left untreated – became involved in P.J.'s case. Around June 12, Dr. Corwin attempted to make contact with the Jensens. Dr. Corwin and Mr. Jensen had a lengthy telephone conversation on June 15, but were unable to reach an agreement as to P.J.'s medical care. Dr. Corwin

and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation. At that point, PCMC decided to refer P.J.'s case to DCFS for medical neglect in refusing what the doctors believed was medically necessary treatment. [R. 515 (Doctors' Ex 15, PCMC Chart Notes pp 17, 19-20), (Doctors' Ex 29, Dr. Corwin Dep. pp 52-53, 55-56, 60-61, 73, 76, 79-80, 90-91, 113-115, 119-120, 165), (Doctors' Ex 11, D. Jensen Dep. p 215); R. 1011 (Eisenman Ex J, Dr. Corwin Dep. pp 70, 117); R. 2424-2429, 2438, 2639, D. Jensen Dep.]

On June 16, a regularly-scheduled meeting was held at PCMC with representatives from DCFS, PCMC, and other community organizations in the child welfare system. Dr. Wagner and Dr. Corwin were also present. At this meeting, and in a case summary submitted to DCFS, Dr. Wagner summarized his interactions with the Jensens. A formal referral to DCFS was made that same day. The parties dispute whether it was Dr. Corwin or Dr. Wagner who actually submitted the referral. For purposes of the summary judgment motions, the district court presumed the latter. [R. 515 (Doctors' Ex 17. Wagner Case Summary); (Doctors' Ex 29, Dr. Corwin Dep. p 165); R. 1075 (Cunningham Ex A, Cunningham Dep. pp 90-93, 114-117)].

DCFS assigned P.J.'s case to Ms. Cunningham, a DCFS social worker. Drs. Wagner and Corwin provided Cunningham with information regarding their understanding of P.J.'s situation, both orally and in written case summaries.

Cunningham was also present at the June 16 meeting at PCMC. Based on communications with Dr. Wagner, Cunningham believed that P.J.'s situation constituted a medical emergency and that something needed to be done within a matter of hours or days. Cunningham possessed no information that additional tests existed that could confirm P.J.'s diagnosis. And Dr. Wagner reported to Cunningham that he had talked to Dr. Coffin, who believed that no further tests were required. [R. 1075 (Cunningham Ex A, Cunningham Dep. pp 74-81, 114-117, 150-155, 162-165); R. 1011 (Eisenman Ex K, Cunningham Dep. p 110, 112-113); R. 515 (Doctors' Ex 17, Wagner's Case Summary); R. 3407-3411, Wagner email to Cunningham].

On June 18, 2003, Cunningham, through Assistant Attorney General (AAG) Julie Lund, filed a Verified Petition and Motion to Transfer Custody and Guardianship (Verified Petition) in the Third District Juvenile Court for Salt Lake County, Utah. Cunningham filed this petition on the information provided to her by Drs. Wagner and Corwin. She did not conduct an independent investigation of PCMC's referral or into whether P.J., in fact, had Ewing's sarcoma. But Cunningham believed that P.J.'s case was an emergency and also that she was entitled to rely on PCMC's diagnosis and Dr. Wagner's medical opinion. [R. 1075 (Cunningham Ex A, Cunningham Dep. pp 147-148, 150-151, 153-154); R. 3435-3446; Juv. Ct. Pldg, Verified Petition and Motion to Transfer Custody and

Guardianship].

Cunningham vacillated about whether she should contact the Jensens directly. But she ultimately decided not to contact P.J. or his parents, because they obtained counsel before the CPS case opened. *Id.* Cunningham also believed that because P.J.'s case constituted an emergency, DCFS policy precluded her from contacting the Jensens until after the Verified Petition had been filed. [R. 1075 (Cunningham Ex A, Cunningham Dep. pp 158-161); R. 3431-3432, DCFS Medical Neglect Policy; R. 3711-3712, DCFS Activity Records].

On June 20, the Jensens first appeared before the juvenile court. Eisenman represented DCFS in place of Ms. Lund and became the primary AAG on P.J.'s case. [R. 1011 Eisenman Ex B, Eisenman Dep. pp 6-9, 14-17].

At the June 20 hearing, the Jensens' attorney, Frank Mylar, represented that they were interested in obtaining further tests of the tissue sample excised by Dr. Christensen. The Court continued the hearing until July 10, as the parties indicated that a stipulation regarding P.J.'s treatment was possible. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 38-41, 106-109, 115-117); R 515 (Doctors' Ex 33-A, Juv. Ct. Trans., generally and pp 7-9); R. 3454-3455, Juv. Ct. Pldg., Pre-Trial Order].

Around this time, the Jensens sought out Dr. Jorg Birkmayer, who practiced in Vienna, Austria. After reviewing P.J.'s medical records, Dr. Birkmayer indicated to the Jensens that he was not "totally convinced" that P.J. had Ewing's Sarcoma

or that chemotherapy was necessary. [R. 3530, Birkmayer letter]

After the June 20 hearing, the Jensens expressed their desire to have Dr. Birkmayer supervise P.J.'s treatment, and on or about June 30, Mylar provided Eisenman and P.J.'s then Guardian *ad Litem* (GAL) attorney with a copy of a June 23, 2003 letter from Dr. Birkmayer. On July 2, Eisenman sent an email to Dr. Birkmayer in which she asked questions regarding, among other things, Dr. Birkmayer's qualifications and licensure and whether Austria had a standard of care similar to that used by the American Academy of Pediatrics.<sup>4</sup> Dr. Birkmayer forwarded Eisenman's email to Mylar, who contacted Eisenman and instructed her not to contact Dr. Birkmayer directly, but to direct inquiries regarding Dr. Birkmayer to Mylar. According to Mr. Jensen, the Jensens abandoned their desire to have Dr. Birkmayer treat P.J. at that time because DCFS was requiring that P.J.'s medical care be provided by a board-certified pediatric oncologist. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 118-121, 125-133); R. 3529, Birkmayer letter to Eisenman; R. 3530, Birkmayer email to D. Jensen; R. 3535, Eisenman email to Birkmayer; R. 2451, 2571-2572, D. Jensen Dep].

Also in late June 2003, Dr. Wagner left Utah to pursue a new job in Ohio. He

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<sup>4</sup> The Jensens attempt to construe those guidelines and to suggest that Eisenman came upon the guidelines through independent research. The record does not support those claims. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 118-121, 126-129); R. 3232, Wagner Dep.].

informed Eisenman that he was leaving and that she could contact Dr. Lemons or Dr. Karen Albritton if she needed anything. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 54-55, 149-150); (Eisenman Ex O, p 2)].

In preparation for the July 10 hearing, Eisenman filed a bench brief and disclosed to the juvenile court and counsel that she intended to prove DCFS's case using three medical experts: Drs. Coffin, Wagner, and Albritton. Eisenman provided the court and counsel with a copy of Drs. Coffin's, Wagner's, and Albritton's CVs and with the PCMC lab results and Dr. Wagner's case summary. Also in preparation for that hearing, Eisenman provided Dr. Albritton with materials related to the case, including Dr. Wagner's case summary and a list of questions that might be asked. [R. 1011 (Eisenman Ex O, Email from Dr. Wagner to Eisenman); R. 3150, Dr. Wagner Dep.; R. 1490-1491, Dr. Albritton Dep.; R. 515 (Doctors' Ex 10, Juv. Ct. Pldgs., Witness List at 46-48); (Notice of Intent to Use Experts at 49-52); (Doctors' Ex 17, Wagner's Case Sum.); (Doctors' Ex 33-B, Juv. Ct. Trans., July 10, 2003)].

The Jensens were represented by Mylar and attorney Blake Nakamura at the July 10 hearing. At the outset, Mylar objected to the introduction of testimony because he believed the hearing was set for a pre-trial conference and not an evidentiary hearing. The juvenile court sustained the objection and Drs. Albritton and Coffin did not testify. [R. 515 (Doctors' Ex 10, Juv. Ct. Rcds, Nakamura Notice of Appearance at 178-179; Objection to Pre-Trial Disclosures at 220-222;

Juv. Ct. Minutes at 227-228; Juv. Ct. Pre-Trial Order at 229-233)].

The Jensens again raised the issue of whether P.J. really had Ewing's sarcoma. And at the hearing's outset, the Jensens submitted a second letter from Dr. Birkmayer, dated July 9, 2003. But neither the Jensens nor their counsel requested leave of the court to have Dr. Birkmayer treat P.J. Instead, after a short recess, the parties stipulated that P.J. would be examined by doctors at the Children's Hospital of Los Angeles (CHLA) and that the Jensens would abide by CHLA's treatment recommendations. The juvenile court set another pretrial conference for July 28, 2003. [R. 1011 (Eisenman Ex X, Birkmayer letter to Eisenman); R 515 (Doctors' Ex 33-B, Juv. Ct. Trans., July 10, 2003), (Doctors' Ex 10, Juv. Ct. Records, Juv. Ct. Pre-Trial Order at 229-233)].

Per the stipulation, the Jensens traveled to Los Angeles, where P.J. met with Dr. Tishler on July 21. At this meeting, Dr. Tishler informed the Jensens that he was recommending chemotherapy based on prior pathology tests, but that CHLA would do its own pathology analysis and genetic testing to confirm the Ewing's sarcoma diagnosis. The Jensens were unhappy with this result because they believed that Dr. Tishler was not performing an independent evaluation, but was merely deferring to the PCMC doctors. [R. 515 (Doctors' Ex 41, Dr. Tishler Dep. p 25); R. 3088-3089, 3096-3099, Dr. Tishler Dep; R. 2499-2500, D. Jensen Dep.; R 2179, 2234, 2254, B. Jensen Dep.].

Based on this dissatisfaction, the Jensens never returned to CHLA, but sought



medical care from Dr. Charles Simone, a New Jersey physician. Dr. Simone initially agreed to treat P.J., but on learning of the legal battle in which the Jensens were entrenched, Dr. Simone declined involvement. Nonetheless, the Jensens believed that Dr. Simone would still agree to treat P.J., if the juvenile court would permit it. [R. 515 (Doctors' Ex 42, Dr. Simone Dep. pp 11-15, 24-25, 41); (Doctors' Ex 11, D. Jensen Dep. pp 315-323, 974-975); (Doctors' Ex 41, Tishler Dep. pp 60-61); (Doctors' Ex 14, B. Jensen Dep. p 491); R. 3616, Tishler email to Eisenman; R. 2188-2189, 2243, 2246, B. Jensen Dep].

On July 28, the court received a report from Dr. Tishler, via telephone, regarding P.J.'s evaluation at CHLA. Dr. Tishler indicated that to his knowledge the CHLA testing was not yet complete. But he also stated that there was no question that P.J. had a malignant tumor that would require chemotherapy right away and that the remaining pathological and radiological tests would serve only to clarify what type of tumor he had for purposes of tailoring the chemotherapy to P.J.'s needs. Nakamura advocated the Jensens' concern that not all of the testing had been completed. Nonetheless, based on Dr. Tishler's testimony, the juvenile court ordered that P.J. commence chemotherapy before August 8, 2003, without regard to the CHLA test results. The court also provided that should the test results indicate that chemotherapy was not needed, the Jensens were free to bring that fact to the juvenile court's attention. [R. 515 (Doctors' Ex 33-C, Juv. Ct.

Trans, July 28, 2003, generally and at 17-18, 23-24, 41-42); R. 3481-3484, Juv. Ct. Pldg., Order for Treatment].

Nakamura also represented, on July 28, that the Jensens were uncomfortable with Dr. Tishler and preferred that P.J. be treated by Dr. Simone. The court asked Dr. Albritton whether Dr. Simone could be the primary treating physician:

No, we wouldn't make him the primary oncologist. My understanding, in fact, is that he is not board certified in oncology, either pediatric or medical oncology. He's – from what little I know, he's a specialist in complimentary and alternative medicine. So the gist I get is that he would be asking someone in Utah or in L.A. to be prescribing the chemotherapy and then he would be suggesting the complimentary approaches that might diminish side effects and so on. I do not think there will be an oncologist in Utah or L.A. who would let him prescribe the chemotherapy from New Jersey.

[R. 515 (Doctors' Ex 11, D. Jensen Dep p 978); (Doctors' Ex 33-C, Juv. Ct. Trans, July 28, 2003 at 50-51)].

The juvenile court also asked Dr. Tishler whether P.J.'s primary treating physician needed to be a board certified oncologist: "Definitely. There's no other physician that could lead the care and provide the care." Based on this, the juvenile court ordered that P.J.'s primary treating physician be a board certified pediatric oncologist or hematologist, but that Dr. Simone was authorized to work with P.J.'s other treating physicians. The court also scheduled an evidentiary hearing on the Verified Petition for August 20, 2003, in the event P.J.'s situation was not yet resolved. [R. 515 (Doctors' Ex 33-C, Juv. Ct. Trans, July 28, 2003 at

53-54); (Doctors' Ex 10, Juv. Ct. Pldg., Signed Minute Entry at 234-235)].

The Jensens maintain that prior to July 10, Eisenman advocated that P.J. receive treatment only from a board-certified physician. The transcripts from the June 20 and July 10 court hearings contain no evidence that Eisenman took that position. [R. 515 (Doctors' Ex 33-A, Juv. Ct. Trans, June 20, 2003); (Doctors' Ex 33-B Juv. Ct. Trans, July 10, 2003)]. It was attorneys Mylar and Nakamura who first discussed P.J. being treated by a board-certified physician on July 10. [R. 515 (Doctors' Ex 33-B Juv. Ct. Trans, July 10, 2003 at 6)]. Eisenman did insist that P.J. receive treatment from a board-certified pediatric oncologist after the juvenile court made that part of its July 28 order.

The Jensens never returned to CHLA or PCMC to receive the ordered chemotherapy. Instead, around August 6, they contacted the Burzynski Clinic in Houston, Texas to inquire whether P.J. could be treated there. A clinic employee contacted the Jensens on August 7 to indicate that the clinic would see P.J. and scheduled an appointment for August 12. [R. 515 (Doctors' Ex 11, D. Jensen Dep. pp 424-425); (Doctors' Ex 51, Burzyinski Clinic Intake Sheet p 1); R. 2248-2249, 2264, B. Jensen Dep.].

The Jensens apparently believed that they did not have to comply with the juvenile court's order to begin chemotherapy by August 8, 2003, and that this would result only in that court holding the August 20, evidentiary hearing on the

Verified Petition. Thus, on August 8, the Jensens took P.J. and the rest of their children to Bear Lake in Idaho to go boating. From Idaho, they planned to travel to Houston for P.J. to be evaluated in the Burzynski Clinic on August 12. [R. 2466-2467, 2518-2522, 2534, 2541, D. Jensen Dep.].

Having not received confirmation that P.J.'s chemotherapy was underway, Eisenman sought a hearing with the juvenile court on August 8, 2003, for the purpose of seeking authorization to take P.J. into protective custody. Eisenman called Nakamura to notify him of her intentions. The court heard directly from Eisenman, Cunningham, and P.J.'s GAL, and from Nakamura, who participated by telephone. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 198-201, 218-229), (Eisenman Ex Q, Nakamura Dep. pp 444-445); R. 515 (Doctors' Ex 55, McDonald Dep. pp 49-50, 223-225); (Doctors' Ex 10, Juv. Ct. Rcds., Order for Treatment at 237-240); (Doctors' Ex 10, Application for a Warrant with Aff. at 241-251); (Doctors' Ex 10, Juv. Ct. Minutes of 8/13/03 at 297-298); (Doctors' Ex 33-D, Juv. Ct. 8/13/03 Phone Conference Trans. at 192-209); (Doctors' Ex 34, Nakamura Dep. pp 101-106, 115, 244-245, 446); (Doctors' Ex 28, Dr. Albritton Dep. pp 109-113)].

Nakamura indicated that P.J. was not receiving chemotherapy, that the Jensens did not want to initiate chemotherapy, and that they were taking P.J. to the Burzynski Clinic for evaluation. In response, Cunningham paged Dr. Albritton,

who joined the hearing by phone. The court and counsel asked Dr. Albritton whether the Burzynski Clinic was qualified to treat P.J. Dr. Albritton indicated that Dr. Burzynski was not a board certified oncologist-hematologist and that his clinic was known for providing extremely controversial therapy. Dr. Albritton further indicated that she was unaware of any pediatric oncologists at the clinic, but would have to confirm that fact. Finally, Dr. Albritton testified that to her understanding, the clinic was not an appropriate treatment option for a newly-diagnosed cancer patient who had not exhausted standard treatment options. [R. 515 (Doctors' Ex 28, Dr. Albritton Dep. pp 109-113), (Doctors' Ex 55, McDonald Dep. pp 223-225), (Doctors' Ex 33-D, Juv. Ct. Trans., 8/13/2003); (Doctors' Ex 34, Nakamura Dep. pp 101-106, 115); R 1011 (Eisenman Ex B, Eisenman Dep. pp 201-205, 219-220, 225-226)].

Eisenman filed an Application to Take a Child Into Protective Custody, which was supported by Cunningham's August 8, 2003 affidavit, and the attached affidavit of Dr. Wagner, dated July 22, 2003. The juvenile court then signed an order authorizing DCFS to take P.J. into protective custody, finding that was in his best interest. Eisenman enlisted the help of Sandy City Police Officer, Travis Peterson, whom she had contacted earlier that day to serve the court's order, but he was unable to do so because the Jensens had already left for Bear Lake. [R. 515 (Doctors' Ex 10, Juv. Ct. Pldg, Application & Aff.'s pp 241-251; Order to Take

Child Into Protective Custody pp 253-254); R. 2020-2021, Eisenman Dep.; R. 3642-3643, Sandy City PD Rcd].

After the hearing, a court clerk told Eisenman and the GAL that a juvenile court warrant would not be placed on a national database, which required an adult warrant. Thereafter, Eisenman told the Jensens' counsel and the GAL that if the Jensens failed to cooperate with the juvenile court orders, she would have to seek assistance from local and federal enforcement authorities. [R. 515 (Doctors' Ex 10, Juv. Ct. Rcds., Guardian ad Litem Motion for OSC pp 259-298); (Doctors' Ex 33 D, Juv. Ct. Trans. 8/13/03 pp 192-209); R. 2904, McDonald Dep.; R. 3728-3729, Eisenman 8/11/03 letter].

Nakamura informed the Jensens of the court's "pickup order" and of the fact P.J. was to be placed in DCFS' legal custody to begin chemotherapy. Despite this, the Jensens decided to stay in Idaho and seek an independent opinion of P.J.'s condition in preparation for the August 20 evidentiary hearing. [R. 2529-2531 & 2535-2539, D. Jensen Dep.; R. 2273, B. Jensen Dep.; R. 3013-3014, Nakamura Dep.; R. 515 (Doctors' Ex 33-D, 8/13/03 Juv. Ct. Trans)].

On August 11, the GAL and Eisenman co-authored a letter to the Burzynski Clinic, notifying it that the juvenile court had placed P.J. in State's legal custody and stating that the State did not consent to P.J. receiving treatment there. And on August 13, P.J.'s GAL filed a motion for an order to show cause. The juvenile court held a hearing the same day. [R. 3732, McDonald/Eisenman letter; R. 2011-

2014, Eisenman Dep.; R. 515 (Doctors' Ex 10, Juv. Ct. Rcds., GAL Motion for OSC pp 259-298); (Juv. Ct. Trans. 8/13/03)].

Nakamura informed the court that he had made telephone contact with the Jensens, and that he had advised them of the court's August 8 order and told them to comply. Eisenman notified the court and counsel that the Salt Lake County District Attorney's (DA) Office planned to screen the matter for criminal charges. The juvenile court then issued bench warrants for Daren and Barbara Jensens' arrest and ordered them to appear and to present P.J. *Id.* [R. 515 (Dr.s Ex 10, Juv. Ct. Rcds, 8/13/03 Juv. Ct. Min. pp 297-298), (Doctors' Ex 33-D, 8/13/03 Juv. Ct. Trans. pp 192-209)].

On August 15, 2003 and based, in part, on information provided by Eisenman to Officer Peterson, the DA's Office held a criminal case screening that Eisenman, Cunningham, and the GAL attended. Eisenman provided the DDA with a copy of the juvenile court's August 8 custody order and told the DDA that Eisenman was most concerned with getting P.J. into treatment. The same day, a Deputy DA filed one count each of custodial interference and child kidnaping against Daren and Barbara Jensen. [R. 1011 (Eisenman Ex B, Eisenman Dep. pp 230-237); (Eisenman Ex T, Micklos Dep. pp 36-38, 84-86); R. 3744, 3774-3781, SL DA File; R. 3658-3661, SCPD File; R. 515 (Doctors' Ex 33-D, Juv. Ct. Trans. 8/13/03 p 12)].

Utah's child kidnaping statute does not require that a person "flee" with a minor child, but states that a person commits child kidnaping if he or she "intentionally or

knowingly, without authority at law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's . . . guardian . . .” Utah Code Ann. § 76-5-301.1 (West 2004).

The DDA's understanding that Parents left the state after the warrant was entered came from her conversations with law enforcement. [R. 1011 (Eisenman Ex T, Micklos Dep. pp 37-38); R. 974, Eisenman SOUF ¶ 40].

On August 16, Mr. Jensen was arrested in Idaho, where he spent four days in jail before making bail. Ms. Jensen left Idaho and took P.J. to Houston to meet with the Burzynski Clinic. But the clinic refused to see P.J. because Eisenman and the GAL had informed it that the State of Utah had legal custody over P.J. and did not consent to his treatment there. [R. 2534, 2569, D. Jensen Dep.; R. 2206-2207 & 2320, B. Jensen Dep.; R. 3732, McDonald letter to Burzynski Clinic].

On August 20, the juvenile court held a non-evidentiary hearing. Nakamura read a letter authored by Mr. Jensen into the record and explained to the court that the Jensens wanted an opportunity to present evidence. The court agreed to set an evidentiary hearing, but refused to lift the warrants. [R. 515 (Doctors' Ex 33-E, Juv. Ct. Trans, 8/20/03); (Doctors' Ex 48, D. Jensen letter to Yeates pp 1-4)] .

Shortly after this hearing, Eisenman assumed a new position in the AG's office and no longer participated in P.J.'s case. Mark May, then Division Chief of the AG's Child Protection Division, assumed primary responsibility for the Jensen



matter. [R. 2028-2029, Eisenman Dep.].

Also at this time, a representative of Utah's governor asked Anderson, DCFS' then-Director and who had only recently learned of P.J.'s case, to personally assist in negotiating a resolution to P.J.'s case. On August 27, Anderson flew to Idaho to meet with the Jensens, where negotiations continued for several days. [R. 1129 (Anderson Ex B, Ex 1, Anderson Dep. pp 65, 67, 72-73, 84-86, 101-104); R. 515 (Doctors' Ex 33-E, Juv. Ct. Trans, 8/20/03)].

By this date, the juvenile court had orders in place: (1) directing P.J. to commence chemotherapy and to be treated by a board-certified pediatric oncologist/hematologist; (2) placing P.J. in the state of Utah's legal custody for purposes of commencing that treatment; and (3) authorizing the arrest of P.J.'s parents for their violation of the juvenile court's prior court orders. [R. 1075 (Cunningham Ex O, D. Jensen Warrant & OSC); (Cunningham Ex P, B. Jensen Warrant & OSC pp); R. 3735-3736, Juv. Ct. 7/28/03 Minutes; R. 515 (Doctors' Ex 33-D, Juv. Ct. Trans. 8/13/03)].

When asked by then Governor Leavitt to resolve the situation between the Jensens and DCFS, Anderson also reviewed DCFS policies relative to medical neglect. And though not asked to do so, Anderson reviewed Cunningham's handling of P.J.'s case – including her failure to independently investigate PCMC'S referral before seeking court action – to determine whether it complied

with DCFS policy for addressing medical neglect in an emergency. Anderson believed that it did. [R. 1129 (Anderson Ex B, Ex 1, Anderson Dep pp 39, 43, 53, 62, 125, 232, 234)]. Relevant DCFS Policy provides that “[i]n cases where the consequence of the parents’ failure to follow treatment may be death or significant permanent physical or mental damages, the worker will take steps to initiate emergency court proceedings by contacting the [AAG] immediately and will not attempt to resolve the situation through voluntary services alone.” [R. 3431-3432, DCFS Medical Neglect Policy].

When asked by the governor to intervene in the Jensen matter, Anderson’s goal was to help the Jensens assemble a plan to present to the juvenile court that would meet both P.J.’s needs and the court’s prior orders. Anderson told the Jensens that he did not believe they were neglecting the situation, but that he also believed that they needed to get a treatment plan in place that was in P.J.’s best interest before the matter could be resolved. Anderson also believed that although the Jensens were addressing P.J.’s situation, they could still be guilty of medical neglect by failing to provide P.J. with standard treatment that was designed to maximize P.J.’s chances for survival. [R. 1129 (Anderson Ex B, Ex 1, Anderson Dep. pp 72-73, 87-88); R. 515 (Doctors’ Ex 11, D. Jensen Dep. pp 801, 809-810)].

Accordingly, on September 5, the parties entered into a stipulation whereby the Jensens agreed to submit P.J. to the care of Dr. Martin Johnston, a board certified

pediatric oncologist at St. Luke's Hospital in Boise, Idaho and to abide by Dr. Johnston's treatment recommendations. DCFS, in turn, agreed to ask the juvenile court to return full custody of P.J. to the Jensens and to vacate the warrants. Upon receiving assurances from the Jensens that they would submit P.J. to chemotherapy if it was recommended, the juvenile court approved the stipulation. [R. 515 (Doctors' Ex 33-H, Juv. Ct. Trans. 9/5/03), (Doctors' Ex 10, Juv. Ct. Pldg., Stipulated Agreement pp 375-378), (Doctors' Ex 10, Minute Entry p 374), (Doctors' Ex 10, Order pp 379-381)].

Dr. Johnston performed the evaluation and concluded that P.J. needed chemotherapy. The Jensens refused to submit P.J. to chemotherapy and claimed Dr. Johnston had rubber-stamped PCMC's diagnosis. Mr. Jensen told Dr. Johnston that if P.J. did receive chemotherapy at St. Luke's, he would "make sure it's a hellish experience for everybody involved." [R. 3807-3810, Johnston 9/26/03 letter; R. 515 (Doctors' Ex 11, D. Jensen Dep. pp 389, 697-698, 700-702), (Doctors' Ex 14, B. Jensen Dep. pp 349, 354, 451-454)].

The juvenile court held another hearing on October 8, where Dr. Johnston testified and confirmed that P.J. had Ewing's sarcoma and that the Jensens had rejected his recommendation that P.J. undergo chemotherapy. AAG Mark May indicated the parties would attempt to reach a settlement. [R. 515 (Doctors' Ex 33-J, Juv. Ct. Trans., 10/8/03, generally and at 6-10, 78); R. 2029, Eisenman Dep. p

242].

But having determined that the Jensens would not submit P.J. to chemotherapy under any circumstances, DCFS filed a Motion to Dismiss the Verified Petition on October 22, 2003. There, DCFS stated that its decision to dismiss the petition was made with full recognition that without chemotherapy, P.J.'s chances of survival would fall dramatically. Nonetheless, DCFS concluded that it was simply unworkable to attempt to force a 13 -year-old boy to undergo chemotherapy unwillingly. [R. 515 (Doctors' Ex 10, Juv. Ct. Pldg., Motion & Memo to Dismiss Verified Petition pp 438-455)].

On October 2, the Jensens entered a plea agreement on the criminal charges. The Jensens each pled guilty to one count of custodial interference. In exchange, the DA's Office dismissed the kidnaping charges. The Jensens' pleas were held in abeyance for one year and were later dismissed. [R. 515 (Doctors' Ex 11, D. Jensen Dep. pp 733-735) (Doctors' Ex 14, B. Jensen Dep. p 591)]. Neither entered an *Alford* plea. [R. 1011 Eisenman (Ex V, D. Jensen Plea in Abeyance rcds pp 6, 8-12; B. Jensen Plea in Abeyance rcds pp 15-23; Ct Minutes pp 24-25), (Ex W 10/2/03 Plea Hearing Trans.)]. See *North Carolina v. Alford*, 400 U.S. 25 (1970); *State v. Stilling*, 856 P.2d 666 (Utah App. 1993).

Daren Jensen testified on deposition in 2007 that the facts alleged in the criminal information and probable cause statement were true. [515 (Doctors' Ex 11, D. Jensen Dep pp 733-735)]. And Barbara Jensen agreed that she interfered with

the State's custody of P.J. [R. 515 (Doctors' Ex 14, B. Jensen Dep., p 591)].

### **Summary of the Argument**

The trial court correctly granted State Defendants' motions for summary judgment because Plaintiffs' similar claims under the U.S. Constitution were fully and fairly litigated and were dismissed as a matter of law in the United States District Court. That decision is sound and should be affirmed by this Court because, as a threshold matter, all of Plaintiffs' claims are barred alternatively by the doctrines of issue preclusion or law of the case. Moreover, Plaintiffs cannot establish that they possess greater constitutional rights under Utah's Constitution than under the U.S. Constitution; thus their claims are unfounded in law. And were this not the case, State Defendants should nonetheless prevail because Plaintiffs cannot demonstrate a "flagrant" violation of their rights. Finally, Plaintiffs failed to adequately raise or to brief any claims against Defendant Eisenman or to support their common law claims on appeal. For this reason alone, the trial court's dismissal of Defendant Eisenman and of Plaintiff's tort claims should be affirmed.

State Defendants therefore ask this Court to affirm the trial court's order granting summary judgment and dismissing Plaintiffs' state law claims. But to the extent the Court may determine that Plaintiffs possess broader constitutional rights as a matter of state law and that the federal court's issue determinations are not binding here, the Court should remand this matter to the state court for further

consideration of the facts and record evidence adduced below in the first instance.

## ARGUMENT

### I. RES JUDICATA AND THE DOCTRINE OF LAW OF THE CASE BAR RELITIGATION OF THE ISSUES UNDERLYING PLAINTIFFS' STATE LAW CLAIMS.

Utah law recognizes two interrelated doctrines regarding the finality of judgments: res judicata and the law of the case. *See Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956; *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, 196 P.3d 588. Res judicata, in turn, embraces issue preclusion and claim preclusion. *Oman*, 2008 UT 70, ¶ 28. Only issue preclusion pertains here.<sup>5</sup>

Issue preclusion and law of the case are kindred concepts designed to limit the relitigation of issues. Traditionally, law of the case contemplates the termination of issues when they arise again in the same case, *see D & K Mgmt., Inc.*, 2008 UT 73, ¶ 26, and issue preclusion contemplates the termination of issues when they arise in subsequent, related litigation. *See Oman*, 2008 UT 70, ¶¶ 28, 31. But this is not a traditional case. Instead, given its unique procedural posture, this Court can affirm the

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<sup>5</sup> Plaintiffs' dismissed federal claims were predicated on the U.S. Constitution. Their dismissed state claims rest upon the Utah Constitution and state common law torts. Because those *claims* differ, issue, not claim preclusion applies. *See Oman*, 2008 UT 70, ¶ 31 (issue preclusion properly bars relitigation of *issues* that have been finally determined, even where the *claims* for relief may differ) (emphasis added) (citation omitted).

trial court's summary judgment, alternatively, under either concept.<sup>6</sup>

**A. The Federal Court Determined All of the Issues Underlying Plaintiffs' State Law Claims.**

Plaintiffs filed suit in Utah's Third District Court for violations of the state and federal constitutions and other common law torts. R. 1-70. All of the defendants removed the case under federal question jurisdiction. R. 106-08. There, the State Defendants filed motions for summary judgment, seeking dismissal of all of Plaintiffs' claims. The federal court determined the material facts were not in dispute and that State Defendants were entitled to summary judgment as a matter of law. That court dismissed Plaintiffs' section 1983 claims and remanded the state claims to state court. Plaintiffs timely appealed the federal court's dismissal under 28 U.S.C. § 1291.

On remand, the district court determined that because Judge Stewart conclusively found that no disputed issues of material fact existed on the same evidence and arguments, it was bound by the federal court's determination. Judge Stewart's issue determinations bear repeating here:

**Defendant Eisenman.** Plaintiffs sued Eisenman for alleged "non-prosecutorial functions" relative to P.J.'s case, including investigative and complaining witness functions. R. 4, Compl. ¶ 15. In both federal and state court, Plaintiffs alleged that (1)

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<sup>6</sup> This Court may affirm the trial court's grant of summary judgment to State Defendants on any ground apparent from the record. *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10, 13, 52 P.3d 1158.

Eisenman made factual misrepresentations or omissions to the state juvenile court, to her clients and co-counsel, and to a deputy district attorney, Add., D, Consol. Memo, pp 43-51; and (2) Eisenman engaged in other, investigative functions. *Id.* at pp. 74, 78. But in the prior litigation, Judge Stewart concluded that all of Eisenman's conduct fell squarely within her role as the state's attorney and that she was absolutely immune from suit. Add. C, *D & O*, 2008 WL 4372933 at \*12-13.

Judge Stewart determined that “[e]ven assuming that Ms. Eisenman intentionally misrepresented facts to the Juvenile Court, those misrepresentations were made in her role as an advocate. There is no evidence that any of the alleged misrepresentations were made under oath or as a witness.” *Id.* at \*12; *see* Statement of Facts, *supra*, pp. 14-26. He found that Eisenman's relationship with Cunningham and Anderson was that of attorney-client and that her relationship with AG Shurtleff was as co-counsel. Judge Stewart concluded that Eisenman's “communications with th[o]se persons were all directly related to the Juvenile Court proceedings,” *D & O* at \*12, and held that even assuming the alleged misrepresentations, the communications were “directly related to [Eisenman's] ability to present the State's case, [and] satisf[ied] the guiding principle of prosecutorial immunity – proximity to the ‘judicial process and the initiation and presentation of the state's case.’” *Id.* (quoting *Scott v. Hern*, 216 F.3d 897, 908 (10th Cir. 2000)).

The federal court also recognized that though Eisenman provided information to the DDA, she did so to effectuate the juvenile court's order of protective custody: “It is



clear to this Court that th[o]se actions were intimately connected to her duties to the Juvenile Court.” D & O at \* 13; *see* Statement of Facts, *supra* pp. 23-25. The court reached the same conclusion respecting a letter Eisenman co-authored with P.J.’s GAL and sent to the Burzynski Clinic. D & O at \* 13; *see* Statement of Facts, *supra*, pp. 23-24.

Finally, Judge Stewart examined the actions that Plaintiffs describe as investigatory. Respecting Dr. Albritton, the court notably observed that Plaintiffs failed to “show how providing documents to a witness in the course of preparing for a hearing is investigative.” D & O \* 13; *see* Statement of Facts, *supra*, pp. 16. And as to the letter to Dr. Birkmayer, Judge Stewart determined that even when viewed in the light most favorable to Plaintiffs, the alleged facts precluded even an inference that Eisenman obtained and forwarded an errant standard of care “through her own investigative efforts.” D & O \* 13; *see* Statement of Facts, *supra*, pp.15.

Because the federal court determined the threshold issue of Eisenman’s absolute immunity in prior litigation, the district court correctly estopped Plaintiffs from relitigating that issue. The district’s court decision is sound and should be affirmed.

**Defendant Cunningham.** Next, Plaintiffs complain that Cunningham violated their state and federal constitutional rights by: (1) initiating a child welfare proceeding without first independently investigating P.J.’s diagnosis and Dr. Wagner’s report of medical neglect, Add. D, Consol. Memo, pp. 51-55; (2) making material

misrepresentations and omissions in the verified petition<sup>7</sup> and affidavits she filed with the juvenile court, *id.* at pp. 56-58; and (3) acting as a complaining witness with respect to criminal charges filed by a deputy district attorney. *Id.* at p. 78. Judge Stewart ruled in Cunningham’s favor on each issue. *D & O*, 2008 WL 4372933 at \*\* 21-24, 26-30.

Judge Stewart found “[t]he Jensens have produced no evidence that Ms. Cunningham had reason to suspect that the information and opinions given to her by Drs. Wagner and Corwin were misleading.” *Id.* at \* 21; *see* Statement of Facts, *supra*, pp. 12-13. The court also determined Cunningham reasonably believed that P.J.’s case constituted an emergency and that as such, she “was reasonable in relying on the information provided to her by the doctors, even in the absence of further investigation.” *D & O* \* 22 (citing *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8<sup>th</sup> Cir. 1996)).

The federal court analyzed Cunningham’s alleged misrepresentations and omissions, and found that “[a]ssuming the Jensens’ version of the facts, the misrepresentations . . . do not establish a constitutional violation,” *id.* at \* 23, and that “[t]he alleged misrepresentations and omissions were of little, if any, consequence.”

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<sup>7</sup> Judge Stewart also determined that Cunningham functioned as a prosecutor and was thus entitled to absolute immunity for her decision to file the Verified Petition in the juvenile court. Add. C, *D & O*, 2008 WL 4372933, \*14 . Plaintiffs’ have not addressed that finding here and any argument that they may have made below is waived. *See Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540.

*Id.*; see R. 3918-29 (Add 2 to Cunningham’s Reply in Supt of MSJ).

Judge Stewart found that two of the allegations “were not misrepresentations or omissions at all, as demonstrated by the [July 28] hearing transcript itself,” D & O \* 23; see Statement of Fact, *supra*, pp.18-20; R. 3918-29, and that when viewed in their proper context, the remaining misrepresentations were not germane to the issues then before the juvenile court and thus “were plainly immaterial.” D & O at \* 23. Instead, the federal court noted the allegations amounted to nothing more than “nitpicking”. *Id.* at \* 26. Respecting the alleged misrepresentations and omissions, Judge Stewart concluded

. . . Cunningham instituted process before a State court of competent jurisdiction to adjudicate the claim of medical neglect against [Plaintiffs]. In this proceeding, [Plaintiffs’] fundamental rights to direct the custody, care, and control of their son were carefully balanced by a neutral judge. There is simply insufficient evidence that Ms. Cunningham deliberately misrepresented or omitted material facts to the Juvenile Court.

*Id.* at \* 24; see also \* 26.

That Court also addressed and rejected Plaintiffs’ claim that they possessed a separate liberty interest in Utah’s child welfare statutes. D & O at \* 27. And, finally, Judge Stewart determined that upon the undisputed evidence that Cunningham neither initiated nor continued the criminal action against the Plaintiff parents. *Id.* at \* 29; see Statement of Facts, *supra*, p. 24.

**Defendant Anderson.** Plaintiffs complained that Defendant Anderson violated their state and federal constitutional rights by (1) interfering with the Plaintiff parents’

ability to take P.J. to a physician of their choice, Add. D., Consol. Memo, pp. 59-63; (2) refusing to immediately dismiss the juvenile court action, *id.* at p. 63; (3) failing to disclose information to the juvenile court, *id.* at pp. 63-64; and (4) failing to properly train or supervise Defendant Cunningham. *Id.* at pp.58-9; 65-66. But Judge Stewart addressed and then rejected each, discrete issue. Add. C., D & O, 2008 WL 4372933 at \*\* 24-27.

Specifically, he found that Anderson's involvement in P.J.'s case did not begin until late August 2003 and was limited to negotiating a resolve to the case between the state and the Plaintiff parents. *Id.* \* 24; *see* Statement of Facts, *supra*, p 26-27. The Court determined that by the time Anderson became involved, the juvenile court previously had already "ordered P.J. to begin chemotherapy administered by a board-certified pediatric oncologist by August 8, 2003," D & O \*24, and had placed P.J. in the state's protective custody because the Plaintiff parents had, by then, missed that deadline. *Id.*; *see* Statement of Facts, *supra*, pp. 26. Judge Stewart found that Anderson's position that P.J. be treated by a board-certified pediatric oncologist was in accord with both the juvenile court's orders and the opinion of Dr. Tishler, a physician whom Parents self-selected. D & O \* 24; *see* Statement of Facts, *supra*, pp. 18-20, 26-27. Judge Stewart thus determined that Anderson's conduct was "narrowly tailored to serve the State's compelling interest in protecting P.J." *Id.*; *see* Statement of Facts, *supra*, pp. 27-28.

Judge Stewart next observed Anderson's remark that Plaintiffs were "great

parents,” but found that comment did not infer that Anderson believed Plaintiffs had not medically neglected P.J. D & O at \* 25; *see* Statement of Facts, *supra*, pp. 26-27. The court remarked, instead, that when viewed in context in which Anderson made this statement, it “in no way interfered with [Plaintiffs’] right to familial association or to [Parents’] right to direct P.J.’s care. D & O at \* 25.

Judge Stewart also underscored that Plaintiffs did “not direct[] the Court to evidence that Mr. Anderson knew the Juvenile Court was unaware of the possibility of genetic testing or that genetic tests were ‘definitive.’” *Id.* “Moreover,” that court observed, Plaintiffs “repeatedly stated their desire for further testing during the Juvenile Court proceedings.” *Id.* Finally, Judge Stewart found that Plaintiffs had adduced no evidence that Anderson understood that if Dr. Johnston diagnosed P.J. before genetic testing was complete that that breached the September 5 stipulation or resulted in a violation of Plaintiffs’ constitutional rights because, as the court observed: “[Plaintiffs] refused to follow Dr. Johnston’s treatment recommendations, which lead to DCFS’s decision to dismiss the case shortly thereafter. The only action taken by the Juvenile Court subsequent to Dr. Johnston’s recommendation was to dismiss the case.” *Id.*; Statement of Fact, *supra*, pp. 28-29.

Judge Stewart then rejected Plaintiffs’ claim that Anderson failed to train and supervise Defendant Cunningham, finding that (1) Plaintiffs brought no evidence to the Court’s attention that could show, if true, that Anderson acted with “deliberate

indifference” to the rights of others in failing to train Ms. Cunningham; and (2) Plaintiffs failed to establish that Cunningham’s conduct violated their constitutional rights, a prerequisite to Anderson’s liability as a matter of law. D & O \* 26 (citations omitted); *see* Statement of Facts, *supra*, pp. 26-27..

Finally, Judge Stewart observed that Plaintiffs’ procedural due process claim also failed, because Plaintiffs’ provided no evidence that DCFS possessed a policy of not investigating medical neglect referrals received from PCMC physicians and that the evidence Plaintiff did possess failed to support even the inference of such a policy. *Id.* \* 27; *see* Statement of Facts, *supra*, 26-27. But the court found instead, that even if Plaintiffs had provided such evidence, it would merely indicate that DCFS policy permitted a caseworker to initiate an action, without further investigation when the caseworker possessed objectively reasonable evidence that the case constituted an emergency. *Id.*

#### **B. Issue Preclusion Bars Plaintiffs’ Claims.**

Issue preclusion provides that a court’s final decision on an issue actually litigated and necessarily decided in a previous suit is conclusive on that issue in subsequent litigation. *Oman*, 2008 UT 70, ¶¶ 31-32 (“The issue was squarely before the federal court, was litigated by the parties, and was necessary to the court’s final judgment on the § 1983 claim”); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The doctrine is more than a court management tool, but is intended to relieve parties of the

cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Id.* at ¶ 28.

Issue preclusion applies when:

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Burrell v. Armijo*, 456 F.3d 1159, 1172 (10<sup>th</sup> Cir. 2006) (citations and emphasis omitted); *see Oman*, 2008 UT 70, ¶ 28 n.5 (federal law applies to determine preclusive effect of federal court decision on a subsequent state court proceeding). Each element is satisfied.

First, the federal court's *Decision and Order* represents a final adjudication on the merits of Plaintiffs' federal claims and of the issues underlying those claims.<sup>8</sup> Next, the parties are identical in each action. Third, the prior summary judgment proceedings afforded Plaintiffs a full and fair opportunity to litigate the issues at controversy here. And, the determinative issues decided by Judge Stewart are identical with the

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<sup>8</sup> Plaintiffs take exception with that assertion. But Plaintiffs confuse issue preclusion with claim preclusion. The federal court did not adjudicate Plaintiffs' state law *claims*; the court remanded them. But where Plaintiffs' state claims embody the same facts and dispositive issues that the federal court determined by a final order, *issue* preclusion applies. *Oman*, 2008 UT 70, ¶ 31.

determinative issues presented here. *See supra*, pp 32-39.<sup>9</sup>

Despite this, Plaintiffs contend that issue preclusion does not apply to bar relitigation of issues decided within the same case. To support this claim, Plaintiffs rely on inapposite case law and dicta, that this Court can distinguish and disregard. *See Appnt. Br.* pp 63, 66 (citing *Payne for Hicks v. Churchich*, 161 F.3d 1030, 1037-38 (7<sup>th</sup> Cir. 1998) (finding under 28 U.S.C. § 1450 that in context of removal, prior *state order* was not conclusive, but was binding until set aside); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034-35 & n. 1 (10<sup>th</sup> Cir. 2000) (dicta).

In neither case was the appellate court faced with whether a *final* order dismissing a

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<sup>9</sup> Plaintiffs contend that, in part, the issues presented in the state court differ from those presented in the federal court and assert that in Utah a party's intent presents an issue of fact. Namely, Plaintiffs argue that "the federal court's findings that misrepresentations made by . . . Cunningham were not made deliberately would be impermissible on summary judgment in state court." *Appnt. Br.*, pp 65-66. But that argument misstates the federal court's determination. Judge Stewart ruled that to the extent Plaintiff proved Cunningham made misrepresentations, they were not germane to the matters then before the juvenile court and they were therefore immaterial. *Add. C., D & O*, 2008 WL 4372933, \*23-24. The court also found that despite alleging that Cunningham engaged in a scheme of deliberate misrepresentations, Plaintiffs failed to produce any evidence to support that claim. *Id.*

Plaintiffs likewise insist that the state court was not bound to follow the federal court's determination that defendants acted "reasonably," because questions of "reasonableness" pose issues of fact best left to the jury. *Appnt. Br.* pp. 67-68. First, that contention is overbroad. *See D & K Mgmt.*, 2008 UT 73, ¶¶ 18-19 (courts should proceed with caution on fact-dependent questions, but courts are not required to draw remote or improbable inferences in favor a non-moving party). Second, none of the instances cited pertain to State Defendants. *See Appnt. Br.*, pp. 68-69.



claim could preclude relitigating the issues essential to that claim on remand.<sup>10</sup> But the majority of courts that have considered that issue, have found that issue preclusion may prevent relitigation of issues inside the same suit. *See, e.g., Vines v. Univ. of Louisiana at Monroe*, 398 F.3d 700, 710-11 (5<sup>th</sup> Cir. 2005) (collateral estoppel precludes plaintiff from relitigating issues in remanded state case where they involve the same issues of ultimate fact determined by a prior, final federal judgment); *Thacker v. City of Hyattsville*, 762 A.2d 172, (Md. Ct. Spec. App. 2000) (when federal court disposes of federal claim before trial, on remand to state court, collateral estoppel precludes relitigating issues the federal court actually decided); *cf. Jaskolski v. Daniels*, 905 N.E.2d 1, 13 (Ind. Ct. App. 2009) (finding no preclusion because federal court did not adjudicate determinative issue). *See also, Haase v. R & P Indus. Chimney Repair, Co.*, 409 N.W.2d 423, 426-27 (Wis. Ct. App. 1987) (issues determined by summary judgment dismissing co-defendant are binding and conclusive at later stage of same litigation), *rev. denied; Columbus Line, Inc. v. Gray-Line Sight Seeing Co.*, 120 Cal.App.Ct.3d 622, 628-30 (Cal. Ct. App. 1981) (collateral estoppel precludes relitigation of issues determined by prior summary judgment dismissing cross-complaint filed in same action); *Hicks v. Hicks*, 176 S.W. 2d 371, 374-75 (Tenn. Ct. App. 1943) (when issue has been finally determined, res judicata prevents relitigation

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<sup>10</sup> This Court was also not faced with that issue in *D & K Management, Inc.*, 2008 UT 73, ¶ 26 & n.20 (differentiating, in dicta, law of the case from res judicata).

of that issue whether in same or independent suit).

It is black letter law that “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). That rule was created to ward off endless litigation and to ensure the stability of judgments. *See* 46 AM.JUR.2D Judgments § 515 (1994). And while the rule usually applies when an issue has been decided in one action and subsequently arises in a second, nothing in the rule’s rationale prevents its application within the four corners of the *same* litigation. The doctrine is intended to limit needless relitigation of issues. Because that rationale is not limited to only subsequent or independent actions, this Court should find that issue preclusion can apply to subsequent proceedings within the same action. *See e.g., Oman*, 2008 UT 70, ¶¶ 28, 31.

Here, the same material issues to Plaintiffs’ state law claims were squarely before the federal court; the parties actually litigated those issues; and the federal court’s final resolution of the issues was essential to that court’s section 1983 determination. *See* Discussion, *supra*, pp. 32-39. Those issue determinations became binding in the subsequent state court action. *See Oman*, 2008 UT 70 at ¶¶ 32-33.

Finally, Plaintiffs have not shown that sufficient policy reasons exist to ignore the preclusive effect of the federal court’s rulings. Plaintiffs urge that the state court

“should have viewed [Plaintiffs’] state constitutional claims independently of their federal claims,” Appnt. Br., pp 42-43, and that by viewing Plaintiffs’ state constitutional claims against the backdrop of issue preclusion, Judge Fratto subrogated Utah’s constitution to its federal counterpart. *Id.* at 37-43, generally. That argument misses the mark.

Judge Fratto, in fact, considered the scope of Plaintiffs’ state constitutional claims. But the court determined, that in the absence of evidence that Article I, sections 1, 7, and 14 provide these Plaintiffs with greater rights as a matter of state law, issue preclusion barred relitigation of the claims. See R. 4202-03, Memorandum Decision at pp. 4-5; R. 4220, Trans. of Hrg. at pp. 20-21, 27-28, 32-34, 39, 55, 69-72. That analysis was proper and was compelled because all of the defendants pled *res judicata* as an affirmative defense to Plaintiffs’ remanded state law claims.

The U.S. Supreme Court has counseled that as a threshold matter, a court must review the presented claims to determine the scope of the alleged constitutional right. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Judge Fratto did that. To determine the necessary scope of Plaintiffs’ Article I claims, the trial court examined the conduct that Plaintiffs maintain violated those rights. But because Plaintiffs, themselves, alleged the same conduct in support of their state law claims as they did in furtherance of their section 1983 claims, the federal court’s final determination of those issues became *res judicata* in the state court. See *Oman*, 2008 UT 70, ¶ 31. The factual underpinnings of

Plaintiffs' state law claims being conclusively established, Judge Fratto correctly granted summary judgment under the doctrine of issue preclusion.

**C. The Law of Case Precludes This Court From Re-examining Issues Determined by the Federal Court.**

The doctrine of law of the case also directs the finality of issues and provides that “a decision made on an issue during one stage of a case is binding in successive stages of the same litigation.” *D & K Mgmt.*, 2008 UT 73, ¶ 26 (citation and internal quotation marks omitted). That doctrine, like issue preclusion, “was developed in the interest of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration or rulings on matters previously decided in the same case.” *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The law of the case can be discretionary or mandatory. *D & K Mgmt.*, 2008 UT 73, ¶ 27.

The law of the case is discretionary when a court is asked to reconsider its own, prior ruling or that of a co-equal judge or coordinate court in the same case. *See Thurston*, 892 P.2d at 1038; *D & K Mgmt.*, 2008 UT 73, ¶ 27. But when judgment is rendered, appealed, and the case remanded, the issues presented to the appellate court and the final rulings logically necessary to sustain

those conclusions also constitute law of the case. Its application under those circumstances is mandatory. *D & K Mgmt.*, 2008 UT 73, ¶ 28.

The mandate rule provides that final decisions become the law of the case that must be adhered to in subsequent proceedings in the same case. *Thurston*, 892 P.2d at 1037-38. The rule is inflexible and “must be followed even though the lower court subsequently addressing this issue may believe that the issue could have been better decided in another fashion.” *Id.*

Here, Plaintiffs sought the state court’s review of issues *finally* determined by the federal court – a non-coordinate court. This case thus tends toward the mandate rule. To hold otherwise permits a state court to exercise appellate jurisdiction over a federal court’s final decision – something the state court lacks jurisdiction to do. *See* Utah Code Ann. § 78A-5-102 (West Supp. 2008) (setting out state district court jurisdiction).

But should this Court determine that the mandate rule does not apply, the trial court’s decision remains sound. Because under the discretionary rule, a court may depart from the law of the case only “(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.” *Gildea v. Guardian Title Co.*, 2001 UT 75, ¶ 9, 31 P.3d 543. None of those exceptions applies here.

Whether under issue preclusion or law of the case, the district court correctly found that it was bound by the federal court's final and conclusive determination of the issues essential to Plaintiffs' state and federal claims. That decision, by any name, is sound. State Defendants ask this Court to affirm it.

## **II. THE UTAH CONSTITUTION PROVIDES PLAINTIFFS IN THIS CASE WITH NO BROADER PROTECTION THAN ITS FEDERAL COUNTERPART.**

Because Plaintiffs' state law claims rest upon the same, essential facts and factual underpinnings as their federal claims, should this Court find the federal court's issue determinations binding, the Court should refrain from addressing Plaintiffs' state constitutional claims. This Court's precedents make clear that whenever possible, the Court avoids making a constitutional ruling when another basis exists for deciding. *See State ex rel. Div. of Consumer Protection v. Rio Vista Oil, Co.*, 786 P.2d 1343, 1349 (Utah 1990); *State v. Gardner*, 789 P.2d 273, 289 (Utah 1989) (Stewart, J., concurring).

In the federal court, Judge Stewart carefully analyzed Plaintiffs' section 1983 claims and found that even when viewed in a light most favorable to them, the material, undisputed facts established no violation of Plaintiffs' rights under the Fourth and Fourteenth Amendments of the U.S. Constitution. In the district court below, Judge Fratto found, in part, that because Plaintiffs established no basis in law or in Utah's history that the state constitution affords them greater protections than under the

federal constitution, summary judgment was proper. Plaintiffs still cannot make that showing nor have they shown that the district court erred. The district court's decision should be affirmed.<sup>11</sup>

Since deciding *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), this Court has continually refined its approach to reviewing claims under Utah's Constitution. Most recently, in *Dexter v. Bosko*, 2008 UT 29, 184 P.3d 592, the Court determined:

In interpreting provisions of the Utah Constitution, [the Court] begin[s] with a review of the constitutional text. [The Court] also 'informs [its] interpretation with historical evidence of the framers' intent.' Finally, [the Court] may consider well-reasoned and meaningful decisions made by courts of last resort in sister states with similar constitutional provisions.

*Id.*, 2008 UT 29, ¶ 11 (footnotes and citations omitted).

**A. The Text of Article I, Sections 1, 7, and 14 Do Not Create Broader Rights as a Matter of State Law.**

Plaintiffs have sued State Defendants under the state's inalienable rights clause (Art. 1, § 1), the due process clause (Art. 1, § 7), and the search and seizure clause

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<sup>11</sup> Plaintiffs' opening brief misstates the federal court's conclusion and contends that "[b]ecause Judge Stewart ruled that the federal constitution did not protect the Jensens at all from the defendants' actions, if this Court concludes that the Utah Constitution does afford such protections, by necessity its protections are broader than those of its federal counterpart." App. Br. at 37. But Judge Stewart did not find that Plaintiffs were entitled to *no* federal protections; instead, that court determined that Plaintiffs had failed to produce evidence establishing that the defendants violated any of Plaintiffs' clearly established constitutional rights of which a reasonable person would have known. *See Add. C, D & O*, 2008 WL 4372933, *passim*.

(Art. 1, § 14). To get to a jury on those claims, Plaintiffs were required, but failed to show, that those sections afford them greater protections than the U.S. Constitution.

Nothing in those sections' text creates new, more expansive, or different rights than the fundamental rights that existed in 1896. Instead, the text and plain language of each section reflects only the constitutional architects' intent to incorporate fundamental rights into the state's constitution. That intent is reflected not only in the text of each clause, but in Utah's quest for statehood itself.

### **1. Article I, section 1.**

Article I, section 1 of the Utah Constitution enumerates certain fundamental rights:

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances, to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

UTAH CONST., art. I, § 1. Plaintiffs' section 1 claim rests on "the right to enjoy and defend their lives and liberties." R.60-61, Compl. ¶¶ 205-07. The text reflects an expression of fundamental law that neither expands nor diminishes Plaintiffs' claimed right of familial association. But the right is similar to the expression of fundamental law found in most state constitutions.

We shall expect a declaration of rights for the protection of individuals and minorities. This declaration usually consists of the following classes of provisions: . . . Those declaratory of the fundamental rights of the citizen; as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty . . .



Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* 36-37 (Leonard W. Levy, ed., De Capo Press (1868)). The text of section 1, therefore, provides no basis for this Court to infer that that section grants Plaintiffs broader rights than those commonly recognized in 1896.

## **2. Article I, section 7.**

Article 1, section 7 of the Utah Constitution was also not intended as a unique expression of due process rights. Instead, after a single amendment, the drafters copied section 7 from the U.S. Constitution for the purpose of incorporating already established fundamental rights into the Utah Constitution. *See* Official Report of the Proceedings and Debates of the Utah Constitutional Convention, 257 (1898 (Star Printing Co. 1898)). Section 7 reads, with its sole amendment: “No person shall be deprived of life, liberty, or property without due process of law.” UTAH CONST. art. I, § 7. *Compare* U.S. CONST. amend. XIV, § 1.

## **3. Article I, section 14.**

Article I, section 14 enumerates Utah’s counterpart to the Fourth Amendment to the U.S. Constitution:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searched and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

UTAH CONST. art. 1, § 14. *Compare* U.S. CONST. amend. IV. Section 14 was approved without comment or amendment. *See* Utah Constitutional Convention at 319. And save for two variations in capitalization and an eliminated “and,” section 14 is identical in text of the Fourth Amendment. Moreover, like sections 1 and 7, nothing in the text suggests the drafters intended its passage to expand rights beyond those secured by the U.S. Constitution.

**B. The History of Article I, Sections 1, 7, and 14 Does Not Support the Intent to Create Broader Rights.**

Constitutional rights are not created upon drafting, but they are based upon “the pre-existing condition of laws, rights, habits, and modes of thought” in existence at the time of drafting. *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235 (quoting Cooley, *supra*, at 36-37). Historical sources thus form a proper reference for determining intent. *Id.* at ¶ 10.

Utah experienced a lengthy struggle toward statehood, with the state drafting the first of seven constitutions in March 1849. *See* John J. Flynn, *Federalism and Viable State Government – The History of Utah’s Constitution*, 1966 UTAH L. REV. 311, 317. And even from its earliest drafts, one of the most notable aspects of Utah’s Constitution is its conformity to the other state constitutions that existed at that time. *See* Christine Durham, Daniel J.H. Greenwood, and Kathy Wyer, *Utah’s Constitution, Distinctly Undistinctive* at 651, 654-61, published in *The Constitutional States of*

America (George E. Conner, Christopher Hammons, eds. Univ. of Missouri Press 2008); *see also*, Flynn, *supra*, at 324-25 (Utah's Constitution is "a patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to placate a hostile Congress.")

Utah's first petition for statehood foundered on issue of slavery. Flynn, *supra*, at 316. Its subsequent efforts ran aground on the practice of polygamy. *Id.* And by the time the State submitted its fourth effort in 1872, the drafters began focusing in earnest on modeling Utah's constitution after states whose efforts had recently passed muster. *Id.* at 317.<sup>12</sup> During this time, Utah experienced both local and national opposition to statehood, with the Mormon church being the moving force behind Utah's statehood quest. *See Society of Separationists, Inc.*, 870 P.2d at 922; Durham, *supra*, at 651, 654. But in the early 1890s the Mormon Church began to retreat from the practice of polygamy and to signal an openness toward the non-Mormons who had begun to settle the Utah territory. Durham, *supra*, at 654; *see* Paul G. Cassell, *Search and Seizure and the Utah Constitution, The Irrelevance of the Antipolygamy Raids*, 1995 B.Y.U. L. REV. 1, 13. At this time, the Mormon church officially renounced the practice of polygamy; state-funded non-sectarian schools were established; the Chamber of

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<sup>12</sup> Even the portion of Article I, section 24 that Plaintiffs' underscore, that "[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of the government," was borrowed from another state's constitution. Durham, *supra*, at 8 (citing Utah Constitutional Convention at 1:362).

Commerce began to integrate Mormon and non-Mormon economic interests alike; and the Mormon church disbanded its political party in favor of a two-party system.

Cassell, *supra*, at 13-14.

By the time of the successful 1895 constitutional convention, all parties in Utah were in pursuit of statehood. Durham, *supra* at 654. That convention had 107 delegates – twenty-nine of whom were non-Mormon – who held two primary concerns (1) drafting a constitution that would gain Congress’ ultimate acceptance, *id.*, and (2) promoting an “aura of inclusiveness.” *Id.* at 660. “Thus, while the Mormon people’s desire for statehood may have originally been motivated . . . by a desire for autonomy, the years of struggle ultimately led to a genuine effort to join the mainstream.” *Id.* This era of cooperation is echoed in the comments of Caleb West, one of Utah’s territorial governors, who cautioned delegates not to “plunge into an unexplored field or traverse a vast and barren and uninhabited wilderness,” but “the nearer you keep” to the U.S. Constitution “and follow its enunciations and fundamental principles, the nearer you will come to the hearts of the people, and commend the new State of Utah to her associates.” Official Report , *supra*, at 11.

Plaintiffs’ claim that Utah’s Constitution was drafted for Utah by Utahns is correct. But their belief that Utah’s constitutional history is bounded only by the Mormon majority’s experience with religious persecution is not.

### **C. The Common Law Does Not Create Broader Rights as a Matter of State Law.**

#### **1. Article I, section 1.**

Article I, section 1 possesses no federal counterpart. But Utah's courts have not found that it offers any unique protections. "The Constitution declares in Article I, section 1, men are by nature free and independent, and have certain inalienable rights among which are the pursuing of happiness, and safety, and property." *Golding v. Schubach Optical Co., Inc.*, 70 P.2d 871, 875 (Utah 1937). Those rights are not absolute and this Court has held that they can be subject to "such reasonable police regulation as may be enacted to promote the public good." *Id.*

Section 1 thus lays out the general and well-understood notion that people are free. And cases interpreting that section typically adhere to federal law interpreting analogous provisions of the federal constitution or to cases addressing more specific Article I provisions. *See, e.g., West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994) (Art. I, §§ 1, 15); *State v. Parker Corp.*, 297 P. 1013 (Utah 1931) (Art. 1, §§ 1, 25); *In re Adoption of B.O.*, 927 P.2d 202 (Utah Ct. App. 1996) (Art. I, §§ 1, 25). Plaintiffs have not cited nor have State Defendants found any cases that address a person's right to familial association under Article I, section 1.<sup>13</sup> That right has,

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<sup>13</sup> Plaintiffs couch this Court's 1904 decision in *Block v. Schwartz*, 76 P. 22, 24-5 (1904), as supporting their claimed liberty interest in the right of personal and familial privacy. But the *Block* court did not examine familial rights. Instead, the Court examined the right of persons to hold, sell, or dispose of personal

instead, been viewed by Utah's courts under Article I, section 7.

**Article I, section 7.**

“[T]here is nothing in Utah's Constitution that suggests that it provides greater due process rights than the United States Constitution.” *State v. Orr*, 2005 UT 92, ¶ 25 n.7, 127 P.3d 1213. But this Court has recognized that “[d]ecisions of the Supreme Court of the U.S. on the due process clause of the Federal Constitution are ‘highly persuasive’ as to the application of that clause of our state constitution.” *Untermeyer v. State Tax Comm’n*, 129 P.2d 881, 885 (Utah 1942). And Utah's courts generally have found that section 7 provides protections equal to the U.S. Constitution.<sup>14</sup>

Respecting the substantive rights that Plaintiffs advanced below – a right to familial association and to direct their child's medical care – no Utah court has held that Utah's Constitution offers broader protections to Utahns than they enjoy under the Fourteenth Amendment to the U.S. Constitution. But in the only cases to have considered those

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property. *Id.*

Plaintiffs likewise misapprehend the Court's statements in *State v. Kent*, 432 P.2d 64, 69 (Utah 1964), wherein the Court addressed a criminal defendant's claim that by surreptitiously viewing him through a ventilation duct, law enforcement violated his right to privacy secured by the Fourth and Fourteenth Amendments to the U.S. Constitution. *Id.* Neither case expresses this Court's opinion respecting the proper scope of the Article I, section 1 rights at issue here.

<sup>14</sup> In limited incidents regarding procedural process due to criminal defendants, this Court has analyzed section 7 differently than the federal due process clause. *See State v. Tiedemann*, 2007 UT 49, ¶ 39, 162 P.3d 1006; *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991); *Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 734-35 (Utah 1991). Those cases do not aid Plaintiffs.

rights, the Court has equated them with the rights afforded by federal law.

For example, in *In re J.P.*, 648 P.2d 1364 (Utah 1982), the plaintiff challenged, under both the state and federal constitutions, a state statute permitting termination of parental rights upon only a showing that termination was in the child's best interest. *Id.* at 1365-66. This Court noted that a parent's right to the care and custody of his or her child is fundamental. *Id.* at 1372. The Court found that the right is protected under the Utah and U.S. Constitutions, but held the right to be no different under each constitution:

[W]e conclude that the Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain parental ties to his or her child under Article I, § 7 and § 25 and that the United States Constitution recognizes the *same right* under the Ninth and Fourteenth Amendments.

*Id.* at 1377 (emphasis added); *see also In re Black*, 283 P.2d 887, 894 (Utah 1955) (analyzing claim that child neglect proceeding violated the 14<sup>th</sup> Amendment and Article I, section 7 under the same standard).

Fourteen years later, the Utah Court of Appeals in *In re B.O.*, 927 P.2d 202 (Utah App. 1996), considered the constitutionality of a state statute that permitted parental termination upon a showing that the parent exercised only token efforts to maintain a parent-child relationship. *Id.* at 207-09. Following this Court's analysis in *In re J.P.*, the Court of Appeals equated a parent's rights under the Utah Constitution with the same rights under the U.S. Constitution. *Id.*

Thus, contrary to Plaintiffs' claim, the only thing that is clear from Utah's case law

is that a right to familial association (which encompasses a right to direct medical care) exists. But that right mirrors the identical right under the Fourteenth Amendment to the U.S. Constitution. The right arises from the same common law antecedents, *see J.P.*, 648 P.2d at 1372-73, grants Plaintiffs' co-equal protections under both constitutions, and is subject to the same level of scrutiny. *Id.*

Nor does Plaintiffs' reliance on antiquated decisions of this Court and cases from other states aid them. None of the cases Plaintiffs cite on pp. 50-56 of their Brief describe the constitutional rights at issue here. *See State v. DeBooy*, 2000 UT 32, ¶ 32, 996 P.2d 546 (inapposite case examining section 14 rights; no mention of polygamy prosecutions at ¶ 32 or elsewhere; but see ¶ 26 "This state's early settlers were themselves no strangers to the abuses of general warrants."); *Cooke v. Cooke*, 248 P. 83, 108 (Utah 1926) (inapposite child custody proceeding addressing whether parent, accused of adultery on suspect evidence, can properly be denied custody of minor child – no constitutional questions raised); *Mill v. Brown*, 88 P. 609, 613 (Utah 1907) (inapposite dicta statement in action challenging constitutionality of lengthy industrial school commitment for juvenile delinquent charged with stealing box of cigars). *See also In re CFB*, 497 S.W.2d 831, 835 (Mo. App. 1973) (inapposite case examining what constitutes medical neglect, not whether challenged action constituted a constitutional violation); *State v. Perricone*, 181 A.2d 751, 754-55 (N.J. 1951) (dicta statement having no application to case; parents put forth no medical evidence, but



proffered religious grounds for refusing blood transfusion; court ruled appointment of guardian to authorize medical treatment constitutional); *Matter of Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979) (case analyzing constitutional factors for determining, under state statute, whether child had been deprived of adequate medical care; constitutionality of state's conduct not at issue); *In re Tony Tuttendario*, 21 Pa.D. 561 (Pa. Q. 1912) (inapposite case examining allegation of medical neglect, not constitutionality of state action); *Lovell v. House of the Good Shepherd*, 37 P. 660 (WA. 1884) (inapposite case regarding challenge by mother for return of custody of child whom she voluntarily placed in an orphanage).

The federal court found that State Defendants violated none of Plaintiffs' substantive federal rights. Absent a showing by Plaintiffs of greater rights here, the result is the same under the Utah Constitution.<sup>15</sup> And because nothing in Utah's Constitution or its case law indicates that State Defendants' conduct would be considered unreasonable under Utah law, the trial court's order granting summary judgment is correct and should be affirmed.

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<sup>15</sup> At best, Plaintiffs have shown that this Court has long construed the state and federal due process clauses as substantially the same, but that the Court has not ruled out its "ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution." Appnt. Br., p. 49 (quoting *Bailey v. Bayles*, 2002 UT 58, ¶ 11, 52 P.3d 1158). To establish State Defendants' liability for money damages, Plaintiffs must do more than show that this Court may, at some date in the future, find that the Utah Constitution offers parties broader rights at state law than under the federal constitution. See *Spackman v. Bd. of Ed.*, 2000 UT 87, 16 P.3d 533 and discussion at Point III, *infra*.

### 3. Article I, section 14.

This Court has observed that “federal Fourth Amendment protections *may* differ from those guaranteed our citizens by our state constitution.” *Brigham City v. Stuart*, 2005 UT 13, ¶ 10, 122 P.3d 506 (emphasis added), *rehearing denied* (July 18, 2005), *reversed and remanded on different grounds*, 126 S. Ct. 1943 (2006); *accord Tiedemann*, 2007 UT 49, ¶ 34. But historically, this Court has “considered the protections afforded one and the same.” *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1998). And when the Court has examined an issue independently under the state constitution, the Court has adopted Fourth Amendment doctrine. *See DeBooy*, 2000 UT 32, ¶19 (adopting 4<sup>th</sup> Amendment “analysis and rationale” to highway checkpoints); *Watts*, 750 P.2d at 1221 (finding, that like Fourth Amendment, section 14 provides no protection against private searches); *see also Sims v. Collection Div. of Utah State Tax Comm’n*, 841 P.2d 6, 10, 14-15 (Utah 1992) (plurality opinion) (adopting U.S. Supreme Court reasoning that quasi-criminal proceedings are subject to exclusionary rule).

Defendants have found only one case where a majority of this Court has determined that section 14 provides greater protection than the Fourth Amendment. And that case is inapposite. In *State v. Thompson*, 810 P.2d 415 (Utah 1991), this Court held that section 14 recognizes a legitimate expectation of privacy in bank records. *Id.* at 417-18. And even then, the protection that this Court recognized was also provided by state

statute. *Id.* The only other case addressing advocating broader section 14 rights garnered support from only a plurality of this Court. *See State v. Larocco*, 794 P.2d 460, 464-71 (plurality) (car thief possesses privacy interest in stolen car).

Nothing in either analysis suggests that Plaintiffs possess greater protection against unlawful seizure under Article I, section 14 than Judge Stewart acknowledged that they possessed under federal law. Nor does either case suggest that analyzing Section 14 claims anew would produce a different result than Judge Stewart reached under the federal constitution.

Moreover, nothing in Utah's unique history supports a broadening of Plaintiffs' section 14 rights. Rather, Utah's history reveals no connection between the anti-polygamy raids and the inclusion of Article I, section 14 in the state's constitution. *Cassell, supra*, at \* 2-7. Likewise, the cases that have examined whether Article I, section 14 may provide broader protections, have focused not on Utah's unique history, but on shielding Utah citizens "from the vagaries of inconsistent interpretations given the fourth amendment by the federal courts." *Watts*, 750 P.2d at 1221 n.8; *see also Thompson*, 810 P.2d at 416-17; *Larocco*, 794 P.2d at 469.

Plaintiffs were unable to establish a violation of their federal rights federal court and the court below recognized that Plaintiffs were also unable to establish that they possessed broader rights under Utah's Constitution. That decision is correct and should be upheld.

### III. PLAINTIFFS' CLAIMS FAIL THE FLAGRANT VIOLATION TEST FOR HOLDING STATE ACTORS LIABLE FOR CONSTITUTIONAL TORTS.

Even assuming that Plaintiffs can establish the existence, here, of broader rights under the Utah Constitution, this Court should affirm the district court's dismissal for want of a "flagrant" violation required by *Spackman v. Board of Education*, 2000 UT 87, ¶ 20, 16 P.3d 533, 537. There, this Court held that before imposing liability on individual government employees under the state constitution, the plaintiff must first show that the alleged violation was "flagrant." *Id.* at ¶ 23.

First, a plaintiff must establish that he or she suffered a flagrant violation of his or her constitutional rights. In essence, this means that a defendant must have violated clearly established constitutional rights of which a reasonable person would have known. To be considered clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] was doing violates that right. The requirement that the unconstitutional conduct be flagrant ensures that a government employee is allowed the ordinary human frailties of forgetfulness, distractibility, or misjudgment without rendering him or herself liable for a constitutional violation.

*Id.* (citations, alterations, and internal quotations marks omitted).

Plaintiffs' claims fail this test. Plaintiffs have not shown – nor have these defendants found – any binding Utah decision or clearly established weight of authority from other jurisdictions that establish the contours of Article I, sections 1, 7 and 14 as Plaintiffs now allege them. *Cf. Holland v. Harrington*, 268 F.3d 1179, 1189 n.13 (10<sup>th</sup> Cir. 2001) (stating in context of federal constitution, "[f]or the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the

clearly established weight of authority from other courts must be as plaintiff maintains.”) In the absence of such a showing that would have alerted State Defendants that their conduct violated Plaintiffs’ Article I rights, Plaintiffs fail to meet *Spackman* as a matter of law.

**A. Article 1, section 1.**

No precedent exists for Plaintiffs’ assertion that Article I, section 1 creates rights broader than the federal constitution. Similarly, no Utah court has applied Article 1, section 1 as the basis for an alleged violation of the right to familial association or to direct medical care. *See* Point II.C.1., *supra*. In the clear absence of such precedent, State Defendants could not have understood, that by advocating the State’s *parens patriae* interests in a state juvenile court, they were violating Plaintiffs’ section one rights.

**B. Article I, section 7.**

Plaintiffs have also not shown that State Defendants flagrantly violated their substantive or procedural due process rights secured under Article I, section 7. And despite their allegations to the contrary, “there is nothing in Utah’s Constitution that suggests that it provides greater due process than the United States Constitution.” *State v. Orr*, 2005 UT 92, ¶ 25 n.7, 127 P.3d 1213.

**1. Procedural Due Process.**

The minimum requirements of procedural due process include “adequate notice and

an opportunity to be heard in a meaningful manner.” *Chen v. Stewart*, 2004 UT 82, ¶ 68, 100 P.3d 1177. “To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker.” *Id.* Juvenile Court Judge Yeates was an impartial decision maker when he heard and considered Plaintiffs’ and State Defendants’ arguments during the multiple hearings that he conducted. [See R.515 Doctors’ Exs. 33A-33K, Juv. Ct. Trans., generally].

But Plaintiffs still maintain State Defendants violated their due process rights by making material misrepresentations or omissions during the juvenile court proceedings. Even if true, Plaintiffs have not shown those actions were “flagrant” under *Spackman*.

Plaintiffs cannot point to any decision holding that when a government actor makes misstatements, misrepresentations, or omissions in open-court, in a civil proceedings where the opponent is represented by counsel, that procedural due process has been violated. *But see Spielman v. Hildebrand*, 873 F.2d 1377, 1380-85 (10<sup>th</sup> Cir. 1989), cited as authority by *Cline v. State*, 2005 UT App. 498, 142 P.3d 127, *rehearing & cert. denied*.<sup>16</sup>

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<sup>16</sup> Plaintiffs set out several, inapposite cases that they maintain support their procedural due process claim here. But the federal court considered those cases and, notwithstanding, determined that Plaintiffs had not shown how State Defendants’ conduct, even if true, violated a constitutional right of which those defendants would have known. Add. C., *D & O*, 2008 WL 4372933, \* 27; *see also Spackman*, 2000 UT 87, ¶ 23 (“To be considered clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] was doing violates that right.”)

## 2. Substantive Due Process

Plaintiffs also cannot show a flagrant violation of their substantive rights under Article I, section 7. To defeat State Defendants here, Plaintiffs were required to show State Defendants actions constituted clear and flagrant violations of the Utah Constitution. But as discussed at pages 55 to 59, *supra*, Plaintiffs cannot make that showing.

The only thing that is clear from Utah's case law is that Plaintiffs' rights to familial association under the state constitution mirror those same rights under the federal constitution. They arise from the same common law antecedents and they extend the same measure of protection against unreasonable conduct. *See In re J.P.*, 648 P.2d at 1373 (parental rights are rooted not in statutes or constitutions but "in nature and human instinct"). The federal court found State Defendants acted reasonably as a matter of law when balancing Plaintiffs' particular rights with P.J.'s specialized needs. *D & O*, 2008 WL 4372933, \* 22-24. And even where State Defendants mistaken in their dealings with Plaintiffs, the law forgives them for such human frailties. *See Spackman*, 2000 UT 87, ¶ 23 ("The requirement that the unconstitutional conduct be flagrant ensures that a government employee is allowed the ordinary human frailties of forgetfulness, distractibility, or misjudgment without rendering him or herself liable for a constitutional violation"); *Bott v. DeLand*, 922 P.2d 732, 738 (Utah 1996) ("The only common feature of all of these cases is that they hold that simple negligence is not

sufficient justification for a [constitutional] damages claim.”)

What’s more, Plaintiffs also fail to support their claim that Plaintiffs possess a separate, protected liberty interest in Utah’s child welfare statutes. But these defendants have searched and have found no case holding that a state, procedural statute provides a party with a substantial, protected liberty interest. Because Plaintiffs have failed to comply with *Spackman*, their Article I, section 7 claims must also fail.

**C. Article I, section 14.**

Plaintiffs cannot show a flagrant violation of Article I, section 14. First, no “seizure” resulted from the juvenile court proceedings, and second, the criminal charges against the Plaintiff Parents were supported by probable cause.

Plaintiffs continue to urge this Court to construe the Utah constitution to create protection against Plaintiffs’ “continued seizure” as result of being a party to the juvenile court proceedings. And they continue to cite only the concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 277-78 (1994), and to ignore that the majority in that case or the fact that both the federal court here and the Tenth Circuit Court of Appeals in *Becker v. Kroll*, 494 F.3d 904 (10<sup>th</sup> Cir. 2007), explicitly refused to adopt Plaintiffs’ theory. See Add. C, *Memo D & O*, 2008 WL 4372933 at \* 28-29; *Becker*, 494 F.3d at 915. Because those decisions make clear that Plaintiffs’ theory of a continuing seizure is not now the law and, more importantly, was not the law in 2003, Plaintiffs cannot show that their participation in the state juvenile court proceedings constitutes a



flagrant violation of their section 14 claim as required by *Spackman*. 2000 UT 87, ¶ 23.

Instead, the only “seizure” that occurred in this case was Daren Jensen’s arrest. But that arrest – and Barbara Jensen’s initial appearance and booking – was well supported by probable cause.<sup>17</sup> Plaintiffs have adduced no case holding that an arrest (or the filing of charges) supported by probable cause constitutes a flagrant violation of the Utah Constitution. And State Defendants have found none. Because Plaintiffs also cannot establish a flagrant violation of their Article I, section 14 rights, the trial court’s dismissal should be affirmed.

**D. Defendant Eisenman is Entitled to Absolute Immunity.**

Finally, Plaintiffs cannot show that Defendant Eisenman committed a flagrant violation of their known constitutional rights, because all of Plaintiffs’ claims stem from Eisenman’s job as Assistant Utah Attorney General (AAG), and she is therefore

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<sup>17</sup> On July 28, 2003, the juvenile court entered an order directing that P.J. begin treatment by August 8. *See* Statement of Facts, *supra*, p 19. The Plaintiff Parents were present in court when this order issued. *Id.*, pp. 18-19. Parents failed to abide by the order and on August 8, the juvenile court issued an order giving the State legal custody of P.J. for the purpose of commencing treatment. *Id.*, pp. 20-22. Parents were apprised of this order by their counsel and advised to comply. *Id.*, p. 23. They did not, but elected to remain with P.J. in Idaho. *Id.* There was thus undisputed probable cause for the criminal charges brought against Parents. And despite their contrary assertion, the undisputed evidence fails to establish that the criminal charges were predicated upon misrepresentation or fraud. *Id.*, pp. 24-25. Moreover, the Plaintiff Parents admitted that the elements of each charge were established. *Id.*, pp. 29-30.

entitled to absolute immunity. For “[t]he efficient operation of the judicial process requires that those closely associated with it be afforded some form of immunity from civil liability.” *Bailey v. Utah State Bar*, 846 P.2d 1278, 1280 (Utah 1993) (citation omitted).

Immunity is essential to the integrity of the judicial process. *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985). Utah’s courts have adopted that reasoning and recognize absolute judicial immunity for persons who perform “functions closely related to the judicial process.” *Sanders v. Leavitt*, 2001 UT 78, ¶ 19, 37 P.3d 1052 (applying *Forrester v. White*, 484 U.S. 219 (1988); *Cleavinger v. Saxner*, 474 U.S. 193 (1985)); *see e.g., Black v. Clegg*, 938 P.2d 293, 296 (Utah 1997) (“official immunity applied under federal and state law”); *Bailey*, 846 P.2d at 1280 (adopting Supreme Court’s functional analysis). Absolute immunity extends to state’s attorneys, *see e.g., Imbler v. Pachtman*, 424 U.S. 409, 424-26 (1976); *see also Bailey*, 846 P.2d at 1280, and “attaches to [an attorney’s] function, not the manner in which [s]he perform[s] it.” *Black*, 938 P.2d at 296. Thus, if the “challenged acts fall within the categories constituting a prosecutor’s duties, the acts are part of [her] official function, even if [s]he acts imperfectly.” *Id.*

Plaintiffs complain that in the course of her representation, Eisenman misrepresented or omitted information before the juvenile court, and others and personally gathered and disseminated information to others relative to P.J.’s case. But

Plaintiffs' objections to the manner in which Eisenman performed her role as AAG are of no consequence and do "not change the fact that [she] acted in the course of [her] official duties." *Id.*

Whether characterized by Plaintiffs as argument, proffers, or testimony, Eisenman's court filings and statements in court are protected. *Imbler*, 424 U.S. at 430-31 & n. 34; *see also Burns v. Reed*, 500 U.S. 478, 489-90, 492 (1991) (prosecutors and other lawyers were immune for making false or defamatory statements during judicial proceedings); *Briscoe v. LaHue*, 460 U.S. 325, 330-35 (immunity for witnesses and parties for in-court testimony is well-established). She is also immune from Plaintiff's complaints about her contact with Drs. Birkmayer and Albritton and of the letter she sent to the Burzynski Clinic. *See Imbler*, 424 U.S. at 431 n.33 ("the duties of a prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom"); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993). Finally, Eisenman's contact with the DA's Office were "integral" both to Eisenman's position as AAG and to the "judicial process" itself. *Bailey*, 846 P.2d at 1280; *see Utah Code Ann. §§ 62A-4a-105(6), -113(1), (2)(a).*<sup>18</sup>

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<sup>18</sup> Utah's DCFS is charged with enforcing the state's child welfare laws, Utah Code Ann. § 62A-4a -105 (6) (West 2004), and is authorized to take "all legal action that is necessary" to meet that end, *id.* at § 62A-4a-113(1), and to "take all initiative in all matters involving the protection of abused or neglected children." *Id.* at § 62A-4a-105(6). And, as an AAG, Eisenman was required to enforce those laws. *Id.* § 62A-4a-113(2)(a). Finally, as an officer of the court,

Eisenman acted as an advocate and officer of the court. She is thus entitled to absolute judicial immunity from all of Plaintiffs state law claims. *See Bailey v. Bayles*, 2002 UT 58, at ¶¶ 10, 13 (appellate court may affirm on any ground apparent from the record).

### **III. PLAINTIFFS HAVE WAIVED ANY ARGUMENTS NOT RAISED IN THEIR OPENING BRIEF ON APPEAL.**

Plaintiffs make a lengthy recitation of facts allegedly pertaining to Defendant Eisenman in their Statement of Facts. But in the body of their Brief, Plaintiffs make no mention of Eisenman, nor do they advance any arguments suggesting how she violated any of the Plaintiffs' state constitutional rights. Plaintiffs have therefore waived any arguments that pertain to Defendant Eisenman and the trial court's grant of summary judgment should be affirmed. *See Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (issues "that were not presented in the opening brief are considered waived and will not be considered by the appellate court."); *see also* Utah R. App. 24(a)(5), (9).

Similarly, Plaintiffs advanced two, state common law tort law claims in the trial court below. But Plaintiffs make only a glancing reference to those claims in their Brief and thereafter ignore those causes of action. Those claims have also been waived. *Id.*

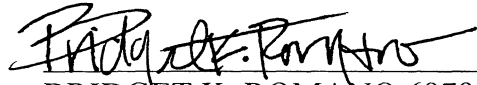
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Eisenman was duty-bound to enforce the juvenile court's custody order.

## Conclusion

Plaintiffs have failed to show that the district court erred when it granted State Defendants' motions for summary judgment and dismissed Plaintiffs' state claims. That decision is correct and State Defendants ask this Court to affirm the trial court's Final Judgment and Order. But to the extent the Court may determine that Plaintiffs possess broader constitutional rights as a matter of state law and that the federal court's issue determinations are not binding, State Defendants ask this Court to remand the matter to the state court for further consideration of the facts and record evidence adduced in the first instance.

RESPECTFULLY submitted this 29th day of October, 2009.



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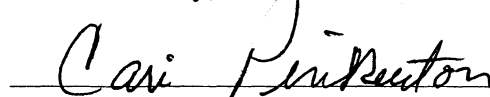
Attorneys for Appellees Anderson,  
Cunningham and Eisenman

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **ANSWER BRIEF** was served by U.S. Mail this 29th day of October, 2009 to the following:

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## Addendum A

# **ADDENDUM A**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

FILED

FEB 18 2009

THIRD DISTRICT COURT  
SALT LAKE DEPARTMENT

BARBARA JENSEN et al.,

Plaintiffs,

vs.

STATE OF UTAH; et al.,

Defendants.

MEMORANDUM DECISION

Case No. 050912502

Hon. JOSEPH C. FRATTO, JR.

The above-entitled matter comes before the Court pursuant to Defendant Cunningham's Motion for Summary Judgment, Defendant Anderson's Motion for Summary Judgment, Defendants Wagner and Albritton's Motion for Summary Judgment, and Defendant Eiseman's Motion for Summary Judgment. The Court heard oral argument with respect to the motions on January 26, 2009. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, arguments of counsel, as well as the decision of Judge Stewart, finds it clear that Plaintiffs have pled the same factual basis for their Causes of Action and further, that all the claims arise from a single set of operative events. Indeed, the factual events pled in the instant mirror those which supported Plaintiffs' federal claims. Moreover, Judge Stewart, after an extensive analysis of the facts, made findings and conclusions based on the issues underlying Plaintiffs' claims.



The aforementioned in mind, the Utah Supreme Court in the similar case of *Oman v. Davis Sch. Dist.*, 2008 UT 70, (Utah 2008) stated the following:

The doctrine of res judicata embraces two distinct theories: claim preclusion and issue preclusion." *Buckner v. Kennard*, 2004 UT 78, P 12, 99 P.3d 842. This appeal raises only the latter principle of issue preclusion. Issue preclusion, which is also known as collateral estoppel, "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Id.* (internal quotation marks omitted). The purposes of issue preclusion include "(1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation." *Id.* P 14.

*Id.* at P28.

The *Oman* court continued stating:

Issue preclusion applies only when the following four elements are met: (I) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits. *Collins v. Sandy City Bd. of Adjustment*, 2002 UT 77, P 12, 52 P.3d 1267 (internal quotation marks omitted).

*Id.* at P29.

Applying the aforementioned to the facts of this case, there can be no question each of the elements has been satisfied. While Plaintiffs argue there was no final adjudication on the merits because the federal court never reached the state law claims, a review of Plaintiffs' Complaint and the federal court's Memorandum Decision demonstrates that the factual contentions and issues supporting the state claims are identical to those underlying the federal claims and were necessary to Judge Stewart's decision. Indeed, in response to a similar argument by the plaintiff in *Oman* regarding his breach of contract claim, the Court stated:

Underlying the § 1983 claim was the dispositive issue of whether the District breached the Classified Agreement when it fired Oman for cause. Indeed, when Oman filed his complaint in federal court, his basis for the § 1983 cause of action was twofold: (1) that the District's "pre-termination conduct deprived him of due process rights secured by the Fifth and Fourteenth Amendments to the United States Constitution," and (2) that the District's "decision to suspend, and later terminate, his employment violated the terms of the Classified Agreement." Thus, a resolution of the § 1983 claim, as framed by Oman, required the federal court to resolve the underlying issue of whether the District violated the Classified Agreement when it fired Oman. The issue was squarely before the federal court, was litigated by the parties, and was necessary to the court's final

judgment on the § 1983 claim. Accordingly, the federal court made findings and conclusions regarding the alleged breach of contract--including the previously quoted conclusion that the District had a sufficient basis for firing Oman for cause under the Classified Agreement--and these findings and conclusions are binding in subsequent actions under the doctrine of issue preclusion.

Although Oman's breach of contract claim was not litigated in the federal court, it is based upon the same underlying issue that was resolved by the federal court: whether the District had a sufficient basis for terminating Oman for cause under the Classified Agreement. The state district court was therefore bound by the federal court's conclusion that "[Oman]'s representations to the District regarding his work hours provided a sufficient basis for termination for cause." Accordingly, even if Oman had argued to the district court that his conduct did not give the District a basis for terminating him for cause, the argument would have failed based on the federal court's prior ruling.

*Id.* at P33.

As noted, the issues in this case arise from a single, distinct set of events and as demonstrated by the Memorandum Decision of Judge Stewart, the factual contentions that underlie the Plaintiffs' state law claims against the Defendants have been conclusively decided.

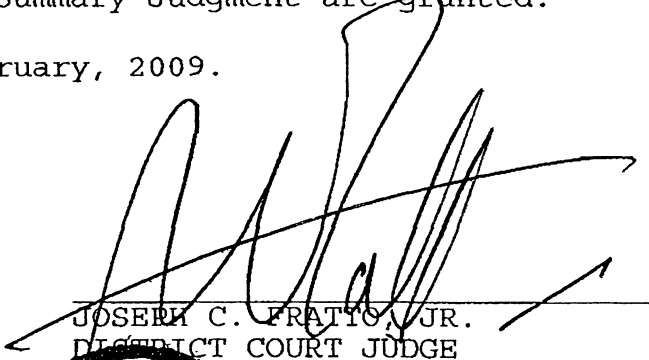
This said, Judge Stewart's legal conclusions bar Plaintiffs' claims under the Utah Constitution because there is no historical

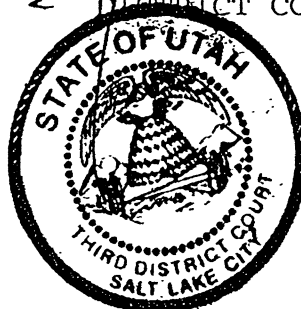
or textual basis for interpreting Utah's Constitutional provisions in this case differently from the Federal Constitution. Moreover, no Utah appellate decision supports interpreting the Utah Constitution to provide broader or different rights in this case.

In sum, the facts, the alleged harm, and the analysis of Plaintiffs' state law claims are the same as those already considered and dismissed by Judge Stewart and, there being no additional or different rights provided by the Utah Constitution, dismissal is appropriate in this forum as well.

Defendant Cunningham's Motion for Summary Judgment, Defendant Anderson's Motion for Summary Judgment, Defendants Wagner and Albritton's Motion for Summary Judgment, and Defendant Eiseman's Motion for Summary Judgment are granted.

DATED this 18<sup>th</sup> day of February, 2009.

  
JOSEPH C. FRATTINO, JR.  
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050912502 by the method and on the date specified.


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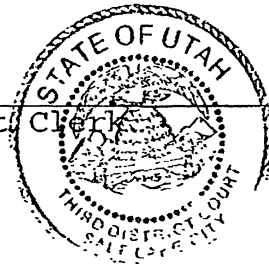
Case No: 050912502  
Date: Feb 18, 2009

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Dated this 18 day of Feb, 2009.

  
Deputy Court Clerk



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**FILED**  
MAR 2 2009  
THIRD DISTRICT COURT  
SALT LAKE DEPARTMENT

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

PARKER JENSEN, a minor, by and through )  
his parents and natural guardians, BARBARA )  
and DAREN JENSEN; BARBARA JENSEN, )  
individually; and DAREN JENSEN, )  
individually, )

Plaintiffs, )

v. )

STATE OF UTAH; INTERMOUNTAIN )  
HEALTH CARE, INC.; KARI )  
CUNNINGHAM, in her individual capacity; )  
RICHARD ANDERSON, in his individual and )  
official capacities; LARS M. WAGNER, in his )  
individual capacity; DAVID L. CORWIN, in )  
his individual capacity; CHERYL M. COFFIN, )  
in her individual capacity; KAREN H. )  
ALBRITTON, in her individual capacity; )  
SUSAN EISENMAN, in her individual )  
capacity; and JANE and JOHN DOE, in their )  
individual capacities, )

Defendants. )

**FINAL JUDGMENT AND ORDER**

Civil No.: 050912502

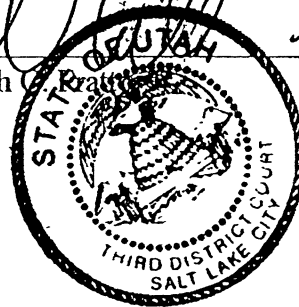
Judge Joseph C. Fratto

Pursuant to the Court's Memorandum Decision issued on February 18, 2009, and for the reasons set forth in the defendants' moving papers addressing res judicata, defendants' motions for summary judgment are hereby granted and all claims against the defendants are hereby dismissed with prejudice on the merits.

DATED this 6<sup>th</sup> day of March, 2009.

THE COURT

Hon. Joseph C. ...



Approved as to Form:

SNOW, CHRISTENSEN & MARTINEAU

RSY

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Andrew M. Morse

R. Scott Young

Attorneys for Defendants Wagner and Albritton

UTAH ATTORNEY GENERAL'S OFFICE

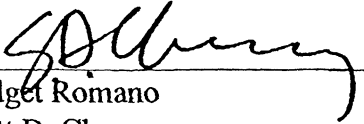
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Joni Jones

Attorney for Defendant Cunningham



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Attorney for Defendant Anderson

CHRISTENSEN & JENSEN, P.C.

---

Roger P. Christensen  
Karra J. Porter  
Attorneys for Plaintiffs

## CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of a proposed **FINAL JUDGMENT AND ORDER** by U.S. Mail, postage prepaid, to the following:

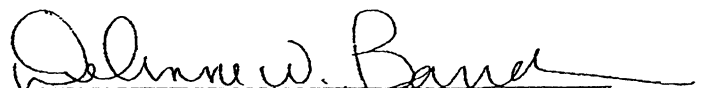
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On this 9<sup>th</sup> day of March, 2009



## Addendum B

# **ADDENDUM B**

# Constitution of the State of Utah

## PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.

## ARTICLE I

### DECLARATION OF RIGHTS

Section 1. [**Inherent and inalienable rights.**] All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Sec. 2. [**All political power inherent in the people.**] All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Sec. 3. [**Utah inseparable from the Union.**] The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.

Sec. 4. [**Religious liberty.**] The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

Sec. 5. [**Habeas corpus.**] The privilege of the writ of *habeas corpus* shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.

Sec. 6. [**Right to bear arms.**] The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.

Sec. 7. [**Due process of law.**] No person shall be deprived of life, liberty or property, without due process of law.

Sec. 8. [**Offenses bailable.**] All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong.

Sec. 9. [**Excessive bail and fines. Cruel punishments.**] Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Sec. 10. **[Trial by jury.]** In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Sec. 11. **[Courts open. Redress of injuries.]** All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Sec. 12. **[Rights of accused persons.]** In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Sec. 13. **[Prosecution by information or indictment. Grand jury.]** Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it.

Sec. 14. **[Unreasonable searches forbidden. Issuance of warrant.]** The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Sec. 15. **[Freedom of speech and of the press. Libel.]** No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Sec. 16. **[No imprisonment for debt. Exception.]** There shall be no imprisonment for debt except in cases of absconding debtors.

Sec. 17. **[Elections to be free. Soldiers voting.]** All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.

Sec. 18. **[Attainder. Ex post facto laws. Impairing contracts.]** No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Sec. 19. [**Treason defined. Proof.**] Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act.

Sec. 20. [**Military subordinate to the civil power.**] The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law.

Sec. 21. [**Slavery forbidden.**] Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State.

Sec. 22. [**Private property for public use.**] Private property shall not be taken or damaged for public use without just compensation.

Sec. 23. [**Irrevocable franchises forbidden.**] No law shall be passed granting irrevocably any franchise, privilege or immunity.

Sec. 24. [**Uniform operation of laws.**] All laws of a general nature shall have uniform operation.

Sec. 25. [**Rights retained by people.**] This enumeration of rights shall not be construed to impair or deny others retained by the people.

Sec. 26. [**Provisions mandatory and prohibitory.**] The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Sec. 27. [**Fundamental rights.**] Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.



## Addendum C

# **ADDENDUM C**

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
D. Utah,  
Central Division.  
P.J., a minor, by and through his parents and natural guardians, Barbara and Daren JENSEN, et al.,  
Plaintiffs,  
v.  
State of UTAH, et al., Defendants.  
No. 2:05-CV-739 TS.

Sept. 22, 2008.

Barton H. Kunz, II, Karra J. Porter, Roger P. Christensen, Sarah E. Spencer, Christensen & Jensen PC, Salt Lake City, UT, for Plaintiffs.

Joni J. Jones, Bridget K. Romano, Scott D. Cheney, Utah Attorney General's Office, Kristin A. Vanorman, Jennifer R. Carrizal, Jeremy G. Knight, Strong & Hanni, Andrew M. Morse, David G. Williams, R. Scott Young, Richard A. Vazquez, Snow Christensen & Martineau, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER  
GRANTING SUMMARY JUDGMENT AND REMANDING STATE LAW CLAIMS

TED STEWART, District Judge.

\*1 This § 1983 case arises from a protracted dispute between Plaintiffs Daren and Barbara Jensen and the State of Utah regarding the proper medical care for their son, Plaintiff P.J. Currently before the Court are the summary judgment motions of Defendants Richard Anderson, Kari Cunningham, Susan Eisenman, Dr. Lars Wagner, and Dr. Karen Albritton. After carefully considering the parties' submissions and having heard oral argument, the Court will grant the summary judgment motions

with regard to the Jensens' § 1983 claims for the reasons discussed below. As the Jensens' state law claims involve important issues of Utah law, the Court declines to exercise supplemental jurisdiction and will remand the state claims to the Utah court from which they were removed.

## I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.<sup>FN1</sup> In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.<sup>FN2</sup> The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>FN3</sup>

FN1. See Fed.R.Civ.P. 56(c).

FN2. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir.1991).

FN3. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir.1991).

## II. FACTS

The following is a summary of the factual background in this case, viewed in the light most favorable to the Jensens: On April 30, 2003, 12-year-old P.J. had a small growth removed from the floor of his mouth by an oral surgeon named Dr. Christensen. The tissue removed by Dr. Christensen was sent to Laboratory Corporation of America in Kent, Washington for analysis. LabCorp informed Dr. Christensen that the sample was malignant. Dr. Christensen then referred P.J. to Dr. Harlan Munz

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at Primary Children's Medical Center ("PCMC") in Salt Lake City, Utah.

The Jensens met with Dr. Munz on May 9, 2003.

After examining P.J., Dr. Munz referred him to PCMC's oncology department where he met with

Dr. Wagner. Dr. Wagner first met with and examined P.J. that same day, but could not offer any diagnosis until after PCMC's pathology department completed its own testing.

Upon PCMC's request, LabCorp sent P.J.'s tissue sample to PCMC's pathology department. On May 20, 2003, Dr. Lowichik completed the pathology report on P.J.'s tissue, diagnosing the growth as "EWING SARCOMA/PERIPHERAL PRIMITIVE NEUROECTODERMAL TUMOR"<sup>FN4</sup> (*i.e.*, Ewing's Sarcoma). This diagnosis was rendered based on immunohistochemical staining and the appearance of the tumor cells. The pathology report indicates that P.J.'s "case was reviewed by [fellow pathologist] [Dr. Coffin] who concurs with this interpretation."<sup>FN5</sup> The deposition testimony of the pathologists likewise indicates that both of them reviewed the testing and were confident in the diagnosis. Dr. Lowichik estimated her confidence in the diagnosis to be "in the high 90 percent."<sup>FN6</sup> Dr. Coffin reviewed the testing and was also very confident that the tumor was Ewing's Sarcoma. In fact, Dr. Coffin testified that the diagnosis was rendered with near certainty.

FN4. Docket No. 345, Ex. 32.

FN5. *Id.*

FN6. Docket No. 334, Ex. 4, at 31.

\*2 In addition to immunohistochemical staining, Ewing's Sarcoma may be diagnosed through cytogenetic and molecular genetic testing. Ewing's cells often manifest a chromosomal translocation (an "11;22 translocation"), which may be detected through these tests. The presence of an 11;22 translocation indicates that a specimen is Ewing's Sarcoma. Cytogenetic testing may be performed only

on fresh or frozen tissue. Where a tissue sample is placed in formalin or paraffin, cytogenetic testing is not possible. Although not optimal, molecular testing can be performed on tissues samples that have been placed in formalin or paraffin.

In 2003, PCMC would commonly attempt to conduct cytogenetic testing on sarcoma tissue samples that were excised at PCMC where "there was adequate sample left over after the standard pathology examination."<sup>FN7</sup> Molecular testing was available through an affiliated institution. In 2003, it would not have been unusual for a PCMC pathologist to send samples out for molecular testing to provide further diagnostic information.

FN7. Docket No. 345, Ex. 15, at 23.

Because the tissue removed from P.J.'s mouth by Dr. Christensen was placed in formalin or paraffin, cytogenetic testing could not be performed on that specimen. There were still tumor cells in P.J.'s mouth, which could have been extracted for this purpose. However, this would have required further surgery to obtain a sample. In contrast, molecular testing could have been performed on the tissue sample obtained by Dr. Christensen.

Dr. Wagner discussed the diagnosis of P.J.'s tissue sample with Dr. Coffin. She told him that she was confident in the diagnosis and that no further testing was needed. According to Dr. Coffin, where the cell appearance and immunohistochemical staining fit "the criteria for the diagnosis of Ewing's sarcoma," it is not necessary to perform cytogenetic or molecular testing to establish the diagnosis.<sup>FN8</sup>

FN8. Docket No. 334, Ex. 3, at 43-44.

On May 21, 2003, Dr. Wagner met with the Jensens for more than an hour. Dr. Wagner expressed his confidence in the Ewing's Sarcoma diagnosis and explained the need for chemotherapy to begin right away. Dr. Wagner further explained the difference between localized and non-localized Ewing's Sarcoma. Specifically, Dr. Wagner informed the Jen-

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sens that the cure rate for localized disease-where there is no evidence of cancer in places other than where it was discovered-was approximately 70% when treated with the recommended chemotherapy, but that the cure rate for non-localized (metastatic) disease was as low as 20%. Thus, Dr. Wagner explained the necessity of beginning treatment right away to prevent the cancer from spreading throughout P.J.'s body.

That same day, radiographic examinations were performed on P.J.'s neck, thorax, chest, and skull to determine whether the cancer had spread beyond the floor of P.J.'s mouth. Each of these tests returned negative. Ms. Jensen testified that at this point they asked Dr. Wagner "if there was any other test he could run to help confirm that it was Ewing's and he said no." FN9 "He was sure it was Ewing's." FN10

FN9. Docket No. 345, Ex. 12, at 127.

FN10. *Id.* at 134.

\*3 During the May 21, 2003 visit, the Jensens asked Dr. Wagner to have P.J.'s tissue sample sent to the Dana-Farber Cancer Institute at Harvard University for a second opinion. Dr. Wagner informed the Jensens that insurance companies often would not pay for a second opinion and encouraged them to contact their insurance provider. Nonetheless, Dr. Wagner agreed to the second opinion and sent the tissue sample to Dana-Farber as requested. The Jensens ultimately cancelled the Dana-Farber consultation.

The Jensens met with Dr. Wagner again on May 29, 2003. At this meeting the Jensens asked Dr. Wagner to order a Positron Emission Tomography ("PET") scan. Dr. Wagner refused to order a PET scan, explaining that it would not be useful in P.J.'s situation because there was no other evidence of metastatic disease. Dr. Wagner further explained to the Jensens that a negative PET scan would not change the need for chemotherapy. The Jensens again asked Dr. Wagner if there were other tests to

confirm the Ewing's diagnosis. Dr. Wagner said no.

By early June 2003, the Jensens and Dr. Wagner differed significantly in their views regarding P.J.'s medical care. Accordingly, a meeting between the Jensens, Dr. Wagner, Dr. Lemons (head of the oncology department), a PCMC social worker, and PCMC's head of quality assurance was scheduled for June 9, 2003, at PCMC. Dr. Wagner again emphasized the need to begin treating P.J. with chemotherapy right away in order to prevent the cancer from spreading. The Jensens' statements during the meeting are disputed. The Jensens contend that they refused to consent to the proposed chemotherapy based on their desire for further confirmatory tests. Dr. Wagner contends that they refused chemotherapy because they wanted to pursue an alternative treatment called Insulin Potentiation Therapy. Regardless, the parties were unable to resolve the impasse. During the meeting, the PCMC head of quality assurance told the Jensens that a referral to the Division of Child and Family Services ("DCFS") might be necessary. The Jensens left the meeting, telling the PCMC representatives, "You're fired." FN11

FN11. *Id.*, Ex. 13, at 181.

At some point, Dr. Corwin of Safe and Healthy Families-a division of PCMC with the responsibility of ensuring that patients are not left untreated-became involved in P.J.'s case. Around June 12, 2003, Dr. Corwin attempted to make contact with the Jensens. Dr. Corwin and Mr. Jensen had a lengthy telephone conversation on June 15, 2003, but were unable to reach an agreement as to P.J.'s medical care. Dr. Corwin and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation. At that point, the decision was made to refer P.J.'s case to DCFS for medical neglect in refusing what the doctors believed was medically necessary treatment.

On June 16, 2003, a regularly-scheduled meeting was held at PCMC with representatives from DCFS, PCMC, and other community organizations

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in the child welfare system. Dr. Wagner and Dr. Corwin were also present. At this meeting, and in a case summary submitted to DCFS, Dr. Wagner summarized his interaction with the Jensens. A formal referral to DCFS was made that same day. The parties dispute whether it was Dr. Corwin or Dr. Wagner who actually submitted the referral. For purposes of the summary judgment motions, the Court must presume the latter.

\*4 DCFS assigned P.J.'s case to Ms. Cunningham, a DCFS social worker. Dr. Wagner and Dr. Corwin provided Ms. Cunningham with information regarding their understanding of P.J.'s situation, both orally and by written case summaries. Ms. Cunningham was also present at the June 16, 2003 meeting at PCMC. Based on communications with Dr. Wagner, Ms. Cunningham was under the impression that P.J.'s situation was a medical emergency and that something needed to be done within a matter of hours or days.

On June 18, 2003, Ms. Cunningham, through Assistant Attorney General Lund, filed a Verified Petition and Motion to Transfer Custody and Guardianship (the "Verified Petition") in the Third District Juvenile Court for Salt Lake County, Utah (the "Juvenile Court"). Ms. Cunningham filed the Verified Petition based entirely on the information provided to her by Drs. Wagner and Corwin. She did not do any independent investigation of P.J.'s referral.

On June 20, 2008, the Jensens first appeared before the Juvenile Court. Ms. Eisenman represented DCFS in place of Ms. Lund and became the primary Assistant Attorney General on P.J.'s case. At that hearing, the Jensens' attorney, Mr. Frank Mylar, represented that the Jensens were interested in obtaining further tests of the tissue sample excised by Dr. Christensen. The Court continued the hearing until July 10, 2003, as the parties indicated that a stipulation regarding P.J.'s treatment was possible.

Around this time, the Jensens sought out Dr. Birk-

mayer, who practiced in Vienna, Austria. After reviewing P.J.'s medical records, Dr. Birkmayer indicated to the Jensens that he was not "totally convinced" that P.J. had Ewing's Sarcoma and that chemotherapy was not necessary.<sup>FN12</sup> The Jensens expressed their desire to have Dr. Birkmayer supervise P.J.'s treatment. On July 2, 2003, Ms. Eisenman sent an email to Dr. Birkmayer in which she asked questions regarding, among other things, Dr. Birkmayer's qualifications and licensure and whether Austria had a standard of care similar to that used by the American Academy of Pediatrics. After receiving Ms. Eisenman's email from Dr. Birkmayer, Mr. Mylar instructed Ms. Eisenman not to contact Dr. Birkmayer directly, but to direct inquiries regarding Dr. Birkmayer to Mr. Mylar. According to Mr. Jensen, the Jensens abandoned their desire to have Dr. Birkmayer treat P.J. at that time because DCFS was requiring that P.J.'s medical care be provided by a board-certified pediatric oncologist.

FN12. Docket No. 345, Ex. 48. Notably, Plaintiffs represent that they submit Dr. Birkmayer's statements only to illustrate the effect they had on the Jensens' mental state and not for the truth of the matter asserted.

In late June 2003, Dr. Wagner left Utah to pursue a new job in Ohio. He informed Ms. Eisenman that he was leaving and that she could contact Dr. Lemons or Dr. Albritton if she needed anything. In preparation for the July 10, 2003 hearing, Ms. Eisenman disclosed to the Juvenile Court that she intended to prove her case using three medical experts: Drs. Coffin, Wagner, and Albritton. In preparation for the hearing, Ms. Eisenman provided Dr. Albritton with materials related to the case, including Dr. Wagner's case summary and a list of questions that might be asked. Mr. Mylar objected to the introduction of testimony at the July 10, 2003 hearing because the hearing was set for a pre-trial conference and not an evidentiary hearing. The Juvenile Court affirmed the objection and Drs. Albritton and Coffin did not testify at that time.

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

\*5 At the July 10, 2003 hearing, the Jensens again raised the issue of whether P.J. really had Ewing's Sarcoma. The parties stipulated that the Jensens would have P.J. examined by doctors at the Children's Hospital of Los Angeles ("CHLA") and that the Jensens would abide by their treatment recommendations. The Juvenile Court set another pretrial conference for July 28, 2003. Per the stipulation, the Jensens traveled to Los Angeles, where P.J. met with Dr. Tishler on July 21, 2003. At this meeting, Dr. Tishler informed the Jensens that he was recommending chemotherapy based on the prior pathology tests, but that CHLA would do its own pathology analysis and genetic testing to confirm the Ewing's Sarcoma diagnosis. The Jensens were unhappy with this result as they believed that Dr. Tishler was not performing an independent evaluation, but was merely deferring to the PCMC doctors.

Based on this dissatisfaction, the Jensens did not return again to CHLA, but instead sought medical care from Dr. Charles Simone. Dr. Simone initially agreed to treat P.J. However, upon learning of the legal battle in which the Jensens were entrenched, Dr. Simone declined involvement. Nonetheless, the Jensens believed that Dr. Simone would still agree to treat P.J. if the Juvenile Court would permit it.

At the hearing on July 28, 2003, the Juvenile Court received a report from Dr. Tishler via telephone regarding P.J.'s evaluation at CHLA. Dr. Tishler indicated that to his knowledge the CHLA testing was not yet complete. However, he also stated that there was no question that P.J. had a malignant tumor that would require chemotherapy right away and that the remaining pathological and radiological tests would serve only to clarify what type of tumor he had for purposes of tailoring the chemotherapy to P.J.'s needs. The Jensens' new attorney, Mr. Blake Nakamura, advocated the Jensens' concern that not all of the testing had been completed. Nonetheless, based on Dr. Tishler's testimony, the Juvenile Court ordered that P.J. commence chemotherapy before August 8, 2003, without regard to

the CHLA test results. The Juvenile Court also provided that should the test results indicate that chemotherapy was not needed, the Jensens were free to bring that fact to the Juvenile Court's attention.

Mr. Nakamura also represented to the Juvenile Court at the July 28 hearing that the Jensens were not comfortable with Dr. Tishler and would prefer that P.J. be treated by Dr. Simone. During the hearing, the Juvenile Court asked Dr. Albritton whether Dr. Simone could be the primary treating physician. Dr. Albritton answered:

No, we wouldn't make him the primary oncologist. My understanding, in fact, is that he is not board certified in oncology, either pediatric or medical oncology. He's-from what little I know, he's a specialist in complimentary and alternative medicine. So the gist I get is that he would be asking someone either in Utah or L.A. to be prescribing the chemotherapy and then he would be suggesting the complimentary approaches that might diminish side effects and so on. I do not think there will be an oncologist in Utah or L.A. who would let him prescribe the chemotherapy from New Jersey.<sup>FN13</sup>

FN13. Docket No. 334, Ex. 33-C, 50-51.

\*6 The Juvenile Court also asked Dr. Tishler whether P.J.'s primary treating physician needed to be a board certified oncologist. Dr. Tishler answered: "Definitely. There's no other physician that could lead the care and provide the care."<sup>FN14</sup> Based on this, the Juvenile Court ordered that P.J.'s primary treating physician be a board certified pediatric oncologist or hematologist, but that Dr. Simone was authorized to work with P.J.'s other treating physicians. The Court also scheduled an evidentiary hearing on the Verified Petition for August 20, 2003, in the event P.J.'s situation was not yet resolved.

FN14. *Id.* at 53-54.

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

The Jensens never returned to CHLA or PCMC to receive the ordered chemotherapy for P.J. Instead, they sought evaluation at the Burzynski Clinic in Houston, Texas. Around August 6, 2003, the Jensens contacted the Burzynski Clinic to inquiry whether it could treat P.J. On August 7, 2003, an employee of the Burzynski Clinic called the Jensens to indicate that the Clinic was willing to see him. Accordingly, an appointment was set for August 12, 2003.

At this point, the Jensens apparently believed that they did not have to comply with the Juvenile Court's order to begin chemotherapy by August 8, 2003, and that this would only result in the Juvenile Court's holding the August 20, 2003 evidentiary hearing on the Verified Petition. Thus, on August 8, 2003, the Jensens took P.J. and the rest of their children to Bear Lake in Idaho to go boating. From Idaho, they planned to travel to Houston for P.J. to be evaluated at the Burzynski Clinic on August 12.

Having not received confirmation that P.J.'s chemotherapy was underway, Ms. Eisenman sought a hearing with the Juvenile Court on August 8, 2003, for the purpose of seeking authorization to take P.J. into protective custody. Ms. Eisenman called Mr. Nakamura to notify him of her intent to obtain a protective custody order. Present at the August 8, 2003 hearing were Ms. Eisenman, Ms. Cunningham, P.J.'s guardian ad litem, and Mr. Nakamura. Mr. Nakamura participated in the August 8 hearing by telephone. Mr. Nakamura indicated that P.J. was not receiving chemotherapy, that the Jensens did not want to initiate chemotherapy, and that they were taking P.J. to the Burzynski Clinic for evaluation. In response to the disclosure of the Jensens' intent to seek evaluation at the Burzynski Clinic, Ms. Cunningham paged Dr. Albritton, who then participated in the hearing by telephone. The Juvenile Court and counsel asked Dr. Albritton whether the Burzynski Clinic was qualified to provide P.J.'s treatment. Dr. Albritton indicated that Dr. Burzynski was not a board certified oncologist-hematologist and that his clinic is known for providing ex-

tremely controversial therapy. Dr. Albritton further indicated that she was unaware of any pediatric oncologists at the Burzynski Clinic, but would need more time to confirm that fact. Finally, Dr. Albritton testified that the Burzynski Clinic was not an appropriate option for a newly-diagnosed cancer patient who had not exhausted standard treatment options.

\*7 Ms. Eisenman then filed an Application to Take a Child Into Protective Custody. This application was supported by an affidavit signed by Ms. Cunningham on August 8, 2003. Attached to Ms. Cunningham's affidavit was an affidavit executed by Dr. Wagner on July 22, 2003. The Juvenile Court signed an order authorizing DCFS to take P.J. into protective custody, finding that it was in P.J.'s best interest. Ms. Eisenman enlisted the help of Sandy City Police Officer Peterson, whom she had contacted earlier that day, to help serve the warrant. Officer Peterson was unable to serve the warrant because the Jensens had already left for Bear Lake earlier that day.

Mr. Nakamura informed the Jensens that the Juvenile Court had signed a "pickup order" and that P.J. was to be placed in DCFS custody to begin chemotherapy. Despite this, the Jensens decided to stay in Idaho and seek an independent opinion of P.J.'s condition in preparation for the evidentiary hearing scheduled for August 20, 2003.

On August 13, 2003, P.J.'s guardian ad litem filed a motion for an order to show cause. After hearing the motion that same day, the Juvenile Court entered a bench warrant for the Jensens' arrest and ordered them to appear and present P.J. However, a Juvenile Court clerk told Ms. Eisenman and P.J.'s guardian ad litem that a Juvenile Court warrant would not be placed on a national database, which would require an adult warrant. Perhaps recognizing this, Ms. Eisenman announced to the Jensens' attorneys and P.J.'s guardian ad litem that if the Jensens did not cooperate with the Juvenile Court orders, she would have to go to local and federal law enforcement authorities.



Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Based on information provided by Ms. Eisenman to Officer Peterson, the Salt Lake County District Attorney's Office agreed to screen the Jensen matter for criminal charges on August 15, 2003. Ms. Eisenman, Ms. Cunningham, and P.J.'s guardian ad litem attended the August 15 screening. That same day, the District Attorney's Office filed criminal charges against the Jensens, including one count of custodial interference and one count of kidnapping.

On August 16, 2003, Mr. Jensen was arrested in Idaho where he spent four days in jail before he was released on bail. Upon Mr. Jensen's arrest, Ms. Jensen left Idaho and took P.J. to Houston in an attempt to meet with the Burzynski Clinic. However, the Burzynski Clinic refused to see P.J. because Ms. Eisenman and P.J.'s guardian ad litem informed the clinic that the State had been granted protective custody over P.J. and did not consent to his treatment.

The Juvenile Court held a non-evidentiary hearing on August 20, 2003. In that hearing, Mr. Nakamura read a letter written by Mr. Jensen and explained that the Jensens wished to have an opportunity to present evidence. The Juvenile Court agreed to set an evidentiary hearing, but refused to lift the warrants.

Shortly after this hearing, Ms. Eisenman assumed a new position in the Attorney General's Office and no longer participated in P.J.'s case. Additionally, Mr. Anderson, Director of DCFS, was asked by a representative of Utah's Governor to personally assist in negotiating a resolution to P.J.'s case. Accordingly, on August 27, 2003, Mr. Anderson flew to Idaho to meet with the Jensens where negotiations continued for several days.

**\*8** On September 5, 2003, the parties entered into a stipulation in which the Jensens agreed to submit P.J. to the care of Dr. Johnston—a board-certified pediatric oncologist of St. Luke's Hospital in Boise, Idaho, and to abide by his treatment recommendations. DCFS agreed to ask the Juvenile Court to return full custody of P.J. to the Jensens and to vacate

the warrants. After receiving assurances that the Jensens would submit to chemotherapy if Dr. Johnston recommended it, the Juvenile Court approved the stipulation.

After performing his evaluation, Dr. Johnston concluded that P.J. needed chemotherapy. The Jensens again refused to submit P.J. to chemotherapy, claiming that Dr. Johnston was merely rubber-stamping the diagnosis of the PCMC doctors. Mr. Jensen told Dr. Johnston that if P.J. ever did receive chemotherapy at St. Luke's, he would “make sure it's a hellish experience for everybody involved.” <sup>FN15</sup>

FN15. Docket No. 344, Ex. 11, at 700-01.

Another hearing was held in the Juvenile Court on October 8, 2003. At the October 8 hearing, Dr. Johnston testified that he had confirmed P.J. had Ewing's Sarcoma and that the Jensens had rejected his recommendation that P.J. undergo chemotherapy. Assistant Attorney General Mark May, who replaced Ms. Eisenman on P.J.'s case, indicated that the parties would attempt to reach a settlement.

Having determined that the Jensens would not submit P.J. to chemotherapy under any circumstances, DCFS filed a Motion to Dismiss Verified Petition on October 22, 2003. In its Motion, DCFS stated that its decision to dismiss the Verified Petition was made with full recognition that without chemotherapy P.J.'s chances of survival would fall dramatically. Nonetheless, DCFS concluded that it was simply unworkable to attempt to force a 13-year-old boy to undergo chemotherapy unwillingly.

On October 2, 2003, the Jensens entered a plea agreement with the State on the criminal charges. The Jensens agreed to enter a guilty plea and abeyance on the custodial interference charge in exchange for the State's promise to dismiss the kidnapping charge.

### III. DISCUSSION

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

In July 2005, the Jensens filed a Complaint in the Third Judicial District Court for Salt Lake County, Utah, against the State of Utah, Intermountain Health Care, Inc., Ms. Cunningham, Mr. Anderson, Dr. Wagner, Dr. Corwin, Dr. Coffin, Dr. Albritton, and Ms. Eisenman. In their Complaint, the Jensens allege the following causes of action: (1) § 1983-violation of the substantive due process right to direct medical care (2) § 1983-violation of the substantive due process right to familial association; <sup>FN16</sup> (3) § 1983-malicious prosecution under the Fourth Amendment; (4) § 1983-violation of the Ninth Amendment; (5) violation of article I, section 1 of the Utah Constitution; (6) violation of article I, section 7 of the Utah Constitution; (7) violation of article I, section 14 of the Utah Constitution; (8) violation of article I, section 25 of the Utah Constitution; (9) wrongful initiation; and (10) intentional infliction of emotional distress.

FN16. In their Complaint, the Jensens allege that Defendants violated their right to familial association under both the First Amendment and the Due Process Clause of the Fourteenth Amendment. However, in the Tenth Circuit “the familial right of association is properly based on the ‘concept of liberty in the Fourteenth Amendment.’” *Griffen v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993). The Court recognizes that the Tenth Circuit has, in dictum, recognized a First Amendment right “to enter into and maintain certain intimate or private relationships.” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 358 (10th Cir. 2006) (dealing with expressive association). Nonetheless, the Tenth Circuit has consistently analyzed familial association claims within the substantive due process framework, even in cases decided subsequent to the *Grace United Methodist Church* case. See *Estate of Herring v. City of Colorado Springs*, 233 Fed. Appx. 854, 856 (10th Cir. May 18, 2007) (recognizing that “the familial right of as-

sociation is grounded in the Fourteenth Amendment concept of liberty”) (unpublished decision); *Suasnavas v. Stover*, 196 Fed. Appx. 647, 654 (10th Cir. Aug. 25, 2006) (“The right of familial association is a substantive due process right ....”)(unpublished decision); *Chatwin v. Barlow*, 2008 WL 501109, at \*4 (D.Utah Feb. 20, 2008) (“The Tenth Circuit has recognized that the freedom of familial association is a substantive right guaranteed by the due process clause of the Fourteenth Amendment.”) (unpublished decision). Based on the long line of cases employing the standards set forth in *Griffen*, the Court finds that the Jensens’ familial association claims arise from and are appropriately analyzed under Due Process Clause of the Fourteenth Amendment.

\*9 After removing the case to this Court, the Defendants filed motions to dismiss. In an Order dated June 16, 2006, the Court dismissed the State of Utah on the basis of sovereign immunity and Drs. Corwin and Coffin on the basis of absolute immunity. The Court also dismissed the fourth and eighth causes of action in their entirety and the first and third causes of action to the extent they were asserted by P.J. IHC has since been voluntarily dismissed.

After the close of discovery on the issue of liability, Mr. Anderson, Ms. Cunningham, Ms. Eisenman, Dr. Wagner, and Dr. Albritton filed the motions presently before the Court, arguing that they are entitled to summary judgment on Plaintiffs’ federal claims based on the *Rooker-Feldman* Doctrine, absolute immunity, and qualified immunity.

#### A. The *Rooker-Feldman* Doctrine

“*Rooker-Feldman* precludes federal district courts from effectively exercising appellate jurisdiction over claims ‘actually decided by a state court’ and claims ‘inextricably intertwined’ with a prior state-

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

court judgment.”<sup>FN17</sup> The doctrine arises from 28 U.S.C. § 1257(a), which allows review of state-court judgments by the United States Supreme Court and, by negative inference, precludes lower federal courts from exercising such jurisdiction.<sup>FN18</sup>

FN17. *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1237 (10th Cir. 2006) (quoting *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir.2002)) (internal quotation marks omitted).

FN18. *Id.*

Noting that the doctrine had, at times, been applied by lower courts far beyond its original contours, the Supreme Court declared in the case of *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,<sup>FN19</sup> that application of the *Rooker-Feldman* doctrine is limited to “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”<sup>FN20</sup> The Tenth Circuit summarized the *Exxon Mobil* holding as follows:

FN19. 544 U.S. 280 (2005).

FN20. *Id.* at 284.

As the Supreme Court emphasized in *Exxon Mobil*, the *Rooker-Feldman* doctrine does not apply “simply because a party attempts to litigate in federal court a matter previously litigated in state court.” To the contrary, a party may lose in state court and then raise precisely the same legal issues in federal court, so long as the *relief sought* in the federal action would not reverse or undo the *relief granted* by the state court: “if a federal plaintiff ‘present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party ..., then there is jurisdiction....’”<sup>FN21</sup>

FN21. *Mo's Express*, 441 F.3d at 1237 (quoting *Exxon Mobil*, 544 U.S. at

292-94).

Accordingly, *Rooker-Feldman* applies only where the relief sought in the federal case would “reverse or undo the state court judgment.”<sup>FN22</sup>

FN22. *Id.*

*Rooker-Feldman* has been applied to constitutional claims arising from child custody proceedings in state courts. For example, in *Warnick v. Briggs*,<sup>FN23</sup> this Court applied the doctrine to a § 1983 claim alleging various constitutional violations against several state actors, seeking review of the circumstances surrounding the removal of the plaintiff's child by the state without a pre-removal hearing.<sup>FN24</sup> The Court found that “if it adjudicated Plaintiffs' claims relating to [the child's] removal, [it] would effectively act as an appellate court in reviewing the juvenile court's disposition.”<sup>FN25</sup> Applying *Rooker-Feldman* in that situation made sense as the juvenile court heard and decided the issue of whether the circumstances justified the child's removal, and the plaintiff did not challenge the “integrity of the evidence” before the juvenile court.<sup>FN26</sup>

FN23. 2007 WL 3231609 (D.Utah Oct. 30, 2007).

FN24. *Id.* at \*9-10.

FN25. *Id.* at \*10.

FN26. *Id.*

**\*10** However, where a plaintiff's federal cause of action is for injury sustained as a result of actions taken during the course of the custody proceedings that are separate from the judgments of the state court, *Rooker-Feldman* does not apply. The case of *Brokaw v. Weaver*<sup>FN27</sup> of the Seventh Circuit is particularly persuasive on this point and is closely analogous to the Jensens' case. In *Brokaw*, the plaintiff was removed from her parents and placed in state custody by order of a state court after a social worker and others fabricated a charge of child

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

neglect.<sup>FN28</sup> Subsequently, another state court found no continuing basis to hold the plaintiff in state custody and released her to her parents.<sup>FN29</sup> Years later, after reaching the age of majority, the plaintiff brought suit in federal court against the social worker and the others who made up the neglect charges, alleging violations of her right to familial relations under substantive due process, violation of the Fourth Amendment in her removal, and violation of procedural due process.<sup>FN30</sup> The district court dismissed the case based on application of the *Rooker-Feldman* doctrine.

FN27. 305 F.3d 660 (7th Cir.2002).

FN28. *Id.* at 662.

FN29. *Id.* at 663.

FN30. *Id.*

The Seventh Circuit reversed, finding that the actions of the defendants “violated her constitutional rights, independently of the state court decision.”<sup>FN31</sup> The court recognized that the plaintiff’s injuries would not have happened without the state court’s order directing her removal and placing her in state custody. Nonetheless, the court found that the plaintiff’s claims were independent of the state court judgments, emphasizing that even if the plaintiff “would not have suffered any damages absent the state order ... her claim for damages [was] based on an alleged independent violation of her constitutional rights. It was this separate constitutional violation which caused the adverse state court decision.”<sup>FN32</sup> Thus, the true cause of the plaintiff’s injuries was the defendant’s actions, even though the injuries would not have occurred absent the state court’s order.<sup>FN33</sup>

FN31. *Id.* at 665.

FN32. *Id.* at 667; *see also Holloway v. Borsh*, 220 F.3d 767, 778-79 (6th Cir.2000) (finding § 1983 suit against caseworker independent of state custody proceedings based on actions taken by the

caseworker during the course of the state proceedings).

FN33. *Brokaw*, 305 F.3d at 667.

In this case, the Court finds that the *Rooker-Feldman* doctrine does not apply to the Jensens’ claims, as they seek relief independent from any judgments rendered by the state courts. The Jensens do not seek to reverse or undo any judgments of the state courts. After all, the Verified Petition was ultimately dismissed and full custody of P.J. returned to the Jensens. Rather, the Jensens’ claims are based on the separate conduct of the Defendants previous to and during the course of the proceedings in the state courts. Although the Juvenile Court was surely called upon to balance the parental rights of the Jensens with the State’s interest in protecting P.J.’s welfare, nothing in the record indicates that either the Juvenile Court or the state criminal court heard and ruled on claims that the Defendants deliberately misrepresented and omitted material facts to the state courts, to each other, to the District Attorney’s Office, or others involved in the events surrounding P.J.’s medical care in 2003.

\*11 Thus, the Jensens allege independent claims similar to those in the *Brokaw* case. Although much of the injury alleged by the Jensens would not have resulted in the absence of the Juvenile Court’s orders, the Jensens argue that the underlying cause of those orders was the Defendants’ factual misrepresentations and omissions. The Jensens’ claims are different from those in the *Warnick* case, where the state court entered specific findings of fact on the very events complained of by the plaintiffs and where there was no challenge to the integrity of the evidence. It is true that granting relief to the Jensens in this case might require the Court to enter findings that contradict issues decided by the state court. However, this does not, of itself, invoke the *Rooker-Feldman* doctrine.<sup>FN34</sup> Thus, the constitutional injury alleged by the Jensens is separate and independent from any orders of the state courts, precluding application of the *Rooker-Feldman* doctrine.

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

FN34. *Mo's Express*, 441 F.3d at 1237.

It must be noted, however, that the Jensens' claims are properly before this Court only to the extent that they allege the Defendants engaged in conduct that was not brought before the Juvenile Court or conduct that materially affected the integrity of the evidence on which the Juvenile Court relied. It is not for this Court to decide whether P.J. actually had Ewing's Sarcoma or whether the Juvenile Court properly balanced the State's interest in protecting children and the Jensens' constitutional rights. Those issues, and other similar matters, were squarely ruled on by the Juvenile Court and could only be properly challenged by the Jensens through an appeal.

#### B. Absolute Immunity

"The Supreme Court has recognized the defense of absolute immunity from civil rights suits in several well-established contexts involving the judicial process." <sup>FN35</sup> "[S]tate attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings are absolutely immune from suit under section 1983 concerning activities intimately associated with the judicial ... process." <sup>FN36</sup> The Tenth Circuit has recognized that social workers are entitled to absolute immunity when they meet this criteria. <sup>FN37</sup>

FN35. *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir.1990).

FN36. *Scott v. Hern*, 216 F.3d 897, 908 (10th Cir.2000) (quoting *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir.1990)) (internal quotation marks omitted).

FN37. *Snell*, 920 F.2d at 687-91 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

The Court applies a "functional approach" to de-

termine whether activities are sufficiently connected with the judicial process to merit absolute immunity. <sup>FN38</sup> A prosecutor is entitled to absolute prosecutorial immunity "when performing the traditional functions of an advocate." <sup>FN39</sup> Thus, a prosecutor enjoys absolute immunity even when he or she is accused of making misrepresentations to the court, as long as the actions were taken in the role of an advocate. <sup>FN40</sup> "However, absolute immunity does not extend to actions 'that are primarily investigative or administrative in nature,' though it 'may attach even to such administrative or investigative activities when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.'" <sup>FN41</sup>

FN38. *Id.* at 686.

FN39. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997).

FN40. *Imbler*, 424 U.S. at 430-31 & n. 34.

FN41. *Scott*, 216 F.3d at 908 (quoting *Pfeiffer*, 929 F.2d at 1490) (internal quotation marks omitted).

\*12 As a general rule, witnesses who testify in a judicial proceeding, whether during trial or before, are likewise entitled to absolute immunity from suit arising from their testimony. <sup>FN42</sup> However, absolute witness immunity is not available to "complaining witnesses"- "the person (or persons) who actively instigated or encouraged the prosecution of the plaintiff"-for testimony "that is relevant to the manner in which the complaining witness initiated or perpetuated the prosecution." <sup>FN43</sup>

FN42. *Anthony v. Baker*, 955 F.2d 1395, 1400 (10th Cir.1992).

FN43. *Id.* at 1399 n. 2, 1402.

As explained below, the Court finds that Ms. Eisenman and Dr. Albritton are absolutely immune from all of the Jensens' § 1983 claims. Ms. Cunningham is likewise entitled to absolute immunity with re-

Not Reported in F Supp 2d, 2008 WL 4372933 (D Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

gard to her decision to file the Verified Petition, but is not so entitled with regard to the rest of the conduct alleged in the Jensens' Complaint

*Ms Eisenman* Ms Eisenman argues that she is absolutely immune from the Jensens' claims arising from functions performed in her role as an advocate or in fulfillment of her duties as an officer of the Juvenile Court. The Jensens claim that Ms Eisenman engaged in a number of harmful activities outside the scope of her advocate role, which are grouped as follows for purposes of analysis: (1) factual misrepresentations and omissions made to the Juvenile Court; (2) misrepresentations to Ms Cunningham, Mr Anderson, and Utah Attorney General Shurtleff,<sup>FN44</sup> (3) factual misrepresentations and omissions made to the District Attorney's Office; and (4) other investigative activities. Additionally, although not discussed by the Jensens, Ms Eisenman contends that she is immune from claims arising from the August 2003 letter to the Burzynski Clinic in which Ms Eisenman informed the Clinic of the custody order and forbade the clinic from providing any treatment to P J. The Court finds that Ms Eisenman is entitled to absolute immunity with respect to all of the Jensens' § 1983 claims.

FN44 The Jensens also claim that a misrepresentation was made to the Guardian ad Litem, but offer no citation to evidence that would support this assertion.

Ms Eisenman is absolutely immune with regard to the first group-misrepresentations made to the Juvenile Court. Even assuming that Ms Eisenman intentionally misrepresented facts to the Juvenile Court, those misrepresentations were made in her role as an advocate. There is no evidence that any of the alleged misrepresentations were made under oath or as a witness.

The Court likewise finds that Ms Eisenman is entitled to absolute immunity with regard to the second group-misrepresentations to others involved in the Juvenile Court proceedings. Ms Eisenman's

communications with these persons were all directly related to the Juvenile Court proceedings. Ms Cunningham and Mr Anderson from DCFS were Ms Eisenman's clients. Attorney General Shurtleff was Ms Eisenman's co-prosecutor, whose name was on the Juvenile Court pleadings. The parties have not cited, nor has additional research uncovered, any cases dealing with the question of whether a prosecutor is entitled to absolute immunity for communications with her clients and co-counsel. Nonetheless, these communications are directly related to a prosecutor's ability to present the State's case, satisfying the guiding principle of prosecutorial immunity-proximity to the "judicial process and the initiation and presentation of the state's case."<sup>FN45</sup> A prosecutor must be able to freely speak with her client-the very person for whom he is advocating-and the other prosecutors assigned to the case without fear that their communications may later form the basis of a civil suit. These communications likely include discussions of, among other things, trial preparation and strategy, discussion of applicable law, as well as plea and settlement opportunities. Allowing claims to proceed against a prosecutor based on information shared (or not shared) during the course of discussions with his client and/or his fellow prosecutor would interfere with the prosecutor's ability to present the State's case.<sup>FN46</sup> Thus, the public policy behind the prosecutorial privilege-"to allow functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory litigation"<sup>FN47</sup>-fully supports Ms Eisenman's entitlement to absolute immunity with regard to her communications with Ms Cunningham, Mr Anderson, and Attorney General Shurtleff.

FN45 *Scott*, 216 F.3d at 908.

FN46 *Id.*

FN47 *Snell*, 920 F.2d at 686-87.

\*13 The Court also finds that Ms Eisenman is entitled to absolute immunity with regard to the third category-misrepresentations made to the District

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Attorney. The Jensens have submitted sufficient evidence to show that Ms. Eisenman provided the District Attorney's Office with factual information that led to the criminal charges against the Jensens. In the absence of other considerations, this would render Ms. Eisenman a complaining witness, absolving her of prosecutorial immunity with regard to the criminal case.<sup>FN48</sup> However, the Juvenile Court had ordered that DCFS take protective custody of P.J. Despite being apprised by their attorney of the Juvenile Court's custody order, the Jensens refused to return to Utah and produce P.J. Seeking to effectuate the Juvenile Court's order, Ms. Eisenman provided information to the District Attorney's office which led to the initiation of criminal charges. It is clear to this Court that these actions were intimately connected with her duties to the Juvenile Court.<sup>FN49</sup> For these same reasons, Ms. Eisenman's actions in drafting and sending the August 2003 letter to the Burzynski Clinic were also intimately connected with the Juvenile Court proceedings. Accordingly, the Court finds that Ms. Eisenman is entitled to absolute immunity with respect to the Jensens' claims related to her providing allegedly misleading information to the District Attorney's Office and to her drafting and sending the August 2003 letter to the Burzynski Clinic.

FN48. *Kalina*, 522 U.S. at 129-31.

FN49. *Cf. Burrows v. Cherokee County Sheriff's Office*, 38 Fed. Appx. 504, 506 (10th Cir. Mar. 19, 2002) (granting immunity to prosecutor for his actions in seeking extradition order) (unpublished decision).

With regard to the fourth grouping-investigative activities-the Jensens point to two examples of investigative activities engaged in by Ms. Eisenman: (1) providing documents to Dr. Albritton in advance of a July 10, 2003 hearing; and (2) sending an email to Dr. Birkmayer in which she made false representations regarding the standard of care for Ewing's Sarcoma treatment. Concerning the former, the Jensens do not show how providing documents

to a witness in the course of preparing for a hearing is investigative. With respect to the latter, the Jensens offer the following evidence in support of their assertion that Ms. Eisenman discovered the standard mentioned in the email to Dr. Birkmayer through her own investigative efforts: (1) Ms. Eisenman testified that she could not remember where she got the document containing the referenced standard; (2) that Dr. Wagner testified that he did not give it to her; and (3) that P.J.'s guardian ad litem did not recognize the document. Even when viewed in the light most favorable to the Jensens, this testimony does not permit an inference that Ms. Eisenman obtained the document through her own investigative efforts. A number of doctors participated in DCFS's involvement with P.J.'s situation-including Drs. Lemons and Albritton, both pediatric oncologists-any one of whom might have provided this information to Ms. Eisenman. Therefore, the Court concludes that Ms. Eisenman is absolutely immune from these claims, which are directly related to Ms. Eisenman's efforts to marshal the evidence and prepare for witness examination.

**\*14 Dr. Albritton.** The Jensens' claims against Dr. Albritton are based on the following allegations: (1) that Dr. Albritton stated to Ms. Eisenman, Ms. McDonald, and the Juvenile Court that only a board-certified pediatric oncologist was qualified to treat P.J.; (2) that Dr. Albritton misrepresented the qualifications and services of the Burzynski Clinic to the Juvenile Court; and (3) that Dr. Albritton failed to disclose to the Juvenile Court and others that genetic testing was routinely conducted at PCMC on cases of suspected Ewing's Sarcoma.<sup>FN50</sup> Each of these allegations are directly tied to Dr. Albritton's role as an expert witness in which she opined as to the medical care required by P.J. and what doctors and facilities were capable of providing it. This was precisely what Dr. Albritton was subpoenaed to testify about. Accordingly, the Court finds that Dr. Albritton is entitled to absolute immunity from the Jensens' § 1983 claims.

FN50. In opposing absolute immunity, the

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Jensens also point to circumstantial evidence that they claims shows Dr. Albritton provided false information to Dr. Johnston. The Jensens argue that this makes Dr. Albritton a complaining witness. However, nowhere in their briefs do the Jensens rely on this evidence to support their constitutional claims. The Jensens make no effort to show how Dr. Albritton's alleged conversation with Dr. Johnston violated their constitutional rights.

*Ms. Cunningham.* The Jensens base their § 1983 claims against Ms. Cunningham on her failure to investigate P.J.'s referral before filing the Verified Petition and on the factual misrepresentations she allegedly made to the Juvenile Court. Ms. Cunningham contends that she is absolutely immune from each of the claims asserted by the Jensens because she performed only prosecutorial functions.

The Court finds that Ms. Cunningham is entitled to absolute immunity, but only with regard to her decision to file the Verified Petition. The Verified Petition was filed with an accompanying "Verification" in which Ms. Cunningham swore under oath that the "matters stated [in the Petition] are true." <sup>FN51</sup> Although Ms. Cunningham surely exercised prosecutorial discretion in electing to file the petition, she acted outside the scope of any prosecutorial function by attesting under oath to the allegations in the Verified Petition as a complaining witness.<sup>FN52</sup> Thus, although Ms. Cunningham is entitled to absolute immunity for her decision to file the Verified Petition, she is not immune from the Jensens' claims based their contention that the Verified Petition contained misrepresentations and omissions. For the same reasons, Ms. Cunningham is not immune from the Jensen's claims arising from the submission of her August 2003 affidavits, which the Jensens claim contained factual misrepresentations and omissions.

FN51. Verified Petition, Docket No. 345, Ex. 43, at 6.

FN52. *Kalina*, 522 U.S. at 129-31.

Finally, Ms. Cunningham is not absolutely immune from the Jensens' claims arising from her alleged failure to properly investigate P.J.'s referral because this duty did not sufficiently relate to the judicial proceedings. Certainly, prosecutorial immunity may be had for actions in "obtaining, reviewing and evaluating evidence" prior to initiation of a criminal action. <sup>FN53</sup> However, this is because these investigative actions "are necessary so that a prosecutor may fulfill his function as an officer of the court." <sup>FN54</sup> Although a judicial proceeding might result from its fulfillment, Ms. Cunningham's duty to investigate reports of child neglect is for the purpose of protecting the children who are the subject of those reports. <sup>FN55</sup> Therefore, it cannot be said that fulfillment of this duty is intimately associated with the judicial process. Accordingly, the Court will deny Ms. Cunningham's request for summary judgment based on absolute immunity.

FN53. *Snell*, 920 F.2d at 693.

FN54. *Id.*

FN55. Utah Code Ann. § 62A-4a-409.

### C. Qualified Immunity

\*15 Each of the Defendants also asserts qualified immunity with respect to the Jensens' § 1983 claims. Where a state actor raises a qualified immunity defense in a motion for summary judgment, "the burden shifts to the plaintiff to satisfy a strict two-part test: first, the plaintiff must show that the defendant's actions violated a constitutional or statutory right; second, the plaintiff must show that this right was clearly established at the time of the conduct at issue." <sup>FN56</sup> "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment-showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." <sup>FN57</sup>



Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

FN56. *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir.2008) (quoting *Nelson v. McMullen*, 207 F.3d 1202, 1205 (10th Cir.2000)).

FN57. *Id.*

A right is clearly established where “it would be clear to a reasonable officer that his conduct was unlawful in the situation.”<sup>FN58</sup> This determination must be made “in light of the specific context of the case, not as a broad general proposition.”<sup>FN59</sup> That a right was clearly established can be shown by controlling case law in the Tenth Circuit or by the weight of authority in other circuits.<sup>FN60</sup> Notably, though, the Supreme Court has held that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>FN61</sup>

FN58. *Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir.2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

FN59. *Id.* (quoting *Katz*, 533 U.S. at 201).

FN60. *Id.* at 1114-15.

FN61. *Id.* at 1115 (quoting *Hope v. Peizer*, 536 U.S. 730, 741 (2002)).

In their § 1983 claims, the Jensens allege that Defendants violated their substantive due process rights and their rights to be free from unreasonable searches and seizures.

#### 1. Substantive Due Process

In their first and second causes of action, the Jensens<sup>FN62</sup> claim that each of the Defendants engaged in substantive due process violations of the Jensens' rights to familial association and to direct P.J.'s medical care.

FN62. In its June 2006 Order, the Court dismissed P.J.'s claims for violation of his right to refuse unwanted treatment. Thus,

P.J. proceeds only on his familial association claim.

The Fourteenth Amendment provides that a state may not “deprive any person of life, liberty, or property, without due process of law.”<sup>FN63</sup> In addition to procedural protections, the Due Process Clause also provides two forms of “substantive” protection: (1) protection against government action that “shocks the conscience” and (2) protection of fundamental liberty interests.<sup>FN64</sup> In the case of *Seegmiller v. Laverkin City*, the Tenth Circuit recently clarified that these two “strands of the substantive due process doctrine” are not mutually exclusive.<sup>FN65</sup> Rather, “by satisfying either the ‘fundamental right’ or the ‘shocks the conscience’ standards, a plaintiff states a valid substantive due process claim.”<sup>FN66</sup> The *Seegmiller* court admonished: “Courts should not unilaterally choose to consider only one or the other of the two strands. Both approaches may well be applied in any given case.”<sup>FN67</sup>

FN63. U.S. Const. Amend. XIV § 1.

FN64. *Seegmiller v. Laverkin City*, 528 F.3d 762, 767 (10th Cir.2008).

FN65. *Id.* at 767, 769.

FN66. *Id.* at 767.

FN67. *Id.* at 769.

A substantive due process claim based on arbitrary and oppressive government action is established where the conduct in question is so egregious that it “shocks the conscience of federal judges.”<sup>FN68</sup> Mere negligence is clearly insufficient to meet this standard.<sup>FN69</sup> For that matter, even an intentional or reckless abuse of power that causes the plaintiff injury does not, of itself, meet the “shocks the conscience” standard.<sup>FN70</sup> Rather, there must be “a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.”<sup>FN71</sup>

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

FN68. *Ward v. Anderson*, 494 F.3d 929, 938 (10th Cir.2007) (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir.2006)) (internal quotations marks omitted).

FN69. *Id.* at 937.

FN70. *Id.* at 937-38.

FN71. *Id.* at 938.

**\*16** A substantive due process plaintiff asserting a fundamental liberty interest must narrowly articulate its scope.<sup>FN72</sup> The Court must then determine whether the asserted interest is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>FN73</sup> Should both of these hurdles be cleared, the plaintiff must then show that the government actor’s conduct infringed on the plaintiff’s fundamental liberty interest and was “not narrowly tailored to serve a compelling state interest.”<sup>FN74</sup>

FN72. *Seegmiller*, 528 F.3d at 769 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

FN73. *Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003)) (internal quotation marks omitted).

FN74. *Seegmiller*, 528 F.3d at 767.

The Jensens claim that Defendants infringed on their right to direct P.J.’s medical care and their right to familial association. The Supreme Court has recognized that the Due Process Clause “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>FN75</sup> This “fundamental right” encompasses both of the liberty interests asserted by the Jensens, calling for application of the compelling interest/narrowly tailored standard. In *Dubbs v. Head Start, Inc.*,<sup>FN76</sup> the Tenth Circuit reversed a district court for applying the “shocks

the conscience” standard to the substantive due process claims of two parents against the state for infringing on their right to direct the medical care of their children.<sup>FN77</sup> Although it ultimately declined to delineate the applicable standard due to the scant record before it, the court included a parent’s right to direct the medical care of his or her children among those fundamental rights for which a substantive due process claim may be stated without meeting the “shocks the conscience” standard.<sup>FN78</sup>

FN75. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

FN76. 336 F.3d 1194 (10th Cir.2003).

FN77. *Id.* at 1202-03.

FN78. *Id.*

Dr. Wagner contends that the Jensens have not narrowly articulated their right to direct P.J.’s medical care and, therefore, are not entitled to application of the compelling interest/narrowly tailored standard. More specifically, Dr. Wagner argues that the Jensens’ claim to absolute autonomy in directing the medical care decisions of their son conflicts with the “ ‘Constitution’s notions of ordered liberty,’ which have always protected a child’s right to treatment whenever it has been unreasonably denied by a parent.”<sup>FN79</sup> The Court agrees with this general proposition. However, with a few notable exceptions that are discussed below, the Court does not read the Jensens’ claimed right so broadly. The Jensens do not claim a right to direct P.J.’s medical care free of *any* State interference. Rather, they claim that the State cannot interfere with their right to direct P.J.’s medical care by making deliberate and material factual misrepresentations and omissions to state courts and other decision makers during the process by which that interference is accomplished. As the Court recognized in its June 2006 Order, when the Jensens’ right to direct P.J.’s medical care is placed in this context, it is not only fundamental, but is also clearly established.<sup>FN80</sup>

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

FN79. Docket No. 381, at 2.

FN80. Docket No. 52, at 22, 34, 41 (citing *Pierce v. Gilchrist*, 359 F.3d 1279, 1297-99 (10th Cir.2004); *Dubbs*, 336 F.3d at 1202-03).

\*17 The proper standard for claims of familial association is more complicated. As a fundamental liberty interest,<sup>FN81</sup> the right to familial association between a parent and his or her child would logically be governed by the same standard applicable to other fundamental rights. However, the Tenth Circuit has consistently applied a balancing test to claims for infringement of the familial association right.<sup>FN82</sup> In *Griffen v. Strong*, the Tenth Circuit called for a balancing test to determine whether a state actor's conduct "constituted an undue burden" on a plaintiff's right to familial association.<sup>FN83</sup> A court applying the undue burden test should balance the plaintiff's right to familial association against the relevant interests of the state, considering the "severity of the alleged infringement, the need for the defendant's conduct, and any possible alternatives."<sup>FN84</sup> This standard clearly involves lower scrutiny than the compelling interest/narrowly tailored test applicable to other fundamental rights. Indeed, the *Griffen* test requires the plaintiff to show that the state actor directed his conduct at the familial relationship "with knowledge that the ... conduct will adversely affect that relationship."<sup>FN85</sup>

FN81. *Gomes v. Wood*, 451 F.3d 1122, 1127 (10th Cir.2006) (reciting parents' fundamental right to "care, custody and control of their children" in removal context).

FN82. See, e.g., *Griffen v. Strong*, 983 F.2d 1544, 1547 (10th Cir.1993) (applying "undue burden" balancing test to substantive due process claim based on right of familial association between husband and wife); *Suasnavas v. Stover*, 196 Fed. Appx. 647, 656 (10th Cir.2006) (applying *Griffen* undue burden test) (unpublished decision).

FN83. *Griffen*, 983 F.2d at 1547.

FN84. *Id.* at 1548.

FN85. *Id.*

In its June 2006 Order, the Court opted to apply the *Griffen* standard as it remains good law in the Tenth Circuit, but noted the conflict between the compelling interest/narrowly tailored and undue burden standards. As the *Seegmiller* decision had no occasion to specifically consider the right to familial association in the child-welfare context or the long line of Tenth Circuit cases applying the undue burden test, the Court will continue to apply the *Griffen* standard to the Jensens' familial association claims.

Clearly, "the right to associate with one's family is a very substantial right."<sup>FN86</sup> However, this right "has never been deemed absolute or unqualified."

<sup>FN87</sup> It is clear that the state may interfere with the right to familial association, even without prior notice and an opportunity to be heard, where such action is needed to ensure the safety of a child.<sup>FN88</sup> Thus, the Court must weigh the State's interest in protecting children against the Jensens' interest in familial association, given the factual record presented, to determine whether the State's interference constituted an undue burden on the Jensens' right to familial association.

FN86. *Id.*

FN87. *Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir.1994).

FN88. *Gomes*, 451 F.3d at 1128-29.

With this framework in mind, the Jensens' substantive due process claims against Dr. Wagner, Ms. Cunningham, and Mr. Anderson are considered below.<sup>FN89</sup>

FN89. As discussed above, Ms. Eisenman and Dr. Albritton are entitled to absolute immunity on all of the Jensens' § 1983

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

claims.

*Dr. Wagner.* The Jensens claim that Dr. Wagner violated their substantive due process rights based on the following allegations: (1) Dr. Wagner refused to perform genetic and molecular testing despite the Jensens' requests; (2) Dr. Wagner made this decision because of his desire to enroll P.J. in a clinical trial, which he did not disclose to the Jensens; (3) Dr. Wagner discouraged the Jensens from seeking a second opinion and then attempted to influence that opinion; (4) Dr. Wagner did not inform Dr. Lemons, Dr. Albritton, Dr. Coffin, Dr. Lowichik, Dr. Corwin, Ms. Cunningham, Ms. Eisenman, or the Juvenile Court of his refusal to order genetic and/or molecular testing; and (5) Dr. Wagner told Ms. Cunningham that P.J. could be dead in five days in order to persuade her to skip the normal investigative process.

**\*18** Having closely examined the record, the Court finds the Jensens have not established that Dr. Wagner violated their substantive due process rights. It is undisputed that Drs. Lowichik and Coffin diagnosed P.J. with Ewing's Sarcoma after performing immunohistochemical testing. According to Dr. Coffin, this diagnosis was rendered with near certainty. Dr. Lowichik estimated her level of certainty "in the high 90 percent." <sup>FN90</sup> Dr. Coffin told Dr. Wagner that she was confident in the diagnosis and that no further testing was needed. This, according to Dr. Wagner, coupled with the need for immediate treatment, was the reason he did not order additional testing. When the Jensens would not agree to begin treatment that he believed was necessary to save P.J.'s life, Dr. Wagner referred P.J.'s case to DCFS. The Jensens offer no competent evidence to place these facts in dispute. Rather, the Jensens ask the Court to draw a number of unreasonable inferences, which the record plainly will not support, in order to attribute a more dubious purpose to Dr. Wagner's actions.

FN90. Docket No. 345, Ex. 16, at 31.

First, the Jensens point to the fact that Dr. Wagner

was an administrator of a clinical trial for which P.J. might have been eligible, arguing that this was the reason behind Dr. Wagner's refusal to order more testing and his insisting on immediate chemotherapy treatment. Even assuming that it was inappropriate to refuse further testing and that Dr. Wagner did refuse the testing with the study in mind, the Jensens were free, at that point, to take P.J. to another facility and another doctor for further testing. Thus, Dr. Wagner's refusal to order further testing did not, of itself, violate the Jensens' right to direct P.J.'s medical care free from unreasonable state interference.

Moreover, outside of P.J.'s possible eligibility to participate in the trial, the Jensens have produced no evidence that Dr. Wagner's decisions were motivated based on a desire to enroll P.J. in the trial. Indeed, the record would not permit such an inference. It is undisputed that the trial required enrollment within 30 days of the diagnostic biopsy which, in P.J.'s case, occurred on May 2, 2003. Thus, on June 2, 2003, P.J. was no longer eligible to participate in the trial. If Dr. Wagner's refusal to order the tests and his push to immediately begin chemotherapy were motivated by a desire to enroll P.J. in the clinical trial, surely his efforts would have ceased or changed course after June 2, 2003. However, it is undisputed that Dr. Wagner's efforts to ensure that P.J. received chemotherapy continued after this date. It was not until after June 2, 2003, that Dr. Wagner involved Dr. Corwin. At the June 9, 2003 meeting at PCMC, Dr. Wagner again emphasized the need for P.J.'s chemotherapy to begin immediately before the cancer spread throughout his body. Finally, it was not until June 16, 2003, that Dr. Wagner referred P.J.'s case to DCFS. In light of these undisputed facts, it is entirely unreasonable to infer that Dr. Wagner's motivation for not ordering further testing and seeking immediate treatment was to enroll P.J. in the clinical trial.

**\*19** The Jensens next contend that Dr. Wagner discouraged them from seeking a second opinion and then attempted to interfere with that opinion. In

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

support of this claim, the Jensens testified that Dr. Wagner told them that insurance companies would often not pay for a second opinion, which would require the Jensens to pay for it. The Jensens also cite an email sent by Dr. Wagner to the oncologist who was to perform the second opinion, in which he stated,

Dear Dr. Grier,

I am a pediatric oncologist at [sic] the University of Utah, and I was wondering if you could provide consultation for a patient being followed in our clinic. This 12-year-old boy underwent excision of a dome-shaped lesion at the floor of the mouth. After careful review by Cheryl Coffin and other pathologists here in Salt Lake, the diagnosis of Ewing's sarcoma has been made. Supporting this diagnosis are the presence of small round blue cells which stain for O13, FLI-1, and vimentin. There is a weak positivity of S-100. Desmin and actin are negative, as are epithelial markers, CD3, and CD45. There was no fresh or frozen tissue to send for RT-PCR for Ewing's translocations, although this possibly could be done on archival paraffin-embedded tissue. If there is significant diagnostic uncertainty, additional fresh tissue could likely be obtained by re-excision, as the margins were clearly positive.

I have discussed these results with the family, and expressed my confidence in the thorough histologic work-up that has been done by expert personnel. However, the family is interested in pursuing a second opinion, and has requested that we send [sic] the slides [sic] and tissue block to you for further review. I have explained that you are an oncologist and not a pathologist, etc., and that further consultations will delay the start of therapy (the child is now 19 days post-resection, as the tissue was initially sent to a pathologist in Washington who made a diagnosis of "poorly differentiated malignancy" after performing a limited immunohistochemical [sic] work-up). Nevertheless, at their request, I am sending by FedEx the tissue to your institution addressed to you. I

would greatly appreciate your help in expediting pathologic review so we can commence with treatment for this young man.<sup>FN91</sup>

FN91. Docket No. 345, Ex. 41, at LMW 8.

This evidence does not rise to the level of a constitutional infringement of the Jensens' right to direct P.J.'s medical care. Whatever his motivations, the Jensens have offered no evidence that Dr. Wagner's statement regarding the likelihood of insurance coverage was false. Although Dr. Wagner clearly expressed confidence in the Ewing's Sarcoma diagnosis, along with his desire to quickly begin treatment, the above email does not support a reasonable inference that Dr. Wagner attempted to interfere with the second opinion sought by the Jensens.

Finally, and most important to their substantive due process claims, the Jensens claim that Dr. Wagner did not tell others involved in P.J.'s case—including Ms. Cunningham, Ms. Eisenman, and the Juvenile Court—of his refusal to order further diagnostic tests despite the Jensens' requests and that he falsely told Ms. Cunningham that P.J. would be dead within five days. With respect to the former, even assuming that Dr. Wagner did in fact fail to tell others about his refusal to order the genetic and/or molecular tests, there is no evidence that he did so deliberately. Rather, as outlined above, the record demonstrates that Dr. Wagner believed that those tests were unnecessary and would delay needed treatment based on the diagnosis of Drs. Coffin and Lowichik. To the extent the Jensens claim substantive due process rights that would impose liability on Dr. Wagner for failing to disclose seemingly irrelevant facts, such rights are not implicit in the concept of ordered liberty and, therefore, do not merit protection under the compelling interest/narrowly tailored standard.

\*20 With respect to the latter, it is undisputed that Dr. Wagner communicated the emergency nature of P.J.'s medical situation to DCFS. The Jensens have

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

not provided any evidence that Dr. Wagner did not actually believe this to be true. Instead, they contend that Dr. Wagner convinced Ms. Cunningham to forgo normal investigatory procedures by overstating the immediacy of P.J.'s medical needs, telling her that P.J. would be dead within five days. The Jensens base this assertion entirely on Mr. Anderson's deposition testimony. However, Mr. Anderson did not testify that Dr. Wagner made this statement, but that *someone* told Ms. Cunningham that P.J. would die within five days. Although Mr. Anderson agreed that it was likely the referring doctors, he "never verified who ... made the statement." <sup>FN92</sup> More important, Mr. Anderson's testimony on this point is inadmissible hearsay and, therefore, must be disregarded.<sup>FN93</sup> Accordingly, the record merely shows that Dr. Wagner communicated his belief to Ms. Cunningham that P.J. required immediate medical treatment to give him the best chance possible of surviving Ewing's Sarcoma, as diagnosed by the pathologists at PCMC.

FN92. Docket No. 345, Ex. 2, at 321.

FN93. *Argo v. Blue Cross and Blue Shield, Inc.*, 452 F.3d 1193, 1199 (10th Cir.2006).

In summary, the Jensens ask the Court to find that Dr. Wagner violated their substantive due process rights to familial association and to direct P.J.'s medical care based on unreasonable inferences that stretch the record far beyond its actual content. This does not satisfy their burden of establishing a violation of their constitutional rights.

The Court finds that Dr. Wagner's conduct in providing medical care for P.J. and referring his case to DCFS after the Jensens would not consent to P.J.'s treatment were narrowly tailored to serve the State's compelling interest in protecting children. The record demonstrates that Dr. Wagner referred P.J.'s case to DCFS after the Jensens refused to consent to chemotherapy treatment which Dr. Wagner reasonably believed was necessary to save P.J.'s life. There were, perhaps, additional measures that Dr. Wagner could have taken that *might* have

avoided the need to involve DCFS. For example, he might have ordered the additional tests despite his belief that they were unnecessary and would delay needed treatment. However, the constitution does not place an affirmative duty on him to do so where he reasonably believed P.J.'s life was in danger. To the extent the Jensens claim to the contrary, their substantive due process rights are no longer within the boundaries of fundamental rights and, therefore, are only entitled to protection under the shocks the conscience standard-which Dr. Wagner's conduct does not do.

In reaching this conclusion, the Court finds it important that any actual interference with the Jensens' substantive due process rights was accomplished by referring the case to DCFS, filing the Verified Petition, and presenting P.J.'s case to a neutral judge-not by simply removing P.J. from his parents and forcing him to undergo chemotherapy. Indeed, the Jensens received ample opportunities to present their side of the story to the Juvenile Court. They were represented by counsel throughout the Juvenile Court proceedings. The Jensens correctly contend that the Constitution would not permit interference with their substantive due process rights by means of intentional misrepresentations to the Juvenile Court. However, as outlined above, the Jensens have simply not submitted evidence from which the Court can conclude that Dr. Wagner deliberately misrepresented the events and circumstances surrounding P.J.'s medical care to either the Juvenile Court or others involved in P.J.'s case.

<sup>\*21</sup> For these same reasons, the Court finds that Dr. Wagner's conduct did not unduly burden the familial association rights of the Jensens and P.J. Dr. Wagner's decision to refer P.J. to DCFS minimally infringed the Jensens' familial association rights, preserving ample opportunity for the Jensens to present their interests to the Juvenile Court. Perhaps further discussion might have led to a more amiable solution, but in light of the perceived need for immediate treatment, it was entirely reasonable to submit P.J.'s medical situation to DCFS authorities.

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Again, the Jensens are correct that intentional and material factual misrepresentations and omissions on the part of Dr. Wagner to either DCFS representatives or the Juvenile Court would surely have interfered with their associational rights on a much grander scale. However, the record simply does not sustain these allegations. Accordingly, the Court will grant Dr. Wagner's Motion for Summary Judgment with respect to the Jensens' substantive due process claims.

*Ms. Cunningham.* The Jensens claim that Ms. Cunningham violated their substantive due process rights in two ways: (1) by failing to properly investigate P.J.'s referral; and (2) by making deliberate factual misrepresentations and omissions to the Juvenile Court.

The Court finds that Ms. Cunningham did not violate the Jensens' constitutional rights by failing to investigate the representations of Drs. Wagner and Corwin. The Jensens' claims have important similarities to the Eighth Circuit case of *Thomason v. SCAN Volunteer Services, Inc.*<sup>FN94</sup> The plaintiff in *Thomason* brought a substantive due process claim against a state social worker for violation of her right to "the care, custody and management" of her infant child.<sup>FN95</sup> The social worker received a report from a doctor who was treating the plaintiff's child, including two letters and an article from the *Journal of Pediatrics*, which stated his concern that the plaintiff might be suffering from a psychological disorder that causes her to partially suffocate her child in order to garner the attention of health care professionals.<sup>FN96</sup> Without investigating the allegations, the social worker removed the child from the plaintiff's custody and "arguably mischaracterized" the doctor's report in an affidavit to the juvenile court.<sup>FN97</sup> The Eighth Circuit held that the social worker's failure to investigate did not violate the parent plaintiff's constitutional rights where she relied on the doctor's "reasonable suspicion that life-threatening abuse [was] occurring in the home."<sup>FN98</sup>

FN94. 85 F.3d 1365 (8th Cir.1996).

FN95. *Id.* at 1370.

FN96. *Id.* at 1368.

FN97. *Id.* at 1372.

FN98. *Id.* at 1373.

Similar to the social worker in *Thomason*, Ms. Cunningham relied on the information provided to her by P.J.'s treating physician in filing the Verified Petition. The Jensens have produced no evidence that Ms. Cunningham had reason to suspect the information and opinions given to her by Drs. Wagner and Corwin were misleading. Rather, the Jensens contend that if Ms. Cunningham would have fulfilled her duties under Utah law to investigate P.J.'s referral, she would have discovered the misrepresentations and omissions allegedly made to her by the doctors. However, any duty to investigate that Ms. Cunningham may have had under State law cannot form the basis of a § 1983 claim for violation of substantive due process.<sup>FN99</sup>

FN99. See *Jones v. City and County of Denver*, 854 F.2d 1206, 1209 (10th Cir.1988) ("Section 1983 does not, however, provide a basis for redressing violations of state law, but only for those violations of federal law done under color of state law.").

\*22 In this emergency situation, like the one in *Thomason*, Ms. Cunningham was reasonable in relying on the information provided to her by the doctors, even in the absence of any further investigation. Dr. Wagner communicated to Ms. Cunningham that P.J.'s situation was a medical emergency and that P.J.'s life was in danger, thus implicating the State's compelling interest in P.J.'s safety. The means used by Ms. Cunningham to address the State's compelling interest in the emergency medical situation were narrowly tailored. Ms. Cunningham did not seek to immediately remove P.J. from the home. Rather, she filed the Verified Petition, thus instituting a state court proceeding where the

Not Reported in F Supp 2d, 2008 WL 4372933 (D Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Jensens would have an opportunity to rebut the doctor's allegations. If the situation had been represented to Ms. Cunningham as something less than an urgent medical emergency, perhaps a duty to investigate could be constitutionally required. Such a duty may be needed in non-emergency situations in order to curb "overzealous suspicion and intervention on the part of health care professionals and government officials," which "may have the effect of discouraging parents and care takers from communicating with doctors or seeking appropriate medical attention for children with real or potentially life-threatening conditions." <sup>FN100</sup> However, there is nothing in the record to suggest that Ms. Cunningham did not reasonably believe the doctors' contentions that P.J.'s life was in danger and immediate action was necessary to ensure his welfare. Accordingly, the Court finds that the Jensens have not established a constitutional violation of either their right to familial association or their right to direct P.J.'s medical care with respect to Ms. Cunningham's actions in failing to investigate P.J.'s referral and in filing the Verified Petition.

FN100 *Thomason*, 85 F.3d at 1373

The Court also finds that the Jensens have not established a constitutional violation based on Ms. Cunningham's alleged misrepresentations and omissions to the Juvenile Court. As an initial matter, the Court notes that the Jensens have failed in their opposition memorandum to point out the specific factual misrepresentations and omissions on which they base their claim against Ms. Cunningham. As the Jensens bear the burden of establishing a constitutional violation of their substantive due process rights, this failure alone entitles Ms. Cunningham to qualified immunity. <sup>FN101</sup>

FN101 "Judges are not like pigs, hunting for truffles buried in briefs." *US v. Griebel*, 2008 WL 1741503, \*4 (10th Cir. Apr. 14, 2008) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1996)).

Nonetheless, having carefully reviewed their opposition memorandum, the Jensens appear to base their substantive due process claims on three instances in which they contend Ms. Cunningham made factual misrepresentations and omissions to the Juvenile Court: (1) the Verified Petition, and (2) an August 8, 2003 affidavit, and (3) an August 18, 2003 affidavit. The Jensens have not brought forth any evidence that Ms. Cunningham knew that the information contained in the Verified Petition was misleading or deficient. As outlined above, Ms. Cunningham had no constitutional duty to investigate the information provided her by PCMC doctors before filing it. Thus, Ms. Cunningham's statements in the Verified Petition do not establish a violation of the Jensens' substantive due process rights. Accordingly, the Jensens' substantive due process claims depend entirely on the misrepresentations and omissions allegedly made by Ms. Cunningham in her August 2003 affidavits.

\*23 Assuming the Jensens' version of the facts, the "misrepresentations and omissions" made by Ms. Cunningham in her August 2003 affidavits do not establish a constitutional violation. The Jensens claim that Ms. Cunningham made the following misrepresentations and omissions in both her August 8 and August 18 affidavits: (1) stating that a sample of P.J.'s tumor was sent to Dana-Farber for a second opinion without stating that the second opinion was never given, (2) stating that P.J. underwent a CT and Bone Scan without stating that these tests were normal, (3) stating that the Jensens wanted to use IPT to treat P.J. when they were actually no longer interested, (4) omitting to state that the "controlling" genetic tests were not yet complete, (5) omitting to state that she had not actually spoken with Dr. Coffin, (6) referring to Dr. Birkmayer as a man rather than as a doctor, and (7) stating that Dr. Tishler recommended in the July 28, 2003 hearing that P.J. should begin chemotherapy when Dr. Tishler had actually reserved his final opinion until all the testing was complete.

Upon close inspection of the circumstances in



Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

which Ms. Cunningham submitted her August 2003 affidavits, the alleged misrepresentations and omissions were of little, if any, consequence. Of the alleged misrepresentations and omissions listed above, only numbers 4 and 7 have any potential significance. However, the record clearly reveals that they cannot support the Jensens' claims.

In the hearing held on July 28, 2003, the Juvenile Court clearly ordered that P.J. begin chemotherapy by August 8, 2003. The Jensens did not begin P.J.'s chemotherapy by that date. Ms. Cunningham's August 2003 affidavits were submitted with the State's application to take P.J. into protective custody as a result of the Jensens' failure to begin P.J.'s chemotherapy.

The hearing transcript shows that Dr. Tishler did in fact recommend that P.J. begin chemotherapy at the July 28 hearing and that any burden to place further test results before the Juvenile Court was on the Jensens. At the July 28 hearing, Mr. Nakamura clearly advocated the Jensens' concern that some of the testing was not yet completed. Dr. Tishler indicated that there was no question that P.J. had a malignant tumor that would require chemotherapy and that the remaining pathological and radiological tests would merely serve to clarify what type of tumor he had. Upon hearing and accepting this, the Juvenile Court ordered that P.J.'s chemotherapy be commenced before August 8, 2003, without regard to the test results. The Juvenile Court also stated in the July 28 hearing that should the test results indicate that chemotherapy was not needed, the Jensens were free to bring that to the court's attention. Thus, numbers 4 and 7 were not misrepresentations or omissions at all, as demonstrated by the hearing transcript itself.

The other alleged misrepresentations and omissions were plainly immaterial. Numbers one, two, and three are listed in Ms. Cunningham's August 18 affidavit as information provided to her by Dr. Wagner around June 16, 2003. Although this information provided useful background information, it was clearly not material to the issues before the Juvenile

Court in mid-August 2003. Those issues centered on the Jensens' failure to comply with the Juvenile Court's order that P.J. begin chemotherapy by August 8, 2003. With respect to number 5, Ms. Cunningham did not state that she spoke with Dr. Coffin. Rather, she merely states that according to Dr. Coffin, the Jensens had Dr. Christensen do a second oral surgery on P.J.'s mouth resulting in an additional sample that was sent to the University of Washington—a fact that the parties do not dispute. Finally, and exemplary of the “misrepresentations and omissions” the Jensens allege Ms. Cunningham made, Ms. Cunningham's reference to Dr. Birkmayer as a man rather than a doctor was not material to the matters before the Juvenile Court at that time.

**\*24** The Court finds that the misrepresentations and omissions allegedly made by Ms. Cunningham were completely immaterial to the issues before the Juvenile Court and, therefore, did not interfere with the Jensens' substantive due process rights, even under the compelling interest/narrowly tailored standard.<sup>FN102</sup> As outlined above, Ms. Cunningham instituted process before a State court of competent jurisdiction to adjudicate the claim of medical neglect against the Jensens. In this proceeding, the Jensens' fundamental rights to direct the custody, care, and control of their son were carefully balanced by a neutral judge. There is simply insufficient evidence that Ms. Cunningham deliberately misrepresented or omitted material facts to the Juvenile Court.

FN102. Accordingly, the Court also finds that Ms. Cunningham's actions did not violate the Jensens' substantive due process rights under the undue burden and shocks the conscience tests.

*Mr. Anderson.* The Jensens allege that Mr. Anderson violated their rights to familial association and to direct P.J.'s medical care by (1) interfering with their ability to select their doctors; (2) refusing to withdraw the Verified Petition; (3) intentionally failing to disclose material facts to the Juvenile Court; and (4) failing to properly train and super-

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

wise DCFS case workers. The Court finds the Jensens have not established that Mr. Anderson violated their substantive due process rights.

First, the Jensens claim that Ms. Anderson violated their right to direct P.J.'s medical care by insisting that the State select the doctor who would treat P.J. According to the Jensens, a parent is entitled to choose the doctor who will provide medical treatment to their child as long as the alternatives are reasonable. They contend that Mr. Anderson "took the position that the State could force the parents to go to the court and let the court decide which physician was 'better,' " <sup>FN103</sup> thus preventing the Jensens from placing P.J. under the care of either Dr. Birkmayer or Dr. Simone.

FN103. Docket No. 340, at 9.

The Court finds, based on the circumstances of the case, that this does not amount to a constitutional violation of the Jensens' right to direct P.J.'s medical care. Mr. Anderson's involvement with P.J.'s case did not begin until late August 2003. By this time, the Juvenile Court had already held a number of hearings to determine the medical care that was in P.J.'s best interest. To that end, the Juvenile Court ordered P.J. to begin chemotherapy administered by a board-certified pediatric oncologist by August 8, 2003. The Jensens did not meet this deadline and the Juvenile Court granted protective custody of P.J. to the State. It was at this point that Mr. Anderson became involved in the case, attempting to negotiate a mutually agreeable solution. In his negotiations, Mr. Anderson took the position that P.J. must be treated with chemotherapy by a board-certified pediatric oncologist. This position was in accord with both the Juvenile Court's order and the opinion of Dr. Tishler who had evaluated P.J. Most important, as even the Jensens' acknowledge, Mr. Anderson's position was that if the Jensens wanted a different doctor, they could make their request to the Juvenile Court. The Juvenile Court was readily available to hear and determine whether the Jensens' desire to have a different doctor treat P.J. was in his best interest. In light of these undisputed

facts-particularly the fact that the negotiations were conducted during the course of the Juvenile Court proceedings, which provided ample process-Mr. Anderson's "position" that having a board-certified pediatric oncologist treat P.J. was in his best interest was narrowly tailored to serve the State's compelling interest in protecting P.J. Accordingly, such does not amount to a constitutional violation.

\*25 The Jensens also allege that Mr. Anderson violated their constitutional rights by refusing to withdraw the medical neglect allegations despite his admission that the Jensens were not neglectful parents. The Jensens base this assertion on their depositions, in which they testified that during negotiations with Mr. Anderson in late August 2003, Mr. Anderson said, "I understand you're a great parent. I can see that, but we can't let you go. We can't have it over. It's gone too far." <sup>FN104</sup> The Jensens ask the Court to infer from this that Mr. Anderson knew the Jensens were not guilty of medical neglect but chose to maintain the Verified Petition anyway for political reasons.

FN104. Docket No. 345, at ¶ 382.

These statements do not establish a violation of the Jensens' substantive due process rights. The negotiations between the Jensens and Mr. Anderson began in late August 2003, after the Juvenile Court had already granted protective custody of P.J. to the State and ordered that he undergo chemotherapy to treat the cancer that multiple medical professionals indicated he had. Mr. Anderson traveled to Idaho in an attempt to negotiate an amiable resolution with the Jensens. The above statements were allegedly made during the course of these negotiations. Upon this background of undisputed facts, the Court cannot reasonably infer from Mr. Anderson's alleged statements that the medical neglect allegations were baseless, that Mr. Anderson knew it, and that he admitted as much to the Jensens. Mr. Anderson's attempt to negotiate a workable solution to the out-of-hand situation in no way interfered with the Jensens' right to familial association or their right to direct P.J.'s medical care.

Not Reported in F Supp 2d, 2008 WL 4372933 (D Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

The Jensens also allege that Mr Anderson violated their substantive due process rights by intentionally failing to inform the Juvenile Court of the following (1) definitive testing had never been performed on P J's tissue, and (2) Dr Johnston had materially breached his agreement to refrain from rendering a diagnosis before completing the independent testing

These allegations provide neither a factual nor legal basis to find that Mr Anderson violated the Jensens' substantive due process rights With regard to first alleged omission, the Jensens have not directed the Court to evidence that Mr Anderson knew the Juvenile Court was unaware of the possibility for genetic testing or that genetic tests were "definitive" Rather, they cite to the deposition testimony of P J's guardian ad litem in which she indicates that *she* was unaware of the possibility for genetic testing until September 4, 2003 This does not show that Mr Anderson intentionally withheld information about genetic testing from the Juvenile Court Moreover, the Jensens repeatedly stated their desire for further testing during the Juvenile Court proceedings

With respect to the second alleged omission, the Jensens contend that Mr Anderson was aware that Dr Johnston had determined to recommend chemotherapy before receiving the results of the genetic tests in violation of the September 5, 2003 stipulation and that Mr Anderson failed to inform the Juvenile Court of this fact Mr Anderson testified that he understood Dr Johnston would perform an independent evaluation of P J's medical condition, including independent testing, before rendering a final treatment recommendation Mr Anderson also testified that he was aware the genetic tests were not finished when Dr Johnston determined to recommend chemotherapy However, there is no evidence that Mr Anderson understood that rendering a diagnosis before completion of the genetic testing breached the September 5 stipulation The deposition testimony cited by the Jensens only refers to "independent testing" <sup>FN105</sup> There is no

indication in either Mr Anderson's testimony, or in the written stipulation, that Dr Johnston could not have sufficiently confirmed the diagnosis through independent testing, like the pathological testing conducted by Dr Coffin, even though the genetic testing was not complete Moreover, there is no evidence showing that Mr Anderson intentionally withheld the fact that the genetic testing was incomplete from the Juvenile Court The Court cannot find that Mr Anderson was deliberately withholding information from the Juvenile Court based merely on the fact that he knew the genetic tests-which Dr Johnston testified were immaterial to his treatment recommendation-were not yet complete Most important, the Jensens have failed to show how Mr Anderson's alleged failure to disclose this information interfered with their right to direct P J's medical care The Jensens refused to follow Dr Johnston's treatment recommendations, which lead to DCFS's decision to dismiss the case shortly thereafter The only action taken by the Juvenile Court subsequent to Dr Johnston's recommendation was to dismiss the case

FN105 Docket No 345, Ex 2, at 249

\*26 Finally, the Jensens argue that Mr Anderson should be liable for failure to adequately train and supervise DCFS case workers Presumably, although it is far than clear, the Jensens claim that Mr Anderson is liable for the injuries resulting from Ms Cunningham's actions in failing to properly investigate P J's referral because he failed to train her The Jensens cite to the case of *City of Canton v Harris*<sup>FN106</sup> for the proposition that a supervisor who acts with deliberate indifference in failing to train and supervise subordinates is subject to liability under section 1983

FN106 489 U S 378 (1989)

The Jensens' failure to train and supervise claim fails for two reasons First, the Jensens have not brought any evidence to the Court's attention that could show Mr Anderson acted with "deliberate indifference" <sup>FN107</sup> to the rights of others in failing

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

to train Ms. Cunningham. Second, the Jensens have not established that Ms. Cunningham's conduct violated their constitutional rights, a prerequisite to Mr. Anderson's liability for failure to train her. <sup>FN108</sup>

FN107. *Id.* at 388.

FN108. *Id.* at 391.

In sum, the Court finds that none of Mr. Anderson's actions during his involvement with P.J.'s case interfered with the Jensens' substantive due process rights.

## 2. Procedural Due Process

The Jensens claim that each of the Defendants violated their procedural due process rights. Ms. Cunningham, Ms. Eisenman, and Mr. Anderson present argument on these claims. Dr. Wagner incorporates these arguments by reference. However, as Ms. Eisenman and Dr. Albritton enjoy absolute immunity, the Jensens' procedural due process claims against them are not discussed.

*Ms. Cunningham.* The Jensens claim that Ms. Cunningham violated their procedural due process rights by failing to properly investigate P.J.'s referral and by intentionally misrepresenting facts to the Juvenile Court.

At its most basic level, due process ensures that a person may not be deprived of an interest in life, liberty, or property without "the opportunity to be heard at a meaningful time and in a meaningful manner." <sup>FN109</sup> As noted by the Court in its June 2006 Decision, the Due Process Clause also requires that "the notice and hearing ... be fair." <sup>FN110</sup> Accordingly, in considering the Defendants' motions to dismiss in June 2006, the Court found that the Jensens' allegation that "[Ms. Cunningham] intentionally misrepresented or omitted facts in the Jensens' case, including the status of allegedly confirmatory tests, to the Utah juvenile court" was sufficient to state a claim for violation of their rights to

procedural due process. <sup>FN111</sup>

FN109. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

FN110. Docket No. 52, at 23 ("[T]he Due Process Clause also encompasses ... a guarantee of *fair* procedure.") (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)) (internal quotation marks omitted).

FN111. *Id.*

However, as set forth above, the Jensens have failed to submit evidence that Ms. Cunningham deliberately made material misrepresentations and omissions to the Juvenile Court. Rather, the Jensens merely nitpick Ms. Cunningham's August 2003 affidavits. These alleged misstatements are not the type of intentional falsities that would render an otherwise procedurally sound judicial proceeding "unfair." <sup>FN112</sup> Rather, these misrepresentations, which dealt with facts known to the Jensens, were more properly addressed by the Jensens' counsel at the August 8, 2003 hearing before the Juvenile Court. For example, the Jensens' counsel could, if desired, easily have pointed out to the Juvenile Court that Dr. Birkmayer was more than just a "man." Thus, the Jensens have not established a violation of their procedural due process rights with regard to the alleged factual misrepresentations and omissions.

FN112. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (finding due process violation where witness gave perjured testimony that he had received no promise in return for his testimony when in reality he had).

\*27 Additionally, the Court finds that the Jensens' had no liberty interest in the investigation of child abuse claims required of DCFS case workers under Utah law and, therefore, cannot establish a viola-

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

tion of their procedural due process rights by virtue of Ms. Cunningham's failure to carry out that investigation. "Protected liberty interests may arise from two sources-the Due Process Clause itself and the laws of the States." <sup>FN113</sup> A State may create a liberty interest "by establishing substantive predicates to govern official decision-making ... and by mandating the outcome to be reached upon a finding that the relevant criteria have been met." <sup>FN114</sup> Both of these elements are necessary for the creation of a liberty interest. Thus, where state law requires the fulfilment of specified substantive predicates but does not mandate a certain outcome, there is no liberty interest.<sup>FN115</sup>

FN113. *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 461 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)) (internal quotation marks omitted).

FN114. *Id.* at 462 (quoting *Hewitt*, 459 U.S. at 472) (internal quotation marks omitted).

FN115. *Id.* at 464-465.

"State-created procedures ... do not create such an entitlement where none would otherwise exist." <sup>FN116</sup> As stated by the Supreme Court: "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." <sup>FN117</sup> For example, in *Pierce v. Delta County Department of Social Services*, the plaintiffs argued that Colorado's Child Protection Act created a liberty interest by mandating that acts of child abuse be reported and properly investigated.<sup>FN118</sup> The court rejected this contention, finding that the Colorado statutes at issue merely mandated procedure without dictating "a particular substantive outcome or guarantee." <sup>FN119</sup>

FN116. *Pierce v. Delta County Dept. of Soc. Servs.*, 119 F.Supp.2d 1139, 1152-53 (D.Colo.2000).

FN117. *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

FN118. *Pierce*, 119 F.Supp.2d at 1153.

FN119. *Id.*

The Jensens contend that Utah law, by statute, imposes mandatory duties to perform specific investigative actions before doing anything that might affect parental rights. Even assuming that this is the case, the Jensens merely assert a liberty interest in process, not in substantive outcomes. The Jensens do not point to any section of the Utah Code that sets forth a specific substantive predicate that, when fulfilled, dictates a specific *substantive* outcome. This does not create the sort of entitlement protected by the Due Process Clause.

Thus, the Jensens have failed to establish that Ms. Cunningham violated their procedural due process rights.

*Mr. Anderson.* The Jensens claim that Mr. Anderson implemented a policy whereby case workers would not investigate allegations of medical neglect when made by doctors from PCMC and that this policy violated their due process rights. <sup>FN120</sup> The Jensens also claim that this policy violated their right to equal protection. However, because they did not plead an equal protection claim, and apparently asserted it for the first time in the summary judgment briefing, the Court will not consider this argument.

FN120. At some point, the Jensens also claimed that Mr. Anderson made factual misrepresentations and omissions to the state courts. However, the Jensens have not pursued this theory in their summary judgment briefing and have submitted no evidence to support it.

The Jensens have failed to submit any evidence that DCFS actually had a policy of not investigating medical neglect allegations if they were made by PCMC doctors. Rather, the Jensens ask the Court to

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

infer that such a policy was instituted by Mr. Anderson based on the following: (1) Ms. Cunningham did not investigate P.J.'s referral; (2) Ms. Cunningham testified that she believed her actions were consistent with DCFS policy; and (3) Ms. Cunningham testified that Mr. Anderson told her she handled P.J.'s case appropriately. This evidence is simply not enough to show that DCFS had a policy of never investigating medical neglect allegations made by PCMC doctors. Ms. Cunningham's alleged failure to investigate P.J.'s referral took place in a situation that was represented to her by Dr. Wagner as a medical emergency requiring prompt action. To the extent that her alleged failure to investigate did represent DCFS policy, it merely shows that DCFS policy allowed case workers to file a custody petition with a juvenile court of competent jurisdiction without further investigation when presented with objectively reasonable allegations of emergency medical neglect made by a doctor charged with the child's medical care. As explained in detail above, such a policy would not violate a parent's rights under the Due Process Clause. Moreover, even if DCFS did have a policy of never investigating referrals submitted by PCMC doctors, such a policy did not harm the Jensens in P.J.'s emergency case. Thus, the Court finds the Jensens have failed to establish that Mr. Anderson violated their procedural due process rights.

**\*28 Dr. Wagner.** As the Jensens received ample notice and an opportunity to be heard, any procedural due process claims against Dr. Wagner must be based on his alleged misrepresentations and omissions. However, as set forth above, the Jensens have not submitted competent evidence that Dr. Wagner deliberately misrepresented or omitted material facts to the Juvenile Court or others involved in the case. Moreover, any misrepresentations and omissions allegedly made by Dr. Wagner did not make the Juvenile Court proceedings unfair. The record demonstrates that the Jensens received ample opportunity to present their desire for further testing in the Juvenile Court. In fact, these desires were heard and decided upon by that court. The

Jensens have not established that Dr. Wagner violated their procedural due process rights.

### 3. Malicious Prosecution

In their third cause of action, the Jensens <sup>FN121</sup> allege that each of the Defendants <sup>FN122</sup> violated their Fourth Amendment right to be free from unreasonable seizures by instituting and continuing a "malicious prosecution." Each of the Defendants has moved for summary judgment on this claim. Notably, the Jensens have failed to respond to Mr. Anderson's motion on this point. Accordingly, the Court will grant his motion with respect to the Fourth Amendment claim.

FN121. As the Court dismissed P.J.'s Fourth Amendment claim in its June 2006 Order, Mr. and Ms. Jensen proceed without him on this claim.

FN122. The Jensens' malicious prosecution claims against Ms. Eisenman and Dr. Albritton are not discussed in light of their absolute immunity.

Under Tenth Circuit law, analysis of a § 1983 claim for malicious prosecution in violation of the Fourth Amendment is guided by the elements of the common law tort of malicious prosecution.<sup>FN123</sup> However, "the ultimate question in such a case is whether plaintiff has proven the deprivation of a constitutional right."<sup>FN124</sup> As recently stated by the Tenth Circuit in *Wilkins v. DeReyes*,

FN123. *Becker v. Kroll*, 494 F.3d 904, 913-14 (10th Cir.2007).

FN124. *Wilkins v. DeReyes*, 528 F.3d 790, 797 (10th Cir.2008) (quoting *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257-58 (10th Cir.2007)) (internal quotation marks omitted).

Under our cases, a § 1983 malicious prosecution claim includes the following elements: (1) the de-

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

fendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.<sup>FN125</sup>

FN125. *Id.* at 799.

The Jensens seek damages for malicious prosecution arising from both the Juvenile Court proceedings and the criminal case.

a. Juvenile Court Proceedings.

To establish a § 1983 claim for malicious prosecution under the Fourth Amendment, the plaintiff must show that a seizure actually occurred.<sup>FN126</sup> In *Becker v. Kroll*, the Tenth Circuit considered a § 1983 plaintiff's claim that she was seized within the meaning of the Fourth Amendment even though she "was never arrested, incarcerated, or otherwise placed under the direct physical control of the state."<sup>FN127</sup> The plaintiff—who was charged with a felony offense in a state court—argued that investigation into her alleged criminal activity "imposed burdens on her time, finances, and reputation by requiring her to travel to and attend meetings, pay legal costs, and eventually, face criminal charges" and, therefore, constituted a seizure for Fourth Amendment purposes.<sup>FN128</sup> The court declined "to expand Fourth Amendment liability in cases where the plaintiff has not been arrested or incarcerated."<sup>FN129</sup> Specifically, the court noted that were it to impose Fourth Amendment liability in cases that lacked a traditional seizure, "every charging decision would support a § 1983 malicious prosecution-type claim no matter the context."<sup>FN130</sup>

FN126. *Becker*, 494 F.3d at 914.

FN127. *Id.* at 915.

FN128. *Id.* at 914.

FN129. *Id.* at 915.

FN130. *Id.*

\*29 It is undisputed that neither Mr. Jensen nor Ms. Jensen was arrested, incarcerated, or otherwise placed under the direct physical control of the State as a result of the proceedings in the Juvenile Court. Recognizing this, the Jensens argue that the Court should expand the Fourth Amendment concept of "seizure" to accord with that proposed in Justice Ginsberg's concurrence in *Albright v. Oliver*.<sup>FN131</sup> The Jensens contend that they suffered "significant, ongoing deprivation[s] of liberty as a result of the Juvenile Court proceedings," which constitute a seizure under the Fourth Amendment, as follows:

FN131. 510 U.S. 266 (1994).

The Jensens were unable to return to the state of Utah (their home) without the threat of arrest and removal of their child. They were unable to take their child for an evaluation in Houston, and to other physicians of their choosing, because the State forbid it. They were subjected to mandatory court appearances. They were ordered to give up their passports. [Mr. Jensen] lost his job, and was exposed to serious diminishment of other employment prospects, both because he was terminated from his previous job, and because he had to devote his time, finances, energy and efforts to attempting to protect his and his family's rights. The Jensens were subjected to close media scrutiny and held up to public ridicule and contempt. Finally, the Jensens endured the horrible financial and emotional strain of defending their family from neglect proceedings that were based entirely upon misrepresentations and deceit.<sup>FN132</sup>

FN132. Docket No. 342, at 15-16.

Although acknowledging the burdens experienced by the Jensens in defending themselves, the Court simply cannot find that they experienced a Fourth Amendment seizure as a result of the Juvenile

Not Reported in F Supp 2d, 2008 WL 4372933 (D Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Court proceedings Tenth Circuit precedent clearly mandates the contrary Accordingly, the Court finds that the Jensens have failed to establish a Fourth Amendment violation related to the Juvenile Court proceedings

#### b Criminal Case

With regard to the criminal case, the Defendants focus their challenges on the first and third prongs above causation and probable cause Because it is clear that neither Dr Wagner nor Ms Cunningham caused the prosecution of the criminal action against the Jensens, analysis of probable cause is unnecessary

In order to establish a constitutional violation, the Jensens must show that Dr Wagner and Ms Cunningham “caused the plaintiff’s continued confinement or prosecution” <sup>FN131</sup> In *Pierce*, the Tenth Circuit held that this element reaches more than just those who actually initiate a criminal action <sup>FN134</sup> Surveying both the common law and cases interpreting the reach of the Fourth Amendment, the court concluded that a forensic analyst who fabricated inculpatory evidence and withheld exculpatory evidence, thereby leading prosecutors to indict and prosecute” the plaintiff, sufficiently caused the plaintiff’s continued prosecution for purposes of the plaintiff’s § 1983 claim, even though she did not formally initiate the charges <sup>FN135</sup> In each of the examples used by the *Pierce* court to reach this conclusion, the state actor’s conduct was closely connected to either the initiation or continuation of the prosecution <sup>FN136</sup> Notably, the principles described by the *Pierce* court closely resemble the definition of a complaining witness provided in *Anthony v Baker* <sup>FN137</sup> for purposes of determining the applicability of prosecutorial immunity “The term ‘complaining witness’ describes the person (or persons) who actively instigated or encouraged the prosecution of the plaintiff” <sup>FN138</sup>

FN133 *Wilkins*, 528 F 3d at 799

FN134 *Pierce*, 359 F 3d at 1291-92

FN135 *Id* at 1291-94

FN136 *Id* at 1292 (“[A] private person who takes an active part in *continuing or procuring the continuation of criminal proceedings initiated by himself or by another* is subject to the same liability for malicious prosecution as if he had initiated the proceedings”) (citing Restatement (Second) Torts § 655), *id* (citing *Robinson v Maruffi*, 895 F 2d 649, 655-56 (10th Cir 1990) (finding “sufficient evidence for the jury to find that the [defendant police officers] purposefully concealed and misrepresented material facts to the district attorney which may have influenced his decision to prosecute [the plaintiff]”)), *id* (“If police officers have been instrumental in the plaintiff’s continued confinement or prosecutions, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors, or magistrates to confine or prosecute him”) (quoting *Jones v City of Chicago*, 856 F 2d 985 (7th Cir 1988))

FN137 955 F 2d 1395 (10th Cir 1992)

FN138 *Id* at 1399 n 2

\*30 The Court finds that Dr Wagner did not cause the initiation or continued prosecution of the criminal case The Jensens’ claims with regard to Dr Wagner relate entirely to information provided to DCFS, its representatives, Ms Eisenman, and the Juvenile Court In fact, Dr Wagner moved to Ohio in late June 2003 during the pendency of the Juvenile Court proceedings and before any change in P J’s legal custody Dr Wagner’s final involvement with the Juvenile Court proceedings was his execution of an affidavit dated July 22, 2003, outlining basically the same information provided previously to DCFS in his case summary Dr Wagner executed the affidavit at Ms Eisenman’s request The affidavit was to be used in connection with the Ju-



Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

venile Court proceedings. There is no evidence that Dr. Wagner ever had contact with anyone from the District Attorney's Office. Initiation and continuation of the criminal case were dependant on multiple intervening events, including, most notably, the Jensens failure to comply with the Juvenile Court's orders. Thus, Dr. Wagner did not cause the initiation or continuation of the criminal case based solely on his referral of P.J.'s case to DCFS and his limited participation in the Juvenile Court proceedings.

The Court likewise finds that Ms. Cunningham did not cause the initiation or continued prosecution of the criminal case. The Jensens argue that Ms. Cunningham's participation in the criminal case is shown by the fact that her name appears on the probable cause statement on which the criminal charges were based and that Ms. Eisenman testified that Ms. Cunningham provided information to Officer Peterson, who authored that statement. Even if this were true, <sup>FN139</sup> it does not provide an evidentiary basis on which the Court could conclude that Ms. Cunningham caused the prosecution of the criminal case. The Jensens do not indicate what information Ms. Cunningham may have provided nor its relevance to the criminal charges-nor do they indicate the circumstances in which Ms. Cunningham provided the information. Accordingly, the Court finds the Jensens have failed to establish that Ms. Cunningham caused the initiation or continuation of the criminal prosecution.

FN139. In reality, the Court cannot assume Ms. Eisenman so testified because the deposition pages cited by the Jensens were left out of their exhibits, despite receiving an opportunity to supplement the record. See Docket No. 375 (ordering the Jensens to provide any materials inadvertently omitted from their exhibits).

The Jensens argue that the Court should apply principles of concurrent causation to hold all of the Defendants liable for the malicious prosecution. In the § 1983 context, “[w]here multiple forces are act-

ively operating ... plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a substantial factor in bringing [the injury] about.” <sup>FN140</sup> Where concurrent causation is established, the burden of proof shifts to each defendant to prove that his conduct was not the cause of the harm.<sup>FN141</sup> Should a defendant fail to do so, he is liable for the whole injury under principles of joint and several liability.<sup>FN142</sup>

FN140. *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir.2006) (quoting *Northington v. Marin*, 102 F.3d 1564, 1568-69 (10th Cir.1996)) (internal quotation marks omitted).

FN141. *Northington*, 102 F.3d at 1568.

FN142. *Id.* at 1569.

The Jensens have not shown that principles of concurrent causation should apply to their Fourth Amendment claim. The Jensens have not submitted any evidence that Dr. Wagner or Ms. Cunningham provided information to the District Attorney's Office or that their involvement in the Juvenile Court case led to the initiation or continuation of the criminal charges. In fact, this is not even consistent with the Jensens' version of the facts: “Eisenman was driving the criminal charges effort, not McDonald or Cunningham.” <sup>FN143</sup> Accordingly, there is no evidentiary basis on which to apply principles of concurrent causation and joint and several liability to the Jensens' claim for malicious prosecution of the criminal case. Therefore, the Court finds that the Jensens have not established that Dr. Wagner and Ms. Cunningham violated their Fourth Amendment rights.

FN143. Docket No. 342, at 20.

#### D. State Law Claims

<sup>\*31</sup> The Court does not have original jurisdiction over any of the Jensens' state law claims. As this

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)  
(Cite as: 2008 WL 4372933 (D.Utah))

Order disposes of all of the Jensens' federal claims, and as their Utah constitutional claims present important questions of state law, the Court declines to further exercise supplemental jurisdiction over the state law claims and will remand them to the Third Judicial District Court for Salt Lake County, State of Utah, from which this case was removed.<sup>FN144</sup>

FN144. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988); 28 U.S.C. §§ 1367(c)(1), (2); 1447(c).

D.Utah,2008.

P.J., ex rel. Jensen v. Utah

Not Reported in F.Supp.2d, 2008 WL 4372933 (D.Utah)

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#### IV. CONCLUSION

For all of the reasons set forth above, it is hereby

ORDERED that Defendant Richard Anderson's Motion for Summary Judgment [Docket No. 324], Defendant Kari Cunningham's Motion for Summary Judgment [Docket No. 326], Defendant Susan Eisenman's Motion for Summary Judgment [Docket No. 329], and Defendants Wagner and Albritton's Motion for Summary Judgment [Docket No. 332] are GRANTED IN PART with respect to Claims 1, 2, and 3 of the Complaint. It is further

ORDERED that Defendant Susan Eisenman's Motion to Strike Plaintiffs' Consolidated Statement of Fact [Docket No. 349], Defendant Wagner's and Albritton's Motion to Strike References to P.J.'s Current Condition [Docket No. 353], Defendants Wagner's and Albritton's Motion to Strike Plaintiffs' Hearsay [Docket No. 356], and Defendant Wagner's and Albritton's Motion to Strike Plaintiffs' Attempts to Rebut Medical Evidence Without Expert Testimony [Docket No. 358] are DENIED AS MOOT. It is further

ORDERED that the Jensens' state law claims (Claims 5, 6, 7, 9, and 10) are REMANDED to the Third Judicial District Court for Salt Lake County, State of Utah. It is further

ORDERED that the Clerk of the Court is directed to close this case forthwith.

## Addendum D

# **ADDENDUM D**

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

PARKER JENSEN, a minor, by and through  
his parents and natural guardians, BARBARA  
and DAREN JENSEN; BARBARA JENSEN,  
individually; and DAREN JENSEN,  
individually,

Plaintiffs,

vs.

KARI CUNNINGHAM, in her individual  
capacity; RICHARD ANDERSON, in his  
individual and official capacities; LARS M.  
WAGNER, in his individual capacity; KAREN  
H. ALBRITTON, in her individual capacity;  
SUSAN EISENMAN, in her individual  
capacity; and JANE and JOHN DOE, in their  
individual capacities,

Defendants.

**PLAINTIFFS' CONSOLIDATED  
MEMORANDUM IN OPPOSITION TO  
DEFENDANTS (1) CUNNINGHAM, (2)  
ANDERSON, (3) WAGNER &  
ALBRITTON, AND (4) EISENMAN'S  
MOTIONS FOR SUMMARY  
JUDGMENT**

Civil No. 050912502

Judge Joseph C. Fratto, Jr.

## TABLE OF CONTENTS

INTRODUCTION .....	iv
FACTS .....	v
ARGUMENT .....	1
I.    THE MOTIONS OF DEFENDANTS (1) WAGNER & ALBRITTON AND (2) ANDERSON SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO COMPLY WITH UTAH R. CIV. P. 7(C)(3)(A), WHICH REQUIRES THE MOVING PARTY TO SET FORTH A SEPARATELY STATED AND NUMBERED STATEMENT OF UNDISPUTED MATERIAL FACTS SUPPORTED BY CITATION.....	1
II.   RES JUDICATA DOES NOT APPLY TO PLAINTIFFS’ STATE LAW CLAIMS.....	2
A. The Utah Constitution Provides Broader Protection than Its Federal Counterpart... 2	
i. Utah Constitutional Analysis in general. ....	3
ii. “Legislative” history and intent of the Framers. ....	5
iii. Article I, § 1 (inherent and inalienable right to liberty).....	10
iv. Article I, § 7 (due process) .....	12
B. Article I, Section 14 (search and seizure) .....	19
A. There was no earlier action. ....	24
B. There was no “final judgment on the merits” on Plaintiffs’ state law claims.....	25
C. Plaintiffs’ state law causes of action presently pending before this Court are separate and distinct from the federal law causes of action ruled upon by the federal court. ....	27
D. The policy justifications behind the doctrine of claim preclusion are not present in this case. ....	26
IV.   ISSUE PRECLUSION IS INAPPLICABLE TO PLAINTIFFS’ CLAIMS AGAINST DEFENDANTS. ....	30
A. The issues presented for review in this action are not identical to the issues decided by the federal court. ....	31
B. The “prior action” was not “finally adjudicated on the merits.”.....	32
C. Policy considerations militate against applying the doctrine of collateral estoppel. ....	32
IV.   THE <i>SPACKMAN</i> REQUIREMENTS FOR PLAINTIFFS’ STATE CONSTITUTIONAL CLAIMS ARE SATISFIED, AND THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANTS FLAGRANTLY VIOLATED PLAINTIFFS’ RIGHTS GUARANTEED UNDER THE UTAH CONSTITUTION, OR ALTERNATIVELY, THERE IS A DISPUTE OF FACT IN THAT REGARD.....	38
A. Flagrancy of Constitutional Violations of Article I, Section 1 & 7 .....	38
i. Wagner & Albritton .....	38

ii.	Eisenman.....	43
1.	Eisenman misrepresentations and material omissions related to the juvenile court proceedings violated Article I, Sections 1 and 7. ....	43
2.	Eisenman misrepresentations and material omissions related to the criminal court proceedings violated Plaintiffs’ rights under Article I, Sections 1 and 7. ....	50
iii.	Cunningham.....	51
1.	Failure to Complete Mandatory Investigation.....	51
2.	Cunningham violated Plaintiffs’ rights under Article I, Sections 1 and 7 by making material misrepresentations to the juvenile court. ....	56
3.	Cunningham did not reasonably rely on DCFS medical neglect policy. ....	57
iv.	Anderson.....	58
1.	Cunningham’s liability has no bearing on Anderson’s liability.....	58
2.	Anderson violated Plaintiffs’ substantive rights under Article I, Sections 1 and 7 by imposing the blatantly unconstitutional requirement that the state’s preferred doctor would trump Plaintiffs’ choice of doctor. ....	59
3.	Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by admitting that the Jensens were not neglectful parents, yet refusing to order withdrawal of the medical neglect petition. ....	63
4.	Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by making material misrepresentations and omissions to the juvenile court. ....	63
5.	Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by failing to train DCFS caseworkers like Kari Cunningham. ....	65
6.	Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by instituting, affirming, or allowing a DCFS policy of not investigating medical neglect allegations from doctors at PCMC.....	65
B.	Article I, Section 14 .....	66
C.	Existing Remedies.....	69
D.	Equitable Relief.....	72
VI.	EISENMAN IS NOT ENTITLED TO JUDICIAL IMMUNITY FOR HER ACTIONS, OR ALTERNATIVELY, THERE IS A DISPUTE OF FACT IN THAT REGARD.....	73
VII.	THE UNDISPUTED FACTS REGARDING DEFENDANTS’ CONDUCT SATISFY THE ELEMENTS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, OR ALTERNATIVELY, THERE IS A GENUINE DISPUTE OF FACT THAT THAT REGARD. ....	75

VIII. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ MALICIOUS PROSECUTION CLAIM, OR AT THE LEAST, THERE IS A DISPUTE OF FACT IN THAT REGARD. ....	76
A. Utah does not recognize absolute immunity as a defense to malicious prosecution claims for social workers like Cunningham who make wrongful misrepresentations and omissions. ....	76
B. Criminal Proceedings.....	76
i. The criminal proceedings were not supported by probable cause. ....	76
ii. Eisenman and Cunningham were complaining witnesses in the criminal court proceedings.....	78
iii. Barbara was arrested and otherwise seized in the criminal proceedings.....	78
iv. Plaintiffs are not judicially estopped from disputing certain facts related to the criminal proceedings.....	79
v. Plaintiffs are relieved from showing that the criminal proceedings terminated in their favor because their pleas in abeyance were coerced. ....	80
C. Juvenile court proceedings.....	89
1. The juvenile court proceedings terminated in the Plaintiffs’ favor, or alternatively, “unusual circumstances” justify dispensing with such requirement. ....	89
ii. The juvenile court proceedings were not supported by probable cause. ....	92
IX. CUNNINGHAM IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT SHE ALLEGEDLY RELIED UPON ADVICE OF COUNSEL. ....	93
XI. WAGNER AND ALBRITTON ARE NOT ENTITLED TO GOVERNMENTAL IMMUNITY BECAUSE THE UNDISPUTED FACTS DEMONSTRATE THEY ACTED WITH FRAUD OR MALICE, OR ALTERNATIVELY, THERE IS A GENUINE DISPUTE OF MATERIAL FACT.....	94
XI. PLAINTIFFS HAVE SET FORTH SUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIM FOR PUNITIVE DAMAGES. ....	95
CONCLUSION.....	95



Plaintiffs Parker, Barbara, and Daren Jensen hereby submit the following Memorandum in Opposition to (1) Defendants Wagner and Albritton's Motion for Summary Judgment; (2) Defendant Susan Eisenman's Motion for Summary Judgment; (3) Defendant Kari Cunningham's Motions for Summary Judgment; and (4) Defendant Richard Anderson's Motion for Summary Judgment.<sup>1</sup>

### INTRODUCTION

In their motions, Defendants argue that the Court has no discretion in ruling on their motions, that this Court 's decision on plaintiffs' *state* law claims has already been made by the federal court judge when he ruled on plaintiffs' *federal* law claims. Had Judge Stewart actually addressed any of plaintiffs' state law claims, defendants might have a point. But he expressly declined to do so, stating that Plaintiffs' "Utah constitutional claims present important questions of state law," and remanding those questions to state court for determination. Stewart Ord. at 62.

When viewing the disputed facts and all reasonable inferences therefrom in favor of Plaintiffs as the Court must do, *Quaid v. U.S. Healthcare, Inc.*, 2007 UT 27, ¶ 8, 158 P.3d 525, it is apparent that the conduct of all of the named Defendants herein violated of Article I, Sections 1, 7, and 14, of the Utah Constitution, and that Defendants caused intentional infliction of emotional distress and wrongful initiation of civil and criminal process against the Jensens. At the very least, a genuine issue of material fact exists, and summary judgment should be denied.

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<sup>1</sup> A consolidated memorandum reflects the fact that most of the defendants' arguments apply to all defendants, and defendants have incorporated by reference each other's arguments. It also cut out several pages of duplication.

## FACTS

Only defendants Cunningham and Eisenman have submitted a numbered statement of facts as required by U.R.Civ.P. 7(c)(3)(A).<sup>2</sup> Pursuant to U.R.Civ.P. 7(c)(3)(B), plaintiffs have submitted a verbatim restatement of those facts that are controverted. See Exhibits A and B hereto. Also pursuant to U.R.Civ.P. 7(c)(3)(B), plaintiffs have filed a separate Statement of Additional Facts in dispute. (Due to the length of the additional statement of facts, which encompasses all five defendants, the statement has been filed as a separate document and is incorporated herein pursuant to U.R.Civ.P. 10(c).)

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<sup>2</sup> Wagner & Albritton and Anderson attach their federal court memoranda (which did set forth separate fact paragraphs) as exhibits to their motions for summary judgment before this Court. Although this is not compliant with Rule 7, for clarity of the record, Plaintiffs attach as Exhibits C and D their disputations of Defendants Wagner & Albritton's and Defendant Anderson's federal court motions for summary judgment statements of fact.

## ARGUMENT

### **I. THE MOTIONS OF DEFENDANTS (1) WAGNER & ALBRITTON AND (2) ANDERSON SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO COMPLY WITH UTAH R. CIV. P. 7(C)(3)(A), WHICH REQUIRES THE MOVING PARTY TO SET FORTH A SEPARATELY STATED AND NUMBERED STATEMENT OF UNDISPUTED MATERIAL FACTS SUPPORTED BY CITATION.**

Under U.R.Civ.P. 7(c)(3)(A), a party moving for summary judgment “shall” set forth an independently numbered statement of individual material facts for which that party claims there is no dispute. Each factual statement is required to be “supported by citation to relevant materials, such as affidavits or discovery materials.” *Id.* There are reasons for this requirement. It is essential to the identification of material fact disputes, and without it, the Court and other parties are forced to sift through unsupported narrative. Utah appellate courts have repeatedly recognized that it is well within a trial court’s discretion to enforce the plain language of Rule 7(c)(3). *Bluffdale City v. Smith*, 156 P.3d 175, 2007 UT App 25, ¶¶ 8-12 (Utah App. 2007). Accordingly, the Court should deny Wagner & Albritton and Anderson’s motions under Rule 7.<sup>3</sup>

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<sup>3</sup> By failing to provide a record upon which this Court may rely in resolving the pending motions, defendants Wagner, Albritton, and Anderson have chosen an all-or-nothing position with respect to their motions: The Court must either defer entirely to the federal court, without engaging in an independent evaluation and assessment of the record under U.R.C.P. 56(c), or deny the defendants’ motions. There is no middle ground. Therefore, because *res judicata* does not apply to the “important questions of state law” that Judge Stewart expressly declined to address (see *infra*), Wagner & Albritton and Anderson’s motions must be denied.

## **II. RES JUDICATA DOES NOT APPLY TO PLAINTIFFS' STATE LAW CLAIMS.**

### **A. The Utah Constitution Provides Broader Protection than Its Federal Counterpart.**

The primary argument in defendants' motions is that plaintiffs' state law claims are all barred by Judge Stewart's rulings on the federal law claims. While it suffers from other defects (see pp. 23-37, *infra*), a fundamental problem with defendants' argument is that it incorrectly assumes that the Utah Constitution offers no greater protection than the federal constitution when applied to rights of familial association, the direction of a child's medical care, and to be free from unreasonable searches and seizures.

Citing *Oman v. Davis School District*, 194 P.3d 956, 2008 UT 70, defendants argue that plaintiffs must demonstrate that their rights guaranteed under the Utah constitution are greater than and separate from those protected by their federal counterparts. While *Oman* does not actually stand for such a proposition (claims under the Utah Constitution were not even at issue in that case), defendants' arguments fail because the rights and guarantees under Utah's Constitution are separate and distinct from, and greater than, the protections offered to Plaintiffs under the federal constitution.

#### **i. *Utah Constitutional Analysis in general.***

In earlier days, evaluation of state constitutional claims typically began with an analysis of federal law, followed by a determination of whether any particular reason existed to stray from whatever federal courts had opined at the time. This variation on the "lockstep" theory (in which state constitutions are presumed to have the same meaning and scope as their federal

counterpart) was initially endorsed by the Utah Supreme Court. *See, e.g., State v. Earl*, 716 P.2d 803, 805-06 (Utah 1986) (recommending analytical process from *State v. Jewett*, 500 A.2d 233, 236-38 (Vt. 1985)); Christine M. Durham, “Employing the Utah Constitution in the Utah Courts,” UTAH BAR JOURNAL 25, 26 (Nov. 1989), *citing* concurrence of Justice Handler in *State v. Hunt*, 450 A.2d 952, 959-969 (N.J. 1982)); . Both *Jewett* and *Hunt* began with the federal constitution, then applied various criteria to decide whether a different result was called for under the state constitution. *See also State v. Gunwall*, 720 P.3d 808, 811-13 (Wash. 1986).<sup>4</sup>

Over time, state courts began to recognize the inappropriateness of abdicating the responsibility to construe their own state’s constitution to a court charged with construing a national constitution. *See* Christine M. Durham, “What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses,” 38 VA. U. L. REV. 353, 366, 369 (2004) (“When state courts rely on their own constitutions to provide substantive protections for individual rights, they are reinforcing the sovereignty of the individual state in its power to guarantee to its citizens freedoms greater than those protected under federal law alone”); *Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992) (“Our Texas Forbears surely never contemplated that the fundamental state charter, crafted after years of rugged experience on the

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<sup>4</sup> Various factors cited in the analysis of state constitutional claims have included: textual differences in the federal and state constitutions; legislative history; state law predating U. S. Supreme Court decisions; differences in federal and state constitutional structures; whether the subject matter is of particular state or local interest; particular state history or traditions; and public attitudes in the state, *Hunt, supra*; “historical and textual evidence, sister state law, and policy arguments,” *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n. 6 (Utah 1993); and “the common law, our state’s particular . . . traditions, and the intent of our constitution’s drafters.” *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994). A number of those factors are addressed below.

frontier and molded after reflection on the constitutions of other states, would itself veer in meaning each time the United States Supreme Court issued a new decision”); *State v. Watts*, 750 P.2d 1219, 1221 n.8 (Utah 1988) (“choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state’s citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts”).

A state court construing its own constitution “do[es] not share the strong limitations perceived by [the U. S. Supreme Court] in its ability to enforce constitutional protections aggressively. Those limitations arise from the structure of our federal system, the Court’s role as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation, and the Court’s lack of familiarity with local conditions. These difficulties do not similarly limit state courts.” *Hunt*, 450 A.2d at 359; *see also* John W. Shaw, “Principled Interpretations of State Constitutional Law—Why Don’t the Primacy States Practice What They Preach,” 54 U. PITT. L. REV. 1019, 1028 (1993) (“Primacy allows strategic tailoring of state constitutional protections to match the values of the state citizenry that created the state constitution, rather than enforcing the lowest common denominator of broadly shared national values”).

ii. “*Legislative*” history and intent of the Framers.

Relatively little history is available regarding adoption of the 1895 Utah Constitution, and particularly the Declaration of Rights. *Society of Separationists*, 870 P.2d at 929 (“There was little discussion or controversy regarding any of the provisions of the Declaration of Rights”). Those rights were so fundamental, so uncontroversial, that there was nothing to debate.

Utah's Declaration of Rights is not identical to that of any of the other forty-four state constitutions, copies of which had been provided to each of the delegates. The Utah Supreme Court has concluded that much of the final document derives from earlier Utah constitutions and those of other states, Nevada, Washington, Illinois, and New York in particular. *Id.* at 928; *see also* John J. Flynn, "Federalism and Viable State Government—The History of Utah's Constitution," 1966 Utah L. Rev. 311, 311 (Illinois, New York, Nevada, Washington, and Iowa); Paul Wake, Comment, "Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?" 1996 UTAH L. REV. 661 (Washington); Kenneth R. Wallentine, "Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14," 17 J. CONTEMP. L. 267, 267 (1991) (Nevada, Iowa, Illinois, New York and Washington).

The Framers' foremost concern was achieving statehood after a frustrating and painful forty-year quest. Delegates knew that noncompliance with Congress's expectations would put statehood at risk. "It is natural, under such circumstances, for men to proceed with caution." *State v. Norman*, 16 Utah 457, 52 P. 986, 990 (1898). Accordingly, the Framers borrowed heavily from the constitutions of other states that had been approved by Congress.

From that fact, defendants the suggestion has been made that it is difficult to say the 1895 Constitution was written by Utahns for Utah. *See* C. Albert Bowers, "Divining the Framers' Intentions: The Immunity Standard for Criminal Proceedings under the State Constitution," 2000 UTAH L. REV. 135, 148 (summarizing contention). That does an injustice to the Framers. Rather than simply copying verbatim from a single constitution, the Framers carefully selected

and rejected portions of various documents as suited their frame of mind. *See, e.g.,* 1 *Official Report of the Proceedings and Debates of the Convention* at 423 (1898) (B. H. Roberts, questioning adoption of Wyoming’s provision on female suffrage rather than that of Virginia, New York, Ohio, or Indiana); 483 (John Murdock: “I don’t wish to refer to what older states have done; they have done as they pleased, and I hope the people of Utah will do as their best judgment will dictate to them, and I am not afraid of innovation”); 776 (David Evans: mentioning constitutions of Kentucky, North Dakota, Maine, Colorado, and California).

Choosing from among different options reflects intent, just as a court’s choice of quotations from other cases is no less a statement of its own intent. Moreover, some Framers expressed a view that Utah was unlike any other state, and/or that their goal was for Utah to be more progressive than other states. *See, e.g., id.* at 433-34 (Andrew S. Anderson: urging delegates to “show to the world that Utah is in the advance march of progress and civilization, and in those life-endearing principles of liberty and justice”); 545 (Andrew Kimball: “the people of Utah through their circumstances are different to any other people in the United States”).

When it came to basic human liberty, the Framers were unwilling to sacrifice their principles even at the cost of the great prize. Including women’s suffrage in the State Constitution would “dig a grave for statehood,” Representative B. H. Roberts warned. *Id.* at 425-28. Such concerns for expediency could “go to the dogs,” delegates declared:

They tell us woman suffrage in the Constitution will imperil statehood. I do not believe it. But if it should, what of it? There are some things higher and dearer even than statehood. I would rather stand by my honor, by my principles, than to have statehood, if I must sacrifice my honor and my principles to obtain it. If Utah is to be immolated for standing by her principles, for enlarging the borders



of liberty, let the sacrifice be made, let her be bound upon the altar, let the high priest of tyranny come forth and plunge the knife into her breast. She cannot perish in a nobler cause than that of freedom and equal rights.

*Id.* at 738 (Orson F. Whitney); *Id.* at 499 (Alma Eldredge) (“[D]o I want statehood at the sacrifice of honor?”).

The Framers of the Utah Constitution did not see their months-long labor as makework (as it would be if construction of the federal Constitution were always dispositive). The Framers viewed and intended the state constitution to be the supreme fundamental law of the State of Utah. *See, e.g., id.* at 434 (Samuel Thurman); 479-80 (Charles Varian); 502 (Eldredge); 561 (Karl G. Maeser); 572 (Charles Crane); 737 (Whitney); *State v. Norman*, 16 Utah 457, 52 P. 986, 987 (1898) (Framers intended state constitution to constitute the “fundamental law of the state”); *Eldredge*, 76 P. at 339 (state constitution is the “will of the sovereignty expressed in the supreme law.”)

The assumption that the Utah Constitution would form the primary basis of protection for Utah residents is reinforced by the fact that, at the time of the Convention, none of the protections of the Bill of Rights had been applied to the states through the Fourteenth Amendment. The first to be applied was in 1897. *Chicago B. & O.R.R. v. Chicago*, 166 U.S. 226 (1897) (takings). First Amendment protections, for example, were not held applicable to the states until 1925; the Fourth Amendment not until 1949. *Gitlow v. New York*, 268 U. S. 652 (1925); *Wolf v. Colorado*, 338 U.S. 25 (1949).

To reinforce their intent, the Framers retained a provision, first adopted in 1882 in the shadow of polygamy prosecutions, that was contained in relatively few other constitutions (and

not in the federal Constitution), which provides: “Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” Article I, § 27. When the purpose of such a provision was questioned, future governor Heber Wells explained the committee’s view that it was necessary “because the tendency of the times might be as it has been in the past, not to recur very often to fundamental principles. When the people are oppressed and do not get their rights, it may be necessary to recur to fundamental principles.”<sup>1</sup> Proceedings at 362.

Consistent with the intent of the Framers, the Utah Supreme Court has repeatedly stated that the federal Constitution sets the floor, but not the ceiling, of constitutional protections for Utah residents. *See, e.g., Society of Separationists*, 870 P.2d at 940; *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701; *West*, 872 P.2d at 1007 (“Above this floor, states may balance the need to redress injuries to reputation with guarantees of free expression in a distinct way, thereby accounting for the unique history, needs, and experiences of their residents”).

The Jensens’ state constitutional claims should thus be reviewed independently of the federal claims. *See, e.g., West*, 872 P.2d at 1007 (adopting “primacy” approach in free speech claim under state constitution, accepting federal law only to the extent it is persuasive). This approach is more consistent with the intent of the drafters, who sought to place as much power as possible in the hands of the state’s residents. The Framers, who had fought so long for home rule, intended that “the agencies by which power was to be exercised should be brought as close as possible to the subjects upon which the power was to operate . . . .” *State v. Eldredge*, 27 Utah 477, 76 P. 337, 339-40 (1904) (“‘Local self-government,’ says Judge Cooley, ‘having

always been a part of the English and American systems, we shall look for its recognition in any such instrument.””). Matters involving the family are of exclusively local interest, *In re Burrus*, 136 U.S. 586, 10 S.Ct. 850 (1890), as are concerns about the integrity of a state’s judicial system. *Hunt*, 450 A.2d at 366.<sup>5</sup>

From the time of its ratification, the Utah Supreme Court has held that the state constitution is to be construed liberally. “A constitution is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, in order that it may accomplish the object of its establishment, and carry out the great principles of the government.” *North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co.*, 14 Utah 155, 46 P. 824 (1896); *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d 829, 830 (1964) (court must “give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions”).

There is little substantive difference in wording between Article I §§ 1, 7, and 14 and their federal counterparts. The key structural distinction between the two constitutions, however, is that the federal Constitution is a grant of enumerated powers to the government, whereas the provisions of state constitutions are limitations upon sovereign power. Courts typically characterize this difference in the state constitution as “a guarantee of those rights rather than as a restriction on them.” *Gunwall*, 720 P.2d at 812.

iii. *Article I, § 1 (inherent and inalienable right to liberty)*

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<sup>5</sup> As the Framers were aware, it is easier to amend a state constitution than the United States Constitution. *See, e.g.*, 1 Proceedings at 500 (Eldredge; constitution could be amended).

Article I, § 1 of the Utah Constitution provides, “All men have the inherent and inalienable right to enjoy and defend their lives and liberties[.]”

The Utah Supreme Court has not construed the meaning of “happiness” as used in Section 1. However, the court deems instructive the interpretation of similar provisions by other courts. *State v. Briggs*, 46 Utah 288, 146 P. 261 (1915)). The right to pursue happiness as guaranteed by a state constitution has been recognized as “include[ing] the right of privacy, the right to marital privacy and choice . . . [and] the right to protect one’s health.” 16A C.J.S. PURSUIT OF HAPPINESS § 737 (citations omitted).

In *Block v. Schwartz*, 27 Utah 387, 76 P. 22, 24 (1904), the Utah Supreme Court addressed a claim that a statute violated Section 1 and Section 7 of Article I. With respect to both sections, the court wrote:

These constitutional provisions constitute the supreme law of the commonwealth upon this subject. To that law the executive, the legislative, and the judicial departments of the government alike must bow obedience, as well as every subject. It forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties.

76 P. at 24; *see also id.* at 25 (forbidding an individual or class the right of acquisition or enjoyment of property “in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their ‘pursuit of happiness’”), 26 (right to pursuit of happiness includes right to pursue business or vocation).

These rights are implicated when a government actor impinges upon an individual's liberty. *Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P.2d 871 (1937) ("These [Section 1] rights are invaded when one 'is not at liberty to contract with others respecting the use to which he may subject his property (or use or employ his time or talents), or the manner in which he may enjoy it'").

The Utah Supreme Court has defined the right of "liberty" encompassed within Section 1 as not just the absence of physical restraint, but as "a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights[.]" *Block, supra*, at 24-25. *See also State v. Kent*, 20 Utah 2d 1, 432 P.2d 64, 69 (1964) (The right to life, liberty, and the pursuit of happiness, "and as a corresponding and accompanying right, the right to privacy in his own home," is a "just claim, God given, or innate as a human").

From the facts set forth in plaintiffs' Statement of Additional Facts and reasonable inferences therefrom, a reasonable jury could find that Defendants' deliberate misrepresentations and omissions prevented Plaintiffs from seeking medical care, maintaining their familial relationship, and otherwise pursuing their right to happiness under Section 1. Defendants' misconduct would be deemed a violation of Section 1 for the same reasons that it violated Article I, § 7 (*see pp. 40-69, infra, summarizing aspects of defendants' conduct*).

iv. *Article I, § 7 (due process)*

Article I, Section 7 provides, "No person shall be deprived of life, liberty or property, without due process of law." Section 7 is a "constitutional guarantee," one of the "inherent and

inalienable rights of citizens.” *Block v. Schwartz*, 27 Utah 387, 76 P. 22, 24-25 (1904). “Liberty,” as employed in Section 7, “is not restricted to mere freedom from imprisonment, but it embraces the right of a person to use his God-given powers, employ his faculties, [and] exercise his judgment in the affairs of life . . . . The word ‘liberty,’ as thus employed in the Constitutions and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights . . . .” *Id.*

It has long been recognized that the Utah and federal due process clauses are not co-extensive:

The prohibition of this amendment is directed to the constitution, and cannot mean the state must observe the due process of the law of some other jurisdiction over which it has no control. Neither can it refer to due process of law under the law of the United States, for the United States has only stated offenses limited to the subjects over which it has jurisdiction. The constitution of the United States cannot, as to the states, be held to be the sole unbending rule as to the method of procedure, when dealing with the life, liberty, and property of individuals in the several states. Such a rule would deprive the states of their right to regulate its procedure, laws, and rules of practice in their own courts, so as to protect life, liberty, and property by such due process of law as should be enacted with reference to the constitution of the United States which was “framed for an undefined and expanding future, and for people gathered, and to be gathered, from many nations and many tongues.

*In re McKee*, 19 Utah 231, 57 P. 23, 26-27 (1899); see *State v. Briggs*, \_\_\_ P.3d \_\_\_, 2008 WL 5191446, 2008 UT 83, ¶ 24 (“While the text of the two provisions is identical, we do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution. In fact, we have not hesitated to

interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate.)(internal citations omitted).

The Utah Supreme Court has held that “[i]t is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with ‘rudimentary demands of justice.’” *Walker v. State*, 624 P.2d 687, 690 (Utah 1981). The same principle applies to use of such testimony to interfere with the parent-child relationship.

It has also been held repeatedly that Section 7 “guarantees parents a fundamental right to sustain relationships with their children.” *In the Matter of K.B.E.*, 740 P.2d 292, 294 (Utah App. 1987) (“the Supreme Court has declared that under the Utah Constitution the parental interest is a ‘fundamental’ right to be invaded only to the extent necessary to promote a ‘compelling’ state interest”); *In the Matter of the Adoption of B.B.D.*, 1999 UT 70, ¶ 10, 984 P.2d 967; *Wells v. Children’s Aid Society*, 681 P.2d 199, 202 (Utah 1984).

This recognition is consistent with the intent of the Framers that the common law be employed to interpret the state constitution. *American Bush v. City of South Salt Lake*, 140 P.3d 1235, 2006 UT 40, ¶ 43, 48; *Deseret Irr. Co. v. McIntyre*, 16 Utah 398, 52 P. 628, 629 (1898). Under the common law, no relationship was afforded greater protection than that of parent and child. A right that has “strong roots in the common law” suggests greater protection under the state constitution. *West*, 872 P.2d at 1013.

Unlike any other state in the West, “Utah was settled primarily by two-parent families . . . .” Carrie Hillyard, “The History of Suffrage and Equal Rights Provisions in State Constitutions,”

10 BYU J. PUB. L. 117, 122 (1996). From the time of the constitution, Utah recognized a presumption that a parent will fulfill his duties

by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. . . . Indeed, the common law based the right of the father to have custody and dominion over the person of his child upon the ground that he might better discharge the duty he owed the child and the state in respect to the care, nurture, and education of the child. Before the state can be substituted to the right of the parent it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect, or incompetency to discharge the duty and thus to enjoy the right.

*Mill v. Brown*, 88 P. 609, 613 (Utah 1907). The Framers shared that view. *See* I Proceedings at 450 (Richards: "In the brute world we find the mother's love for offspring more strong than the instinct for self preservation. This is an unfailing passion throughout the whole course of organic life, whether brute or human").

Both prior to and after ratification of the Utah Constitution, a child could be removed from the home in Utah only upon a showing of his parent's "habitual intemperance, and vicious and brutal conduct, or from vicious, brutal and criminal conduct towards said minor child." Laws 1851 to 1870, Chapter XVII, § 9. This standard was re-enacted by the first state legislature, *see* Rev. Stat. 1898, Title 3, § 82, indicating that it was consistent with the Framers' intent. *See P.I.E. Employees Federal Credit Union v. Bass*, 759 P.2d 1144, 1147 (Utah 1988) (noting that many of the first legislators were delegates to the constitutional convention); *Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 P. 523, 526 (1908) (re-enactment of statute is evidence that framers intended the law to remain as it was).



In Washington, to which the Framers looked when drafting the 1895 Constitution, the supreme court had expounded a year earlier on the principle that a child cannot be removed from their parents unless the parents are affirmatively unfit, not merely because the state would prefer they make different choices. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 P. 660, 661 (1894) (“There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child”).

At the time of the 1895 Convention, nearly 90 percent of Utah’s population were members of the LDS Church. Richard D. Poll et al., eds., *Utah's History* (Provo, Utah: Brigham Young University Press, 1978), p. 393. Three-quarters (79) of the 107 delegates to the constitutional convention were Mormon. *Society of Separationists*, 870 P.2d at 928. It is thus relevant and appropriate to discuss the background and views of Mormon church members at the time of the convention. *See id.* at 929 n. 31 (discussing Joseph Smith’s attitude toward American government); P. Bobbit, *Constitutional Fate Theory of the Constitution* (1984) at 9-11 (relevant history includes prevailing sentiment at time of adoption); *Jewett*, 500 A.2d at 236 (relevant history includes social and political setting in which the constitution was adopted).

LDS Church founder Joseph Smith had expressed concerns about weak constitutional protections:

The only fault I find with the Constitution is, it is not broad enough to cover the whole ground. Although it provides that all men shall enjoy religious freedom, yet it does not provide the manner by which that freedom can be preserved, nor for the punishment of Government officers who refuse to protect the people in their religious rights . . . . Its sentiments are good, but it provides no means of enforcing them. It has but this one fault. Under its provision, a man or a people who are able to protect themselves can get along well enough; but those who have the misfortune to be weak or unpopular are left to the merciless rage of popular fury.

Larry E. Dahl and Donald Q. Cannon, ed., *Encyclopedia of Joseph Smith's Teachings*, p. 144 (quoting Sabbath address, Nauvoo, 15 October 1843).

The Framers had strong concerns about government intrusion into the family. For decades, LDS Church members had experienced what they viewed as persecution by a government intent on imposing its own values on the Mormon family structure, culminating in the famed polygamy prosecutions. *See State v. DeBooy*, 2000 UT 32, ¶ 32, 996 P.2d 546 (citation omitted) (mentioning prosecutions in construing Section 7).

“[M]any of Utah’s constitutional convention delegates had either been pursued by federal authorities or were well acquainted with people who had. Because of widespread newspaper coverage, the vast majority of Utah’s population was aware of the prosecutions, and the delegates to the constitutional convention had an intimate awareness of the problems posed by systematic oppression by the federal government. . . . Prior to becoming a state, the framers of the Utah Constitution suffered heavily at the hands of the federal government. These memories were fresh in the minds of the framers . . . .”

“Divining the Framers’ Intent,” 2000 UTAH L. REV. at 151, 169. For example, the President of the Convention, John H. Smith, an apostle in the LDS Church, had himself been the target of a polygamy prosecution. *See Wallentine, supra*.

The anti-polygamy campaign was directly targeted at the disruption of families, and was pursued to devastating effect. Fathers, mothers, and sometimes children were imprisoned. Children were left without support when their parents were jailed or forced into hiding. Conditions were harsh for those targeted by the government. See Martha S. Bradley, “‘Hide and Seek’: Children on the Underground,” 51 UTAH HISTORICAL QUARTERLY (1953), pp. 133-153.

In 1882, as deprivations caused by the prosecutions were on the rise, a new provision was added to the state’s draft constitution, declaring that “The blessings of free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and frequent recurrence to fundamental principles.” This language was restated in the 1887 version. Significantly, when its inclusion was questioned in 1895, Heber Wells stated the committee’s view that it was needed in light of the abuses “in the past.”

That the Framers would have been repulsed by the state forcing particular health care providers on a parent is further suggested by the writings of the Hon. Thomas Cooley of the Michigan Supreme Court, considered “the foremost constitutional authority in the world, perhaps,” by the drafters. 1 Proceedings at 447 (Richards); *American Bush*, 2008 UT 40 at ¶¶ 13, 49 n. 16, 51 (citing Judge Cooley).<sup>6</sup>

In *Van Deusen v. Newcomer*, 40 Mich. 90, 128 (1878), a family committed the plaintiff to an insane asylum. Concurring in a decision to order a new trial, Judge Cooley wrote, “I cannot admit that because one is a practitioner of medicine, it is therefore proper or safe to suffer him to

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<sup>6</sup> The “eminent jurist” Cooley had been cited in 35 Utah cases prior to ratification of the Utah Constitution, and was cited an additional 35 times in the next five years. Cooley was also cited by the Framers. See, e.g., I Proceedings at 464, II Proceedings at 1739.

decide upon mental disease, and consign people to the asylum upon his judgment or certificate.” If “differences of opinion among those who are called to give scientific evidence” exist, he wrote, it would be intolerable for the patient’s fate to hinge on whether “one physician rather than another happened to be called in as the adviser.” *Id.* at 132.

Consistent with common law and statutory history in Utah, the Utah Supreme Court held long ago that, to be constitutional, removal of a child from his parent’s custody requires an affirmative showing of unfitness. *Mill*, 88 P. at 613; *Cooke v. Cooke*, 67 Utah 371, 248 P. 83 (1926) (“[T]he unfitness which deprives a parent of the right to the custody of the child must be positive and not merely comparative, or merely speculative”); *In re B.R., et al.*, 2006 UT App 354, ¶ 87, 144 P.3d 231 (Under Utah Constitution, “a parent is entitled to a showing of unfitness, abandonment, or substantial neglect before his or her parent rights are terminated”) (court’s brackets omitted), rev’d on other grounds, *In re B.R.*, 2007 UT 82, 171 P.3d 435. *See also* pp. 60-63, *supra* (similar holdings by sister states).<sup>7</sup>

Construing the facts and inferences in the light most favorable to the plaintiffs, the defendants knew that their sole complaint was comparative in nature (*i.e.*, that the Jensens preferred to follow the recommendations of a health care provider other than Wagner). They knew that they could force the removal of Parker under that standard. Accordingly, they employed misrepresentation and half-truth in order to create an appearance of positive unfitness.

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<sup>7</sup> The defendants were not seeking permanent termination of the Jensens’ parental rights. However, they were seeking transfer of physical and legal custody, and for a purpose that was permanently life altering and potentially lethal.

In view of the common law, statutory, and constitutional history of Utah’s due process provision, the Utah Supreme Court would unquestionably find a state actor’s attempt to establish parental neglect through misrepresentations and material omissions prohibited under Section 7.

The Utah Supreme Court has also recognized a separate protected right of children in their familial relationship. *Jones v. Moore*, 61 Utah 383, 213 P. 191 (1923) (recognizing right of minor “to be a member of the father’s family, to be with her little sister, and ultimately to reap the fruits of that relationship, whatever they may be”). The above analysis would apply with equal or greater force to Parker’s own constitutional rights.

**B. Article I, Section 14 (search and seizure)**

The right to be free of unreasonable searches and seizures “is one of the most cherished rights guaranteed by the Utah and United States Constitutions.” *Brigham City v. Stuart*, 2005 UT 13, ¶ 15. The Utah Constitution’s guarantee against unreasonable searches and seizures is “‘the right to be let alone—the most comprehensive of rights and the right most valued by civilized men’ that demands an independent and proper judicial determination.” *State v. DeBooy*, 2000 UT 32, ¶ 32, 996 P.2d 546 (citation omitted).

The Utah Supreme Court has indicated on several occasions that the scope of protections afforded by Article I, Section 14 are greater than those afforded by the Fourth Amendment of the United States Constitution. *See, e.g., DeBooy*, 2000 UT 32, ¶ 12 (citations omitted); *State v. Larocco*, 794 P.2d 460 (Utah 1990).

Commentators concur. In “Divining the Framers’ Intentions,” *supra*, at 147, for example, C. Albert Bowers argues that “several unique facets of Utah’s history” suggest that

state constitutional requirements for testimonial immunity do not mirror the federal. “Most important is Utah’s early settlement by religious refugees and the subsequent tension between the local territorial government and the United States government. Additionally, many prominent territorial citizens witnessed first-hand the problems that arise when the government can compel testimony from a witness without adequate protection.”

As the Utah Supreme Court has recognized, “Mormon delegates likely viewed the territorial government—controlled by federally appointed non-Mormons—as oppressive. They had experienced the attempted control and suppression of their religious beliefs and practices by the federal government, often operating through territorial officials. . . . Both groups of delegates could claim that some form of authority, be it federal or local, had denied them freedom of conscience, and both were acutely aware of the threat government power presented to that freedom.” *Society of Separationists*, 870 P.2d at 935.

The employment of falsehoods by government officials, as alleged here, would have been especially disturbing to the Framers. From their perspective, LDS Church members had suffered extraordinary harm as the result of false testimony. In 1838, for example, Missouri governor Lilburn Boggs issued the notorious “extermination” order expelling Mormons from the state three days after the execution of a false affidavit by Thomas B. Marsh and Orson Hyde that claimed, among other things, that Joseph Smith intended to conquer the United States. Gary J. Bergera, “The Personal Cost of the 1838 Mormon War in Missouri: One Mormon’s Plea for Forgiveness,” *MORMON HISTORICAL STUDIES* (Spring 2003), p. 139. A month later, Missouri officials used the affidavit as a basis to jail Smith for treason. *Id.*

Seven years later, Smith was again pursued by government officials, this time in Illinois. In reliance upon a promise of security by Governor Ford, Smith and other Mormon leaders voluntarily surrendered. Instead, Smith and his brother Hyrum were allowed to be murdered in their jail cell in Nauvoo. See Whitney, *History of Utah*, Vol. 1, pp. 228-30; *History of the Church of Jesus Christ of Latter-day Saints*, The Church of Jesus Christ of Latter-day Saints (Deseret News: 1932), Vol. VII, p. 172 (Smith was arrested through “false pretense”).

In 1857, William Drummond, an appointee to the territorial supreme court, made a false report to the attorney general that Brigham Young had murdered territorial leaders, and that the Mormons had burned territorial records and committed acts of treason. He urged immediate military intervention. See Andrew L. Neff, *History of Utah* (ed. Leland H. Creer, Salt Lake City: Deseret News, 1940), Vol. 1, pp. 448-51. President Buchanan, with whom LDS Church leaders were already at strife, cited Drummond’s assertions as evidence that the Mormons were in rebellion, and dispatched the Army to Utah to replace Young as governor by force. *Id.*

Young issued a proclamation decrying, again, deception by government officials: “For the last twenty five years we have trusted officials of the Government, from Constables and Justices to Judges, Governors, and Presidents, only to be scorned, held in derision, insulted and betrayed.” Proclamation, August 5, 1857; *id.* (“We know these aspersions are false, but that avails us nothing”). More than 30,000 Mormons evacuated northern Utah in anticipation of invading forces. Hubert Howe Bancroft, *History of Utah 1540-1886* (San Francisco, The History Company: 1889), p. 535.

In 1871, Brigham Young was indicted by territorial officials for an 1857 murder based upon the false affidavit of a man named William Hickman, who was “in collusion with the crusading officials to bring trouble upon his former brethren”. Whitney, *History of Utah*, pp. 629-640. Young was refused bail and spent four months under house arrest; two of his alleged co-conspirators spent six months in jail. Bancroft, *History of Utah*, pp. 663-64.

These and other examples of victimization through government falsehoods would have lent special force to the Framers’ adoption of the requirement in Article 14 that searches and seizures be “supported by oath or affirmation.” Utah Supreme Court opinions predating the constitution also reflected a need for protection from fabricated testimony of government officials. *See, e.g., United States v. Miller*, 8 Utah 29, 28 P. 957, 958 (1892) (“We think no man can be found guilty of a fraud against the government on the mere certificate of any officer of the government, even if a statute of the congress authorizes it. Such statute is in violation of natural right, and of that clause of the constitution that provides that a man cannot be deprived of life, liberty, or property without due process of law; for it is not due process to find a man guilty of a fraud without any evidence whatever of his guilt”); *see also Merchants’ Nat. Bank of Kansas City v. Robison*, 8 Utah 256, 30 P. 985 (1892) (person who signs a certificate of stock containing false information is liable; “[t]hese views are so fundamental, and so consonant with honesty and fair dealing, that they need no authority in their support”).

The federal constitution is only a “floor,” a minimum level of constitutional protection. *See, e.g., Society of Separationists*, 870 P.2d at 940; *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701; *West*, 872 P.2d at 1007. In this case, Sections 1, 7, and 14 of Article I provide



protection that is separate and greater than the federal constitution. Accordingly, there is no basis for defendants' argument that the federal court's rulings on federal law bind this Court's hands on state law.

### **III. CLAIM PRECLUSION IS INAPPLICABLE TO PLAINTIFFS' CLAIMS AGAINST DEFENDANTS IN ANY EVENT.**

Defendants argue that Plaintiffs' state law claims are barred under the doctrine of claim preclusion, a subset of the doctrine of *res judicata*. *Murdock v. Springville Mun. Corp. (In re General Determination of the Rights to the Use of All the Water)*, 1999 UT 39, ¶ 15, 982 P.2d 65 (“[R]es judicata has two branches: claim preclusion and issue preclusion.”). “In general terms, claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously.” *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, 2005 UT 19 (quoting *Culbertson v. Bd. of County Comm'rs*, 2001 UT 108, ¶ 12, 44 P.3d 642). When a party asserts the application of claim preclusion based upon a prior federal judgment, Utah courts apply federal *res judicata* law to the determination of whether claim preclusion applies. See *Massey v. Board of Trustees of Ogden Area Community Action Comm.*, 86 P.3d 120, 2004 UT App 27, ¶ 6-7.

Under federal law, claim preclusion only applies if the party asserting the doctrine satisfies three elements: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.” *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. (Utah) 2008)(quoting *MACTEC Inc. v. Gorelick*, 427 F.3d 821,

831 (10th Cir.2005). In the present case, claim preclusion is inapplicable for at least three independent reasons.

A. There was no earlier action.

The doctrine of claim preclusion looks to the causes of action that were filed in an *earlier* proceeding. *Pelt, supra*, at 1281; *see Oman*, 2008 UT 70, ¶ 31. Here, there was no “earlier proceeding.” All of the claims were filed in the same lawsuit in the same court at the same time. It was Defendants who elected to remove the matter from state court to federal court. That did not somehow convert this single case into two cases. *See Payne for Hicks v. Churchich*, 161 F.3d 1030, 1037 (7th Cir. 1998)(reversing federal district court application of res judicata to claims removed to federal court based on state court’s dismissal of other claims before removal, concluding that “this situation does not involve two separate lawsuits, one in state court and another in federal court. Rather, it involves *one suit* that originated in state court and that was removed to federal court.”); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000)(“Res judicata does not speak to direct attacks in the same case, but rather has application in subsequent actions.”) Because the claims presently pending before this Court were filed at the inception of this action, they do not constitute, after remand, a subsequent proceeding. As a result, claim preclusion is inapplicable.

B. There was no “final judgment on the merits” on Plaintiffs’ state law claims.

If this Court believes that claim preclusion applies despite the existence of only one case, the test for claim preclusion nonetheless is not satisfied because there was no final judgment on the merits of Plaintiffs’ state law claims. Defendants assert, with no supporting analysis, that

Plaintiffs' state law claims were the subject of a final judgment on the merits in the federal court proceeding. However, it has long been recognized that res judicata does not apply if a court dismissed the prior claims for want of jurisdiction, or if the claim was disposed of on any ground that did not go to the merits of the action. *See, e.g., Hughes v. United States*, 4 Wall. 232, 71 U.S. 232, 18 L.Ed. 303 (1866).

In other words, "jurisdictional dismissals are not 'on the merits,'" and as a result, claim preclusion does not bar the subsequent litigation of claims dismissed on such basis. *Park Lake Res. Ltd Liab. Co. v. USDA*, 378 F.3d 1132, 1136 (10th Cir. 2004)(quoting *Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir.1983)); *see also Whitesell v. Newsome*, 138 S.W.3d 393 (Tex.App.2004)("...we reject Whitesell's argument that the federal court's dismissal of the state-law claims for lack of subject-matter jurisdiction – acknowledging that the state-law claims could be pursued in state court – was equivalent to a final judgment on the merits.")(citing *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1013 (5th Cir.1998); *Thacker v. City of Kyatsville*, 762 A.2d 172 (Md. App. 2000) ("As a general rule, when a federal court dismisses federal claims on the merits before trial, and then declines to exercise its supplemental jurisdiction over related pendent state claims that were removed along with the federal claims, principles of res judicata or claim preclusion do not bar litigation of the remanded state claims in state court."); *Benton v. Louisiana Pub. Facilities Authority*, 672 So.2d 720, 722 (La.App. 1996) (reversing state trial court's grant of summary judgment in favor of defendants based on claim preclusion, concluding that, where federal court had dismissed state law claims for lack of

pendent jurisdiction, “[t]here ha[d] never been a ruling, nor the opportunity for a ruling, on the merits of the state law claims.”)

Moreover, the Utah Supreme Court has explicitly held that, where a federal district court dismisses a plaintiff’s state constitutional and common law claims without prejudice and declines to exercise supplemental jurisdiction, neither claim or issue preclusion applies. *Snyder v. Murray City Corporation*, 73 P.3d 325, 2003 UT 12, ¶ 36. Here, the federal court never reached the merits of Plaintiffs’ state law claims; rather, it expressly declined jurisdiction to do so. Stewart Ord. at 62. Because the federal court’s remand was premised on a jurisdictional ground that did not resolve the substantive merits of Plaintiffs’ state law causes of action, claim preclusion does not apply, and the federal court decision cannot be invoked to defeat Plaintiffs’ state law claims pending before this Court.

C. Plaintiffs’ state law causes of action presently pending before this Court are separate and distinct from the federal law causes of action ruled upon by the federal court.

Defendants’ argument that Plaintiffs’ state law causes of action are identical to the federal causes of action dismissed by the federal court is without merit. Defendants argue that, because Plaintiffs rely on the same underlying facts to support their claims under the Utah Constitution as were relied upon in federal court, the causes of action under state and federal law must be “identical,” thus meriting the application of claim preclusion to bar Plaintiffs’ state law claims. However, plaintiffs have more than met their burden of analyzing how and why the Utah Constitution is different and broader from the federal constitution in this case. *See State v. Earl*,

716 P.2d 803, 805-06 (Utah 1986) (“It is imperative that Utah lawyers brief this Court on relevant state constitutional questions”).

Moreover, the Tenth Circuit’s analysis of claim preclusion utilizes the “transactional approach” to defining a cause of action, which “provides that a claim arising out of the same ‘transaction, or series of connected transactions’ as *a previous suit*, which concluded in a valid and final judgment, will be precluded.” *Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir.1999)(emphasis added). “What constitutes the same transaction or series of transactions is ‘to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.’” *Id.* (quoting Restatement (Second) of Judgments § 24 (1982)). Therefore, “[u]nder the transactional test, a *new action* will be permitted only where it raises new and independent claims, not part of the previous transaction, based on the new facts.” *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150(Utah 2006)(emphasis added).

If Plaintiffs were attempting to bring new claims after the federal claims had been dismissed, defendants’ argument might have merit under the transactional approach. But this aspect of claim preclusion is inapplicable when there is only one case, one Complaint, one record, and where the state constitutional and common law claims were filed at the same time as the federal claims. Defendants have been on notice from the inception of the litigation that they would be required to defend against the state law claims, and had to know that the federal court was unlikely to take upon itself the resolution of “important questions of state law.”

D. The policy justifications behind the doctrine of claim preclusion are not present in this case.

“The fundamental policies underlying the doctrine of res judicata (or claim preclusion) are finality, judicial economy, preventing repetitive litigation and forum-shopping, and ‘the interest in bringing litigation to an end.’” *Plotner v. AT & T Corp.*, 224 F.3d 1161 (10th Cir. 2000)(quoting *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009 (10th Cir.1990)). These fundamental policies are not achieved in this case. First, any policy related to finality is not implicated by the procedural stance of this case, because Plaintiffs’ state law claims have been pending since the inception of the case, and have never been ruled upon by any court.

Neither is judicial economy at risk. Plaintiffs do not seek to waste scarce judicial resources; Plaintiffs ask only for their day in court on their state law claims. No judicial energy was expended on Plaintiffs’ state law claims by the federal court, as the state law claims were not addressed. As to the policy of preventing repetitive litigation and forum shopping, plaintiffs have filed only one action in one court. It was not Plaintiffs who sought to remove this case to federal court (a tactic more akin to “forum shopping”), but rather Defendants. Finally, the policy related to “bringing litigation to an end” is inapplicable here, because Plaintiffs’ state law claims have been pending since the inception of this case, and were never considered by the federal court. Plaintiffs are entitled to their day in court, and claim preclusion should not be applied to deprive them of that entitlement.

Finally, in cases involving state constitutional claims, such as the case at present, a state court interpreting the state constitution must always undertake an independent analysis when one of the parties attempts to assert res judicata based on a federal court's decision. The need for independent evaluation is particularly cogent when other case has not made it through the appellate process. Here, the Jensens are appealing the federal court's decision. Accordingly, because interpretation of this state's highest law is at issue, and because the federal decision is being appealed, policy justifications mandate that this Court engage in its own independent evaluation and analysis of Plaintiffs' state constitutional and common law claims.

#### **IV. ISSUE PRECLUSION IS INAPPLICABLE TO PLAINTIFFS' CLAIMS AGAINST DEFENDANTS.**

Defendants also argue that the second prong of res judicata, issue preclusion, should bar plaintiffs' state law claims. "Collateral estoppel, or, in modern usage, issue preclusion, 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Schiro v. Farley*, 510 U.S. 222, 232, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). Again, however, this component of res judicata does not apply because this is the same case in which the federal court claims were originally filed, and there have been no prior or subsequent proceedings. There is no "future lawsuit" – it is the same lawsuit.

The elements of issue preclusion would not be met in any event. As noted earlier, federal *res judicata* law applies if a party is attempting to bind a state court to a federal court ruling. Under Tenth Circuit law, issue preclusion has four requirements:

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). Here, the issues presented for review are not identical to the issues decided by the federal court, the prior action was not finally adjudicated on the merits, and policy justifications do not support applying the doctrine of collateral estoppel.



A. The issues presented for review in this action are not identical to the issues decided by the federal court.

Foremost, the legal issues before this Court are different than the legal issues considered and applied in the federal court proceeding. The federal court applied federal law of absolute immunity, qualified immunity, substantive and procedural due process under the Fourth and Fifth Amendments to the United States Constitution, and malicious prosecution under the Fourth Amendment to the United States Constitution. Here, this Court is applying state law, including Article I, Sections 1, 7 and 14 of the Utah Constitution, and the common law of this state applicable to intentional infliction of emotional distress and wrongful initiation of civil and criminal process.

Additionally, as discussed above, the Utah Constitution offers broader protections than the federal counterpart when applied to the fundamental right to associate with one's family and to direct the medical care of one's child's. Because the federal court dismissed the Utah claims without consideration of the merits, and because the rights guaranteed under the Utah Constitution are broader, the logical conclusion is that the issues pertinent to the additional scope of protection under the Utah Constitution have not been determined, and as such, are not identical to any issues decided by the federal court.

Furthermore, the factual issues that were considered by the federal court, and which defendant urge this Court to follow, are not identical to the factual issues presented in the case at bar. Factual issues are necessarily implicated by reference to legal standards. In other words, without reference to a law or legal standard, it is impossible for a Court to determine whether a

particular fact is material or not. (For example, a statement might be material to a claim for defamation, while immaterial to a claim for breach of contract.)

Consequently, when dealing with causes of action arising under an entirely distinct legal theory and source of right, the factual issues implicated are different. Therefore, because the factual issues implicated by Plaintiffs' state constitutional and common law claims are different, issue preclusion does not apply.

B. The "prior action" was not "finally adjudicated on the merits."

As discussed above, there was no "prior action" but rather a single case, so this threshold element of issue preclusion fails. Moreover, again there was no final adjudication on the merits, at least with respect to Plaintiffs' state law claims, because the federal court never reached those claims. Accordingly, issue preclusion does not apply.

C. Policy considerations militate against applying the doctrine of collateral estoppel.

The Tenth Circuit recognizes that in certain instances issue preclusion should not be applied, namely, where the application of issue preclusion "would 'do[ ] nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost.'" *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n*, 327 F.3d 1019, 1030, (10th Cir. (Okla.) 2003).

In addition, the Utah Supreme Court has recognized that "collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care." *Buckner v. Kennard*, 2004 UT 78, ¶ 15, 99 P.3d 842. Accordingly, courts "must carefully consider whether granting

preclusive effect to a prior decision is appropriate.” *Id.* at ¶ 15. “Collateral estoppel ‘is not an inflexible, universally applicable principle[.] ... Policy considerations may limit its use where ... the underpinnings of the doctrine are outweighed by other factors.’ ” *Id.* (alterations in original) (quoting *Jackson v. City of Sacramento*, 117 Cal.App.3d 596, 172 Cal.Rptr. 826, 829 (1981)).

Such policy considerations are present in this case. The Utah Constitution is the “supreme law” of the state of Utah. Under the Supreme Court’s “primacy” approach, it routinely examines state constitutional issues first, and considers federal law of no more persuasive weight than case law from a sister state. *State v. Tiedemann*, 162 P.3d 1106, 2007 UT 49 ¶ 33 (“This court, not the United States Supreme Court, has the authority and obligation to interpret Utah’s constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language.”); *State v. Worwood*, 164 P.3d 397, 2007 UT 47, ¶ 15.

Additionally, the Utah Supreme Court would not consider a state court bound by the federal court ruling in this case because certain findings in that ruling would be impermissible by a state court judge. As the Supreme Court has noted, the standard for summary judgment in state court is different from that in federal court, including the parties’ evidentiary burdens. *See, e.g., Orvis v. Johnson*, 2008 UT 2, 177 P.2d 600 (Utah has not adopted federal *Celotex* standard with respect to moving party’s burden of production (“While this has been the law in the federal courts for over two decades now, it is not Utah law”); unlike in federal court, in state court a moving party’s *own* evidence must conclusively establish absence of any fact issues).

Under Utah law, on a motion for summary judgment, “the facts and all reasonable inferences [are viewed] in the light most favorable to the nonmoving party.” *Southern Utah Wilderness Alliance v. Automated Geographic Reference*, 2008 UT 88, ¶ 12. “[A] reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted and established by the evidence, when those facts are viewed in the light of common experience.” *D’Aston v. Aston*, 844 P.2d 345 (Utah App. 1992)(quoting *Gillmor v. Gillmor*, 745 P.2d 461, 464 (Utah App.1987))(internal quotations omitted).

A state court is precluded from granting summary judgment “if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case ... *particularly if the issue turns on credibility or if the inferences depend upon subjective feelings or intent.*” *IHC Health Services, Inc. v. D & K Management, Inc.*, 196 P.3d 588, 2008 UT 73, ¶ 18 (Utah 2008)(quoting *Uintah Basin Med. Ctr. v. Hardy*, 2008 UT 15, ¶ 19, 179 P.3d 786 (emphasis added) (quoting 73 Am.Jur.2d. Summary Judgment § 46 (2001))).

“Moreover, on summary judgment, the trial court [is] required to construe ‘[d]oubts, uncertainties, or inferences concerning issues of fact ... in a light most favorable to the party opposing summary judgment.’” *Wasatch Oil & Gas, supra* at ¶ 35 (quoting *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984)). Issues involving an actor’s state of mind are factual in nature. *Lysenko v. Sawaya*, 7 P.3d 783, 2000 UT 58, ¶ 17.

Here, the federal court made certain factual determinations that would be impermissible on summary judgment in Utah. For example,<sup>8</sup> with respect to Defendant Cunningham, the federal court concluded that, although she did indeed make misrepresentations and omissions in her August 18, 2003 affidavit, those misrepresentations were not material to the issues before the juvenile court, and hence had no impact on Plaintiffs' constitutional rights. However, the Utah Supreme Court has said that, under Utah law, the question of materiality is generally one best left for the jury. *See, e.g., Yazd v. Woodside Homes Co.*, 2006 UT 47, ¶ 28, 143 P.3d 283; *Prudential Property & Cas. Ins. Co. v. Mardanlou*, 607 P.2d 291 (Utah 1980); *Wasatch Oil & Gas, L.L.C. v. Reott*, 163 P.3d 713, 2007 UT App 223, ¶ 43 (reversing district court grant of summary judgment, where district court improperly weighed facts and evidence to determine defendants' lack of fraudulent intent).

The federal court also found that, although Cunningham made numerous misrepresentations in sworn legal documents, there was no evidence that she deliberately misrepresented any facts. This conclusion reflects a failure to draw all reasonable inferences in favor of Plaintiffs, as is required on a motion for summary judgment, and specifically to draw the reasonable inference that, given the sheer number and context of misrepresentations and

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<sup>8</sup> Because Plaintiffs are before this Court on their state constitutional and common law claims, Plaintiffs have not set forth in full herein each instance of the federal court's findings of fact that would not be permitted by a state court judge. The examples provided are some of the more patent examples, offered to explain why this Court must engage in its own independent analysis and evaluation of the facts and law. The federal court's decision is presently on appeal before the United States Court of Appeals for the Tenth Circuit.

omissions, Cunningham's actions were deliberate, or at the very least, an issue of fact exists in that regard.

As further examples, the federal court incorrectly concluded that the record evidence does not permit a reasonable inference that Defendant Wagner deliberately misrepresented facts about Parker, or the purported diagnosis of Ewing's, to anyone involved in the case. However, when viewing the record and the evidence (albeit circumstantial) regarding Wagner's involvement, one rational and logical deduction from those facts is that Wagner deliberately or recklessly interfered with Plaintiffs' constitutional rights.

Wagner did not simply fail to conduct genetic and molecular testing on Parker's tissue, he falsely told the Jensens that there were no confirmatory tests. He told DCFS that the Jensens had canceled their final meeting when he knew that *he* had canceled it. He told DCFS that Parker would be dead in "five days" if treatment did not commence, in order to persuade them to forgo the required investigation before institution of a juvenile court medical neglect petition. (Wagner now denies this.) He attempted to influence the second opinion that the Jensens wanted from Dana Farber. There is evidence – quite a lot, actually – from which a jury could conclude that his refusal to perform confirmatory testing and other actions were because the opportunity to enroll Parker in a clinical trial was about to expire. See, e.g., Pls' Statement of Additional Facts, ¶¶ 45-86, 109, 136.

At the very least, the evidence presented by Plaintiffs raised a dispute of fact on Wagner's intent, motivation, credibility, and state of mind. This Court cannot defer to factual determinations that do not construe "[d]oubts, uncertainties, or inferences concerning issues of

fact ... in a light most favorable to the party opposing summary judgment[.]” *Wasatch Oil & Gas, supra* at ¶ 35.

The federal court’s factual findings, particularly with respect to Defendants Wagner and Cunningham, improperly resolved credibility issues involving the state of mind of Defendants in favor of Defendants. Conversely, the federal court refused to draw inferences in favor of Plaintiffs, all of which hinged upon the subjective thoughts and intents of Wagner and Cunningham. The evidence presented by the parties at the very least shows “more than one plausible but conflicting inference on a pivotal issue in the case,” thus precluding summary judgment. *D & K Management, Inc., supra*, at ¶ 18.

Plaintiffs recognize there is no “smoking gun” to present to this Court, because, not surprisingly, none of the Defendants have admitted to any malicious motive regarding their dealings with the Jensens, and nor would they be expected to do so. In such circumstances, Plaintiffs are entitled to rely on circumstantial evidence to show a reasonable inference that the defendants acted with the requisite intent rising to the level of violating the Jensens rights guaranteed under the Utah Constitution.<sup>9</sup>

This Court should independently evaluate the record and factual and legal issues before it in resolving the defendants’ motions for summary judgment.

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<sup>9</sup> “‘It is well established that intent can be proven by circumstantial evidence.’” *State v. Holgate*, 2000 UT 74, ¶ 21, 10 P.3d 346 (quoting *State v. James*, 819 P.2d 781, 789 (Utah 1991))).

**IV. THE SPACKMAN REQUIREMENTS FOR PLAINTIFFS' STATE CONSTITUTIONAL CLAIMS ARE SATISFIED, AND THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANTS FLAGRANTLY VIOLATED PLAINTIFFS' RIGHTS GUARANTEED UNDER THE UTAH CONSTITUTION, OR ALTERNATIVELY, THERE IS A DISPUTE OF FACT IN THAT REGARD.**

Under *Spackman v. Bd. Of Ed. Of Box Elder County Sch. Dist.*, 2000 UT 87, 16 P.3d 533, a plaintiff suing under one of Utah's constitutional provisions must satisfy a three-part test before proceeding on the constitutional claim: first, that the constitutional violation was "flagrant;" second, that "existing remedies" do not redress his injuries; and third, that "equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries."<sup>10</sup>

**A. Flagrancy of Constitutional Violations of Article I, Section 1 & 7**

In *Spackman*, the Court explained the meaning of a "flagrant" constitutional violation:

In essence, this means that a defendant must have violated "clearly established" constitutional rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). To be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

*Spackman*, *supra* at ¶ 23.

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<sup>10</sup> A plaintiff is also required to show that the particular state constitutional provision is self-executing. Before proceeding on a claim for damages arising out of a violation of the Utah Constitution, a plaintiff must demonstrate that the constitutional provision is "self-executing." See *Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996); *Spackman* at ¶ 19. Judge Cassell ruled previously that Sections 1, 7, and 14 are self-executing, *P.J. ex rel. Jensen v. Utah*, 2006 WL 1702585 at \* 14 (D.Utah 2006), and defendants do not claim otherwise in their pending motions.



For well over thirty years, it has been clearly established in Utah that Article I, Section 7 of the Utah Constitution guarantees both procedural and substantive due process rights. *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 204 (Utah 1984). The right of a parent to associate with his own child is protected under Section 7. *In re J.P.*, 648 P.2d 1364 (Utah 1982)(“...we conclude that the Utah Constitution recognized and protects the inherent and retrained right of a parent to maintain parental ties to his or her child under Article I, s 7 and s 25...”) Furthermore, because the Supreme Court defined the right of “liberty” encompassed within Section 1 as not just the absence of physical restraint, but also, as “a term of comprehensive scope[] ... embrac[ing] not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights[,]” *Block v. Schwartz*, 27 Utah 387, 76 P. 22, 24 (1904), the right to associate with one’s family is also guaranteed under Article I, Section 1.

Shortly after deciding *In re J.P.*, the Utah Supreme Court reiterated that “the fundamental right of parenthood” is protected under Article I, Section 7, and articulated that a violation of that section is subject to the strict scrutiny standard: a violation results unless the governmental actor establishes “a compelling state interest” in the result and that the means utilized are “narrowly tailored” to that compelling interest. *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 206-07 (Utah 1984) (*quoting In re Boyer*, Utah, 636 P.2d 1085, 1087-88 (1981)).

It goes without saying that the State has a compelling state interest in protecting the health and well-being of children. *See In re J.P., supra*. However, there is no compelling state

interest in falsifying or misrepresenting evidence to a juvenile court, nor do defendants cite any authority suggesting otherwise.

Additionally, the Jensens' entitlement to a *procedurally* sound involvement with DCFS and the juvenile court is also clearly established under Article I, Section 7. Section 7 has been interpreted not only to guarantee the substantive right to association with one's family, but also procedural rights, "notably, notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." *Wells, supra* at 204, (citing *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *State v. Casarez*, Utah, 656 P.2d 1005 (Utah 1982); *Concerned Parents of Stepchildren v. Mitchell*, 645 P.2d 629, 636 (Utah 1982); *Lindon City v. Engineers Construction Co.*, 636 P.2d 1070 (Utah 1981)). "The general test for the validity of such rules, the test of procedural due process, is fairness." *Id.*

Both the substantive and procedural protections of Article I, Sections 1 and 7 were so clearly established at the time of Defendants' conduct that objective persons in their shoes would have plainly recognized the unconstitutionality of their actions. The procedural protections of Article I, Section 7 were so well known in 2003 that "a reasonable official would [have] underst[ood] that what he is doing violates that right." *Spackman* at ¶ 23. Facts illustrating the flagrancy of each Defendant's conduct are set forth below.

i. *Wagner & Albritton*

With respect to Defendant Wagner, Plaintiffs' Additional Statement of Facts establishes:

1. that Dr. Wagner refused common, definitive testing to confirm a diagnosis of Parker's condition, even though such testing was routinely conducted at PCMC and was even recommended by the same pathology report upon which he claims to have relied;

2. that Wagner refused definitive testing in spite of the Jensens' requests for such testing and their stated concerns about the diagnosis, and in spite of the fact that everything about this alleged case of Ewing's Sarcoma was odd, i.e., Parker's case was not consistent with the clinical presentation of Ewing's observed in the vast majority of other people – location in soft tissue, location in the mouth, slow/no growth, lack of symptoms, etc.;

3. that Wagner refused to request the genetic or molecular testing because it would have jeopardized a 30-day deadline for enrolling Parker Jensen in a clinical trial for which he was a co-investigator;

4. that when the Jensens asked for a second opinion from Dana-Farber, Wagner first attempted to discourage the request, then secretly attempted to influence the opinion;

5. that Wagner concealed his true motivations from the Jensens;

6. that Wagner concealed his refusal to order definitive diagnostic testing from his superior, Dr. Lemons, as well as from Dr. Albritton, from Dr. Coffin, from Dr. Lowichik, from Dr. Corwin, from DCFS caseworker Cunningham, and from Assistant Attorney General Eisenman; and,

7. that Wagner falsely told Kari Cunningham/DCFS that Parker could be dead in "five days," in order to persuade Cunningham to skip the normal DCFS investigative process.

With respect to Defendant Albritton, Plaintiffs' Additional Statement of Facts establishes:

1. that Albritton urged and stated that only a board-certified *pediatric* oncologist was qualified to treat Parker, while intentionally or recklessly failing to disclose that the reporting doctor (Wagner) was not himself board-certified in pediatric oncology;
2. that, as part of the process for obtaining custody and warrants, Albritton misrepresented to the juvenile court the qualifications and services of the Burzynski Clinic, from which the Jensens wanted to obtain an evaluation;
3. that Albritton knew, and intentionally or recklessly failed to disclose to the court and others, that genetic testing was routinely conducted at PCMC on cases of suspected Ewing's Sarcoma.

These facts demonstrate that Wagner and Albritton's conduct amounts to a flagrant violation of both the substantive and procedural protections of Article I, Sections 1 and 7 of the Utah Constitution, because any reasonable person in Wagner or Albritton's situation would know that his or her conduct violated the Utah Constitution.

Wagner and Albritton attempt to frame the issue as one of child protection (their actions) versus child neglect (the Jensens' actions). All they did was make a diagnosis, they say. They had to report the Jensens when the parents refused life-saving treatment for their son, they say. In other words, the Defendants want this Court to rule as a matter of law not only what their actions were, but also what their motives were. The Jensens have presented evidence that Wagner and Albritton misrepresented P.J.'s condition to the juvenile court, refused to order

specific medical tests that would have conclusively identified P.J.'s cancer, ignored or misrepresented evidence that was inconsistent with their diagnosis, and falsified or misrepresented evidence to the juvenile court. (See Pl.St.Facts, ¶¶ 45-59, 68-81, 102-107, 126, 132-146, 261-263, 283-284, 322-325.) This conduct amounts to a flagrant violation of the Jensens' substantive rights guaranteed under Article I, Sections 1 and 7.

By misrepresenting and omitting critical material information from the individuals involved in the juvenile court proceedings, Wagner and Albritton deprived the Jensens of their entitlement to "fairness" in that proceeding. Defendants make much over the fact that the Jensens purportedly had their day in court before a neutral, objective, and independent decision maker. What Defendants fail to recognize is that, where that neutral decision maker has nothing to rely on in reaching his decision but material misrepresentations of fact, the proceeding can never be "fair." As a result, such conduct violates the procedural component of Article I, Section 7.

ii. *Eisenman.*

With respect to Defendant Eisenman, Plaintiffs' Additional Statement of Facts establishes that Eisenman violated Plaintiffs' procedural and substantive rights guaranteed under Article I, Section 7.

1. *Eisenman misrepresentations and material omissions related to the juvenile court proceedings violated Article I, Sections 1 and 7.*

The record evidence demonstrates that Eisenman:

1. Knew, and failed to disclose, to the court, the DCFS case worker, and the guardian ad litem, that additional diagnostic tests were available to confirm Parker's diagnosis. (See Pl.St.Facts, ¶ 249.)

2. Knew, and repeatedly failed to disclose, to (a) the juvenile court and (b) the DCFS case worker, that defendant Wagner was not a board-certified *pediatric* oncologist. This was a material omission because the Jensens were ultimately required to consult only with a board-certified pediatric oncologist, which requirement precluded the Jensens from retaining Dr. Simone as their primary physician, and instead forced them to choose L.A. Children's and Dr. Johnston. (Pl.St.Facts, ¶¶ 235-236, 284-285, 322.) Cunningham testified that she considered important the fact (which she learned only after this lawsuit was filed) that Dr. Wagner was not a board-certified *pediatric* oncologist, and would have alerted the juvenile court had she known that he lacked that certification. (Pl.St.Facts, ¶ 285.)

3. Intentionally or recklessly failed to disclose to the court that Dr. Wager was directing Parker's care under the provisions of a Clinical Trial Protocol. Although Eisenman claims she was not aware of the real Clinical Trial Protocol, a jury could conclude otherwise based upon the fact that she affirmatively represented to the juvenile court that another document was the standard of care under which treatment was being sought. (Pl.St.Facts, ¶ 76 n.6.)

4. Intentionally or recklessly failed to disclose to the juvenile court on August 8 that the "controlling" test results from L.A. Children's were not back. (Pl.St.Facts, ¶¶ 273, 287, 290.) Eisenman knew the test results were not complete because she had been in communication with

Dr. Tishler of L.A. Children's on August 4, and he never said that that testing was completed. (Pl.St.Facts, ¶ 290.)

5. Intentionally or recklessly made numerous factual misrepresentations on or about August 29, 2003, to DCFS director Richard Anderson, who relied on such representations. Eisenman knew that Anderson had the authority to terminate DCFS's juvenile court petition, had he been given accurate information. (Pl.St.Facts, ¶ 384.) Eisenman's misrepresentations to Anderson included the following (*see* ¶ 385):

a) Omission of all facts known to Eisenman indicating that the Jensens were questioning the diagnosis after May 20, 2003, and instead implying that the Jensens' sole objection was limited to Dr. Wagner's treatment plan;

b) A misleading implication that the Jensens were pursuing IPT as the sole treatment for Parker as of July 10, 2003, when she had in actuality been informed more than a week earlier by the Jensens' attorney that the Jensens were not committed to IPT, and were instead considering all treatment options;

c) A misrepresentation that a second opinion was not obtained from Dana Farber because the Jensens "declined to pay the consultation fee," which was not true;

d) A misrepresentation that as of May 29, 2003, the Jensens "want[ed] to use 'Insulin Potentiation Therapy,'" and that the referring doctor, Dr. Wagner, asked for time to do research, which was untrue. PCMC records said otherwise, that it was the Jensens who asked Wagner to "look into" IPT;

e) A misrepresentation that neither Dr. Wagner nor Lara Neiderauer from Huntsman could find “any reliable research about the therapy,” which was a mischaracterization of the content of Neiderauer’s e-mail;

f) Omission of all discussions at the June 9 meeting evidencing that the Jensens had questions about the diagnosis of Ewing’s;

g) A misrepresentation that Dr. Thomson at LDS Hospital had performed “a PET scan and other tests,” when he had performed no tests at all, and a misrepresentation that she (Eisenman) had no records of this consultation, when a copy of a letter from Dr. Thomson was in DCFS’s own file, and the Jensens’ attorney had given her a letter from Dr. Thomson shortly after June 19;

h) A misrepresentation that Dr. Wagner did not contact DCFS or the PCMC child protection team until June 12, when DCFS’s own records plainly showed that contact was made as early as June 2;

i) A misrepresentation that the Jensens had refused to meet with Drs. Corwin and Wagner, when in fact it was Wagner who refused to have the meeting;

j) Omission of all statements by the Jensens’ attorney at the June 20, 2003 hearing that the Jensens were seeking additional diagnostic testing, again intentionally creating the impression that treatment was the only issue;

k) A misrepresentation that she thought the July 10, 2003 hearing before the juvenile court “was set for evidentiary hearing,” when the court’s record stated to the contrary,



and the Jensens' attorney had reminded Eisenman a week earlier that the scheduled appearance was not an evidentiary hearing;

l) A misrepresentation that oncologists at PCMC did not know that a second excision was going to be performed on Parker's tissue, when Wagner had been told of the Jensens' intent, and the procedure had been cleared with Dr. Muntz at PCMC ahead of time;

m) An omission that Jensens objected to the juvenile court conducting an evidentiary hearing on July 10 on Eisenman's petition for removal because Eisenman was improperly attempting to convert what had been scheduled for a pretrial conference into a full-blown evidentiary hearing, without complying with the juvenile court statutes and rules regarding notice, and further omitting that the juvenile court refused to conduct her sought hearing;

n) An omission that the reason the Jensens were no longer using Dr. Birkmayer was because Eisenman had taken the inflexible position that only a physician licensed in the United States was qualified to be Parker's primary care physician, when she knew that the State was not permitted to take that position;

o) An omission that, before the Jensens were required to begin treatment, L.A. Children's was to complete an independent evaluation of Parker's tissue, including genetic testing, the disclosure of which fact would also have required Eisenman to reveal that the Jensens were questioning the diagnosis;

p) A misrepresentation that Parker's lost tissue was found by PCMC "within 48 hours," when Eisenman knew it had been missing for nearly two weeks;

q) An omission that L.A. Children's "controlling" test results were not back at the time she obtained bench warrants in juvenile court on August 8, and that she was on notice of that fact by virtue of an e-mail from Dr. Tishler at L.A. Children's on August 4 that did *not* indicate that results were back;

r) A misrepresentation that Eisenman contacted the Sandy City Police after a hearing in juvenile court on August 12 [13], implying it was the police who contacted the District Attorney's office, when Eisenman herself contacted the police and the D.A.'s office before the hearing (which was on August 13, not August 12);

6. Making misrepresentations to her supervisor, Utah Attorney General Mark Shurtleff, who had the ability to intervene and/or terminate Eisenman's activities had he learned the truth. (*See* Pl.St.Facts, ¶ 377):

a) Failing to disclose that DCFS/Kari Cunningham had merely rubber stamped the reporting doctors' allegations, which Shurtleff would have known to be improper;

b) Failing to disclose that neither DCFS/Cunningham nor Eisenman had conducted an objective, thorough, accurate, fair or independent investigation of the medical neglect allegations, which Shurtleff would have known to be improper;

c) Failing to disclose that the Jensens had asked for cytogenetic testing at PCMC and been refused, and that a chromosome (genetic) test was one way of definitively diagnosing Ewing's;

d) Misrepresenting to Shurtleff that the Jensens had voluntarily decided not to use Dr. Birkmayer, which was untrue;

e) Misrepresenting to Shurtleff that the Jensens had declined a second opinion from Dana-Farber because they had been told their insurance would not pay for it, which was untrue;

f) Omitting that Dr. Wagner's decisions regarding Parker Jensen, including the refusal to conduct genetic testing and the intention to leave allegedly cancerous cells in Parker's mouth, were being driven by the AEWS0031 Clinical Trial, which a jury could reasonably conclude was known to Eisenman;

g) Misrepresenting to Shurtleff that the Jensens had "fled" the state after warrants were issued, which Eisenman knew to be untrue.<sup>11</sup>

7. Misrepresenting to the juvenile court on August 13, when seeking warrants for the Jensens, that the Jensens were not responding to messages on their cell phones, when no such messages were ever left. (Pl.St.Facts, ¶ 339.)

8. Misrepresenting to the juvenile court on August 13 that she had not been in communication with Dr. Tishler at L.A. Children's, when she had in fact received a lengthy e-mail from him just the week before. This omission was material because, in that e-mail, Dr. Tishler (a) did not mention any test results being completed, and (b) made numerous inflammatory statements about the Jensens and their lawyers that Eisenman knew would reveal

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<sup>11</sup> These misrepresentations and omissions were material because they were contrary to Shurtleff's instructions to his assistant attorneys general to "do everything we can to respect the rights of parents and preserve families," (Shurtleff depo., pp. 157-158), and because they would have cast serious doubt on the integrity of Eisenman's actions toward the Jensens.

him to be unobjective and having formed opinions not based upon the results of independent testing, as required under the July 10 stipulation. (Pl.St.Facts, ¶¶ 290, 339.)

2. *Eisenman misrepresentations and material omissions related to the criminal court proceedings violated Plaintiffs' rights under Article I, Sections 1 and 7.*

The record contains evidence from which a jury could find that Eisenman:

1. Misrepresented to the District Attorney's office that the Jensens had fled the state after the August 8 warrant was issued, which she knew was untrue. (Pl.St.Facts, ¶¶ 344-345, 364.) This misrepresentation was material, as evidenced by the testimony of Deputy D.A. Angela Micklos, who said that the felony child-kidnapping charges were based in part on that information. (*Id.*, ¶ 347.)<sup>12</sup>

2. Failing to disclose that, at the time the Jensens were alleged to have violated a juvenile court order, no such order had been entered. (Pl.St.Facts, ¶ 343.)<sup>13</sup>

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<sup>12</sup> Arrest warrants were activated nationally only for the felony kidnapping charges. (Pl.St.Facts, ¶ 349.) But-for those charges, therefore, Daren Jensen would not have been arrested in Idaho, and Barbara Jensen would have been able to join her family there.

<sup>13</sup> Eisenman has taken the position that it was immaterial whether an order had actually been entered, because the judge had made oral statements from the bench. While this ignores Utah law, *Barnard v. Wassermann*, 855 P.2d 243, 247 (Utah 1993) (order has no effect until entered), there is also a practical reason why written directives are required: because parties – and even attorneys – often have conflicting memories and/or understandings of what a court said; hence the frequent wrangling over the language of court orders. In the Jensen case, the guardian ad litem's notes as to what the judge said and Eisenman's proposed order were materially different. (Pl.St.Facts, ¶ 288.) No minutes were available for that hearing until August 11, after warrants had been issued. Eisenman knew that a "proposed" order could not form the basis of a contempt action, because it might or might not comport with the judge's own notes or memory. It is also notable that, of the documents that Eisenman provided to the D.A.'s office on August 15, she omitted copies of the underlying order, on which the ink was barely dry. (*Id.*, ¶ 343.)

3. Failed to disclose that the court orders and warrants upon which Eisenman based her complaint had been procured by misrepresentations and material omissions. (Pl.St.Facts, ¶¶ 197, 201, 214-215, 224-229, 234-236, 249, 283-285, 290-291, 314, 326.)

iii. *Cunningham*

With respect to Defendant Cunningham, Plaintiffs' Additional Statement of Facts establishes that she violated Plaintiffs' procedural and substantive rights guaranteed under Article I, Section 7.

1. *Failure to Complete Mandatory Investigation*

Cunningham violated Plaintiffs' rights under Article I, Section 1 and Section 7 by failing to comply with the mandatory, non-discretionary statutes and administrative rules governing her obligations as a DCFS caseworker to conduct a "thorough preremoval investigation" of the Jensens and their son prior to taking any action against the Jensens' parental rights. U.C.A. § 62A-4a-409(1)(a)(2003). This conduct violated both Plaintiffs' substantive right to associate with their family and to direct their son's medical care, but also their procedural right to a fair involvement with DCFS and the juvenile court.

Analysis of this issue must begin with the recognition that DCFS's enabling statutes require DCFS and its caseworkers such as Kari Cunningham to give the highest regard to the family association and parental rights of the citizens of the State of Utah:

(1) (a) Courts have recognized a general presumption that it is in the best interest and welfare of a child to be raised under the care and supervision of his natural parents. A child's need for a normal family life in a permanent home, and for positive, nurturing family relationships will usually best be met by his natural parents. Additionally, the integrity of the family unit, and the right of parents to

conceive and raise their children have found protection in the due process clause of the Fourteenth Amendment to the United States Constitution. *The right of a fit, competent parent to raise his child has long been protected by the laws and Constitution of this state and of the United States.*

(b) *It is the public policy of this state that parents retain the fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children who are in their custody.*

...

(3) When the division intervenes on behalf of an abused, neglected, or dependent child, it shall take into account the child's need for protection from immediate harm. *Throughout its involvement, the division shall utilize the least intrusive means available to protect a child,* in an effort to ensure that children are brought up in stable, permanent families, rather than in temporary foster placements under the supervision of the state.

U.C.A. § 62A-4a-201(1)(2003)(emphasis added).

DCFS caseworkers consequently operate under an unambiguous duty to respect and act in accordance with the parental rights of every Utah citizen. Of course, DCFS' primary purpose is to protect children from abuse and neglect, § 62A-4a-201(2), but it can only do so by using "the least intrusive means available," and in undertaking those least intrusive means, it must protect Utah parents' "fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children." *Id.*

The statutes at issue establish a protected liberty interest under Article 1, Sections 1 and 7 of the Utah Constitution. It is well recognized in the federal arena that state statutes using "explicitly mandatory language in connection with the establishment of 'specified substantive predicates to limit discretion'" create protected liberty interests. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 466, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)(internal quotations

omitted). Utah's preremoval investigation statutes and administrative rules contain explicitly mandatory language that required Cunningham to take certain steps as part of a thorough and accurate investigation prior to taking any action that infringed upon a citizen's parental rights. Those statutes and rules also contain specific substantive predicates that limit the social worker's discretion in fulfilling the required investigation. Accordingly, those statutes create a constitutionally protected interest in parents reported to have neglected their child.

The DCFS preremoval investigation statutes and rules create a constitutionally protected liberty interest because they impose mandatory, non-discretionary requirements that DCFS caseworkers thoroughly and accurately investigate allegations of neglect and abuse before taking action that impacts parental rights. The preremoval statute and rules explicitly enumerate the required acts that must compose an investigation. U.C.A. § 62A-4a-409(2) (2003); § 62A-4a-202.3(2)(a)-(g) (2003). Acting with the parents' fundamental rights in mind, DCFS is required under statute to conduct a "thorough pre-removal investigation" whenever it receives a report of child abuse or neglect. U.C.A. § 62A-4a-409(1)(a). DCFS administrative rules echo the requirement that a "child protective services caseworker" must complete an "accurate and timely investigation" following the receipt of a report of abuse or neglect. UTAH ADMIN. R. 512-201-1 & 201-4 (2003).

The statutes and rules leave the DCFS caseworkers with no discretion in what steps to take in completing an investigation, because the statutes and rules specifically delineate the acts that compose the investigation. The statute mandates that DCFS' "investigation *shall* include" "a search for and review of any records of past reports of abuse or neglect involving the same

child, any sibling or other child residing in that household, and the alleged perpetrator;” a personal interview with the child, where he or she is older than five years; an interview with the child’s parents; an interview of the person who reported the abuse; “interviews with other third parties who have had direct contact with the child[;]” an “unscheduled visit to the child’s home[;]” and an independent medical examination, where allegations of medical neglect are at issue. U.C.A. § 62A-4a-409(2) (2003); § 62A-4a-202.3(2)(a)-(g) (2003).

The statute goes on to specify exactly how caseworkers should conduct the required interviews, by specifically delineating when the interview can be conducted without notifying a parent, the length of an interview when it is completed without notification, those specific individuals who must be notified prior to conducting an interview, and when a child may have a support person during the interview. U.C.A. § 62A-4a-409(9) (2003).

Additionally, by Rule, the caseworker is required to conduct an “assess[ment] [of] the immediate protection safety needs of a child and the family’s capacity to protect the child[;]” including a “domestic violence assessment[;]” an “[a]ssessment of immediate risk, safety, and protection needs of a child to include an assessment of risk, that an absent parent or cohabitant may pose to the child[;]” an “assessment of risk, protection, and safety needs for any siblings or other children residing in the home as sibling or child at risk[;]” an “[a]ssessment of the family’s strengths, needs, challenges, limitations, struggles, ability, and willingness to protect the child[;]” a “[d]etermination of eligibility for enrollment or membership in a Native American tribe[;]” and finally, to ensure that “[m]edical or mental health evaluations [are] completed as required by statute within required time frames[.]” UTAH ADMIN. R. 512-201-4 (2003).



Viewing all statutes governing DCFS together, DCFS' compliance with the provisions of the preremoval statute not only serves to protect the state's *parens patriae* interest in the safety of children, but also serves to ensure that the government undertakes the least restrictive means to protect a child, and that the government does not unconstitutionally and unnecessarily intrude upon parents' constitutionally protected rights. DCFS can only make the determination that the state's interests outweigh a parents' interest by first conducting the mandatory, non-discretionary investigation required by U.C.A. § 62A-4a-409 (2003).

DCFS' mandatory, nondiscretionary requirements create a protected liberty interest in Utah parents to an accurate, timely, and thorough investigation before the state encroaches upon their due process rights guaranteed under Article I, Section 7 of the Utah Constitution. The undisputed facts show that Cunningham failed to honor her obligations under the aforementioned statutes and rules. This conduct amounts to flagrant violations of Article I, Section 7 of the Utah Constitution, by depriving Plaintiffs of their procedural protections guaranteed under those sections. By failing to afford Plaintiffs the pre-removal investigation to which they were entitled, Cunningham deprived the Jensens of their entitlement to "fairness" in DCFS' and the juvenile court's involvement in their son's medical care. Defendants make much over the fact that the Jensens purportedly had their day in court before a neutral, objective, and independent decision maker. What Defendants fail to recognize is that, where that neutral decision maker does not have the full breadth of evidence before him, which evidence should have been marshaled by the involved government actors but was not, in plain dereliction of duty, the

proceeding can never be “fair.” As a result, such conduct presumptively violates Article I, Section 7.

2. *Cunningham violated Plaintiffs’ rights under Article I, Sections 1 and 7 by making material misrepresentations to the juvenile court.*

Plaintiffs have presented the following evidence of Cunningham’s misrepresentations to the juvenile court:

Cunningham’s verified petition omitted several material facts, including that she had not done the statutorily required investigation; that tests necessary to confirm the diagnosis had never been run; that, if Parker did have Ewing’s sarcoma, it was an atypical form and manifestation, which was one reason that the Jensens were questioning the use of a standard treatment on a non-standard condition; and that Dr. Corwin was a psychiatrist, and not qualified to provide an “independent assessment” of Parker’s medical condition, or render a second opinion, or opine whether the Jensens were medically neglectful. (*See Pl.St.Facts*, ¶¶ 165-167.)

Cunningham admitted that her August 18, 2003 affidavit presents only the State’s side of the story. Cunningham also admits that certain information in the affidavit is false or misleading. For example, she admits that she knew at this time that tests had not been conducted at Dana Farber, as implied by the affidavit, and that the CT and bone scans were normal, contrary to the affidavit’s implication, and that the Jensens were no longer interested in IPT, contrary to the affidavit’s assertion. Cunningham also knew at that time that the controlling genetic tests were in the works at L.A. Children’s, did not know whether the test results were back, and did not ask anyone. She did not have any conversations with Dr. Coffin, as she

claimed in paragraph 7 of the affidavit. She referred to Dr. Jeorg Birkmayer as a “man,” which she acknowledges is materially different from a doctor. (While Cunningham says that she “doesn’t know” why she referred to Dr. Birkmayer as a man rather than a doctor, one obvious inference is that she wanted to create the false impression that the Jensens were consulting a layperson regarding their son’s medical treatment, as opposed to a licensed physician.) Cunningham also falsely stated in her August 8 affidavit that Dr. Tishler had opined on July 28, 2003, that “Parker should commence chemotherapy,” when she knew that Tishler had repeatedly stated that he would not be making final treatment recommendations until all of his independent testing was in, including genetic testing. (*See* Pl.St.Facts, ¶¶ 317-319.)

On August 18, 2003, DCFS worker Kari Cunningham submitted to the juvenile court another Affidavit in Support of Warrant to Take Child into Protective Custody. (Exh. 43, August 18 affidavit.) The affidavit restated the same (mis)representations from Cunningham’s August 8 Affidavit. (*See* Pl.St.Facts, ¶ 359.)

Cunningham’s repeated material omissions and misrepresentations to the juvenile court amounts to flagrant violations of Plaintiffs’ substantive rights under Article I, Section 7 of the Utah Constitution.

3. *Cunningham did not reasonably rely on DCFS medical neglect policy.*

Cunningham argues she reasonably relied on DCFS’ emergency medical neglect policy, and that therefore, she cannot be held accountable for any violations of the Utah Constitution. What Cunningham neglects to mention is that she never followed the emergency medical neglect

policy. Even under the emergency medical neglect guidelines, Cunningham was still required to “meet with the parents, attempt to negotiate voluntary compliance with medical treatment pending or in lieu of court involvement, and assess and document the parents’ reasons for refusal to treat.” (p. 44 § A.3.) The undisputed evidence demonstrates that she never even attempted to fulfill such tasks before filing the medical neglect petition. Accordingly, she cannot now claim reliance on that policy to relieve her from liability for flagrant violations of the Utah Constitution.

iv. *Anderson*

1. *Cunningham’s liability has no bearing on Anderson’s liability.*

Defendant Anderson asserts that he cannot be held liable for any constitutional violation or tortious conduct because, he says, defendant Cunningham is not liable. But Anderson’s liability is not contingent upon the acts of Cunningham, because Plaintiffs claim that Anderson independently violated their rights Article I §§ 1, 7, and 14, of the state Constitution, and that he acted tortiously, by personally engaging in a number of unlawful acts:

1. Anderson created, encouraged, or perpetuated a policy by which DCFS case workers did not investigate allegations of medical neglect if the reporting doctor was assigned to Primary Children’s Medical Center (PCMC), but instead automatically assumed such reports to be true;

2. Anderson imposed an unconstitutional standard on the Jensens that, if parents had a licensed medical doctor who disagreed with a doctor assigned to PCMC, the parents were not

permitted to make the call between the two physicians, they were required to follow the PCMC doctor's recommendations;

3. failing to train DCFS caseworkers to follow the law and DCFS policy regarding medical neglect allegations, and exhibiting deliberate indifference with respect to the training and supervision of defendant Kari Cunningham;

4. personally refusing to order DCFS to withdraw the medical neglect allegations and juvenile court petition despite acknowledging that the Jensens were not neglectful parents;

5. failing to disclosure to the Jensens or the juvenile court his knowledge that a stipulation in which the Jensens had been promised an independent evaluation by Dr. Martin Johnston was not being honored.

These are independent acts of Anderson himself, which have nothing to do with Cunningham's conduct or responsibility for constitutional violations. As a result, her liability has no bearing on Anderson's liability.

2. *Anderson violated Plaintiffs' substantive rights under Article I, Sections 1 and 7 by imposing the blatantly unconstitutional requirement that the state's preferred doctor would trump Plaintiffs' choice of doctor.*

Anderson had the authority to (and eventually did) terminate the medical neglect proceedings against the Jensens. For the first two months of his involvement, however, he refused to do so because it was his position that, if a licensed physician consulted by parents and a licensed physician consulted by the State disagreed, the parents did not get to make the call. Instead, Anderson took the position that the State could force the parents to go to court and let

the court decide which physician was “better.” (Pl.St.Facts, ¶¶ 390-391.) Accordingly, Anderson refused to withdraw DCFS’s petition regardless of whether the Jensens placed Parker under the care of a licensed physician. *Id.* That refusal was plainly unconstitutional.

“Parents have a fundamental liberty interest in the ‘care, custody, and management’ of their children.” *Santosky v. Kramer*, 455 U.S. 745, 753, (1982); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). That includes the right to direct the medical care of one’s minor child. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003). It has long been settled in this country that the government cannot interfere with a parent’s choice between licensed medical practitioners merely because the state prefers one over the other (or, as in this case, has instituted a policy to always enforce a particular provider’s recommendations). Similarly, the state cannot interfere with a parent’s choice simply because there is a conflict in medical opinion in a particular case. This principle was well articulated in *In the Matter of Hofbauer*, 393 N.E.2d 1009 (1979).

In *Hofbauer*, 7-year-old Joseph Hofbauer was diagnosed with Hodgkin’s disease, and his attending physician, Dr. Cohn, recommended radiation treatment and possibly chemotherapy. “[A]fter making numerous inquiries,” the boy’s parents rejected Dr. Cohn’s advice and elected to have their son treated with laetrile at a clinic in Jamaica.

Neglect charges were filed against the Hofbauers for rejecting the first physician’s recommendation. There was a “sharp difference in medical opinion as to the effectiveness of the treatment being administered to Joseph[:]” two physicians opined that radiation treatment was necessary; others opined that it was not, that nutritional therapy and other less-invasive measures

would be appropriate. *Id.* at 653. The family court found that “Joseph’s mother and father are concerned and loving parents who have employed conscientious efforts to secure for their child a viable alternative of medical treatment administered by a duly licensed physician,” and therefore concluded that the child was not neglected. *Id.* at 654.

The New York Court of Appeals affirmed. While recognizing that the fundamental right of parents to rear their child is not absolute, the court observed that “great deference must be accorded a parent’s choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same.” *Id.* at 655. “In this regard, it is important to stress that a parent, in making the sensitive decision as to how the child should be treated, may rely upon the recommendations and competency of the attending physician if he or she is duly licensed to practice medicine in this State, for ‘[i]f a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment.’” *Id.*, quoting *Doe v. Bolton*, 410 U.S. 179, 199 (1973).

Analysis of a parent’s rights to direct medical care cannot be posed in terms of whether the parent has made a ‘right’ or a ‘wrong’ decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definitive conclusions. . . . Rather, in our view, the court’s inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child’s affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority.

*Id.* at 656 (noting that “this is not a case where the parents, for religious reasons, refused necessary medical procedures for their child . . . [T]his is not a case where the child is receiving no medical treatment, for the record discloses that Joseph’s mother and father were concerned

and loving parents who sought qualified medical assistance for their child”); *see also State v. Perricone*, 181 A.2d 751 (N.J. 1962) (parents rejecting for religious reasons unanimous medical opinion as to need for blood transfusions; “[h]ad there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant’s life, a strong argument could be made in favor of appellants’ position”); *In re CFB*, 497 S.W.2d 831, 835 (Mo. App. 1973) (clinic’s report of neglect for mother’s withdrawal of child as patient was baseless; “Whether the mother’s reasons for that dissatisfaction [with the clinic] were correct or incorrect is not the point. The mother had a right to choose between different doctors or institutions for the purpose of this type of care. So long as the mother was willing and intended to provide appropriate care in some manner, no finding can stand that she was guilty of neglecting the child”); *In re Tony Tuttendario*, 21 Pa. D. 561, \*3 (Pa. Q. 1912) (court could not substitute its medical judgment for that of parents absent showing of unfitness; even if defective judgment were a basis for superseding parents’ decision, neglect was not shown where “the science of medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolutely correct diagnosis in all cases, and still less an absolutely correct prognosis”). *Cf. Custody of a Minor*, 733, 379 N.E.2d 1053, 1064 (Mass. 1978) (“no dispute” as to diagnosis and need for chemotherapy; emphasizing that parent’s refusal “was not based on the parents’ view that another medically effective form of treatment could be found,” but merely upon ‘hope’ of child’s recovery).



Anderson cites no authority for the proposition that he could force parents to choose the “best” doctor, or the State’s preferred doctor, and all authority is to the contrary. Regardless of his alleged pure motives, Anderson imposed a blatantly unconstitutional standard on the Jensen family. As a result, the medical neglect proceedings were extended another two months. The Jensens could not go home for another two months. They could not take Parker to Dr. Peterson for the long-overdue margin for another two months. They could not go back to work for another two months.

3. *Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by admitting that the Jensens were not neglectful parents, yet refusing to order withdrawal of the medical neglect petition.*

Anderson is also incorrect in asserting that he did not possess authority to unilaterally terminate the juvenile court neglect proceedings. The record demonstrates that he could and did do that very thing. Pls’ St. Add’l Facts, SOF ¶ 389.

4. *Anderson violated Plaintiffs’ rights under Article I, Sections 1 and 7 by making material misrepresentations and omissions to the juvenile court.*

Plaintiffs have further adduced evidence that Anderson omitted and misrepresented crucial information from the juvenile court. Foremost, Anderson knew of availability of genetic testing and failed to advise the juvenile court of that fact, or the fact that it had not been performed. Furthermore, Anderson knew that Dr. Johnson breached a prior stipulation by not performing independent testing, but he failed to inform the juvenile court of such fact. The record reflects:

1) As of September 4, 2003, Anderson knew that definitive diagnostic testing had never been run on Parker Jensen's tissue, and that the juvenile court was unaware of that fact. Yet he did not disclose that information to the court at hearings on September 3 or September 5, 2003. (Pl.St.Facts, ¶ 397.)

2) As of September 23, 2003, Anderson was informed by Dr. Martin Johnston that (a) Johnston intended to recommend chemotherapy even though the results of his independent testing was not in yet, and (b) he (Johnston) was going to wait a couple of days to tell the Jensens his conclusions. (Pl.St.Facts, ¶ 416.) Anderson knew that, under a stipulation between DCFS and Jensen, Johnston was not to decide on the diagnosis or treatment unless and until he had completed independent testing. (*Id.*, ¶ 417.) In spite of his knowledge that the State had materially breached the stipulation, Anderson did not inform the juvenile court.

Anderson asserts that there is no evidence he had any way of knowing that Johnston's diagnosis of Parker before the completion of genetic testing was a violation of the stipulation. But Anderson admits that he understood that the entire purpose of Johnston's evaluation was to obtain an independent, neutral evaluation of Parker's condition, and that Johnston was not going to arrive at any treating recommendations until the results of independent testing were recieved. (Pl.St.Facts, ¶ 401). Contrary to the stipulation, however, Johnston told Anderson he had a strong inclination to follow the treatment recommendations made by the other doctors. This was a clear violation of the September 5 stipulation. Anderson's failure to inform the Court of that fact, standing alone, violated the Jensens' rights to family association and to direct their son's medical care guaranteed under Article I, Sections 1 and 7 of the Utah Constitution.

5. *Anderson violated Plaintiffs' rights under Article I, Sections 1 and 7 by failing to train DCFS caseworkers like Kari Cunningham.*

With respect to training, Anderson had a statutorily imposed duty to ensure that DCFS employees were fully trained to comply with the law. U.C.A. § 62A-4a-105.5(1) (2003) (“The director shall ensure that all employees are fully trained to comply with state and federal law, administrative rules, and division policy in order to effectively carry out their assigned duties and functions.”); *see also* U.C.A. § 62A-4a-107(1) (2003) (Child Welfare Training director is appointed by, and serves at the pleasure of, the director of DCFS). An issue of fact exists as to Anderson’s authority with regard to training his subordinates, and whether he fulfilled his statutory duties to do so.

6. *Anderson violated Plaintiffs' rights under Article I, Sections 1 and 7 by instituting, affirming, or allowing a DCFS policy of not investigating medical neglect allegations from doctors at PCMC.*

Anderson is liable for DCFS’ policy of not investigating allegations of medical neglect from PCMC doctors. Anderson asserts that he had no authority to change, modify, or adopt DCFS policy. Therefore, he says, he cannot be held responsible for implementing an unconstitutional policy. Anderson gives himself too little credit. He admitted in his deposition that he had the ability to “influence” how DCFS practices were carried out. (Anderson depo., p. 30.) In the Jensen case, where there was no written policy addressing the circumstance of medical neglect allegations made by specific institutions such as PCMC, the carrying out of the policy *is* the policy.

Furthermore, Anderson interpreted Division policy as permitting DCFS case workers to forego an investigation of medical neglect allegations if the reporting doctor was assigned to PCMC. (Cunningham depo., pp. 212-213 (Anderson told Cunningham that she had acted appropriately in her handling of the case; Cunningham’s understanding was that her actions were consistent with DCFS policy).) Such a policy violates both Sections 1 and 7 by impermissibly interfering with the parent-child relationship and the right of family association.

B. Article I, Section 14

The defendants’ actions described above involving material misrepresentations and omissions caused the imposition of both custodial and noncustodial seizures of Plaintiffs. Custodial seizure is, as the term suggests, a physical arrest. A continuing seizure is one that results from state-imposed conditions that seriously, but not physically, restrict liberty.

The continuing seizure concept was originally articulated by Justice Ginsburg in her concurring opinion in the case of *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807 (1994). Justice Ginsburg recognized that a citizen who is released from physical custody may be subject to state imposed conditions that restrict liberty, including conditions of bail, mandatory court appearances, restrictions on freedom to travel, diminishment of employment prospects, reputational harm, and “the financial and emotional strain of preparing a defense.” *Id.* at 278. In such a case, the person remains “seized” for trial, “so long as he is bound to appear in court and answer the state’s charges.” *Id.* at 279. Justices Souter’s and Stevens’ concurring opinions in *Albright* expressed agreement with Justice Ginsburg’s view that “the initial seizure of petitioner continued until his discharge.” *Id.* at 307.

Holding in accordance with Justice Ginsberg's opinion in *Albright*, the Second Circuit has concluded that non-custodial seizures that impose serious restraints on liberty are seizures under the Fourth Amendment. In *Murphy v. Lynn*, 118 F.3d 938, 945 (2nd Cir. 1997), for example, the Second Circuit concluded that a post-arraignment order prohibiting an arrestee from leaving the State of New York and requiring that he attend court appointments amounted to a "seizure" within the purview of the Fourth Amendment.

Other circuit courts have concluded that, where the conditions of release are more severe than the typical case, a Fourth Amendment seizure takes place. See *Evans v. Ball*, 168 F.3d 856, 860-61 (5th Cir.1999)(overruled on other grounds by *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir.2003))(holding that a plaintiff had alleged Fourth Amendment seizure where, in addition to being summoned to appear and answer to charges, plaintiff was forced to sign personal recognizance bond, and was required to report regularly to pretrial services and obtain permission before leaving the state); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3rd Cir.1998) (finding seizure where plaintiff was required to post \$10,000 bond, attend all court hearings, maintain weekly contact with pretrial services, and refrain from traveling outside New Jersey and Pennsylvania); *DiBella v. Borough of Beachwood*, 407 F.3d 599, 601-603 (3rd Cir. 2005)("...some onerous types of pretrial, non-custodial restrictions constitute a Fourth Amendment seizure.")

Several federal district courts have relied upon *Murphy*, as well as Justice Ginsburg's concurrence in *Albright*, to conclude that a plaintiff who suffers significant restrictions, even in the absence of travel restrictions, may nevertheless assert fourth amendment violations. See,

*e.g.*, *Kirk v. Metropolitan Transp. Authority*, 2001 WL 258605 (S.D.N.Y. 2001); *Sassower v. City of White Plains*, 992 F.Supp. 652, 656 (S.D.N.Y.1998); *Willner v. Town of North Hempstead*, 977 F.Supp. 182, 189 (E.D.N.Y.1997); *Martinez v. Gayson*, 1998 WL 564385 (E.D.N.Y. 1998).

The Utah Supreme Court would similarly construe the protections of Section 14, particularly given the Framers' experience with the polygamy prosecutions. Many members of the Church had been forced into hiding or to abandon their families during the 1880s, which was no less an infringement of their physical liberty than an arrest. (In 1887, less than a decade before the Utah Constitution was drafted, LDS President John Taylor had died while in hiding.) The Framers would have been very aware that a deprivation of freedom by the government can take forms beyond physical restraint.

In this case, the Jensens suffered such "significant, ongoing deprivation[s] of liberty" as a result of the juvenile court proceedings that it is clear they were seized for Section 14 purposes. Justice Ginsberg recognized in *Albright* that numerous kinds of conditions imposed by government can effectuate a seizure for Fourth Amendment purposes, including 1) bail payments, 2) mandatory court appearances, 3) restrictions on freedom to travel, 4) diminishment of employment prospects, 5) reputational harm, and 6) the "financial and emotional strain of preparing a defense." *Albright, supra*, at 279. The government imposed all of these conditions on the Jensens during the course of the juvenile proceedings:

The Jensens were unable to return to the state of Utah (their home) without the threat of arrest and removal of their child. They were unable to take their child for an evaluation in

Houston, and to other physicians of their choosing, because the State forbade it. They were subjected to mandatory court appearances. They were ordered to give up their passports. Daren Jensen lost his job, and was exposed to serious diminishment of other employment prospects, both because he was terminated from his previous job, and because he had to devote his time, finances, energy and efforts to attempting to protect his and his family's rights.

The Jensens were held up to public ridicule and contempt, and subjected to close media scrutiny. They Jensens endured an enormous financial and emotional strain of defending their family from neglect proceedings that were based upon deceit. These facts rise to the level of a seizure under Article I, Section 14 of the Utah Constitution.

C. Existing Remedies

Defendants assert that plaintiffs' state constitutional claims are precluded because the relief available to plaintiffs under federal law sufficiently redresses their injuries incurred as a result of defendants' violations of the Utah Constitution. Of course, according to defendants, there *is* no relief under federal law, which would seem to preclude that argument.

Moreover, defendants' argument disregards the suggestion in *Spackman* that a plaintiff need only demonstrate that existing *state law* remedies, not federal remedies, are insufficient to redress his or her injuries. *Spackman* at ¶ 24, n. 10 ("We do not reach the question of whether existing federal law remedies should preclude a state court from awarding damages for a state constitutional tort," and citing *Binette v. Sabo*, 710 A.2d 688, 707-08 (1998)(Callahan, C.J., concurring) for proposition that "the relevant inquiry is whether the plaintiff lacks a state remedy"); *see also*, *Brokaw v. Salt Lake County*, 2007 WL 2221065 (D.Utah 2007)(declining to

dismiss state constitutional claims based upon second *Spackman* element and rejecting defendants' argument that federal section 1983 claims sufficiently redressed plaintiff's injuries, and recognizing that "[t]he issue of whether existing federal law remedies provide sufficient redress for a state constitutional claim is still an open question.")

In answering this question, the Court should uphold the long-recognized principles of federalism by giving the Utah Constitution its full import and enforcement. *See State v. Tiedemann*, 2007 UT 49, ¶ 33, 162 P.3d 1106 ("it is part of the inherent logic of federalism that state law be interpreted independently [from] ... federal questions....By looking first to state constitutional principles, we also act in accordance with the original purpose of the federal system.")(internal quotations and citations omitted).

It is important to note that, in deciding to require a plaintiff to demonstrate an insufficient existing *state* remedy, the *Spackman* Court relied on United States Supreme Court cases declining to allow a federal constitutional claim against federal agents, where Congress, the federal legislative body, has enacted federal statutory schemes providing redress for the alleged federal injuries. *Spackman*, *supra*, at ¶ 24, citing *Schweiker v. Chilicky*, 487 U.S. 412, 425, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) and *Bush v. Lucas*, 462 U.S. 367, 378, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983).

If this Court concluded that the existence of a federal remedy precludes a claim for damages for a violation of an independent right guaranteed by the Utah Constitution, thereby determining that remedies available under the United States Constitution supplant remedies under the Utah Constitution, this Court will greatly weaken the efficacy of the Utah Constitution.



Such a ruling would place a chilling effect on future plaintiffs who have suffered injuries as a result of governmental violations of rights guaranteed by the Utah Constitution, and as such, will curtail the development of any meaningful jurisprudence for Utah's constitution.

Defendants also argue that Plaintiffs have sufficient redress for their state constitutional violations through their common law claims. Anderson MSJ Memo at 13; Eisenman MSJ Memo at 13-14. No supporting analysis is provided, nor does any come to mind. Moreover, any remedy available under a common law tort is insufficient to remedy the flagrant violations of the supreme law of the State of Utah that occurred in this case. Foremost, allowing ordinary common law claims to trump state constitutional claims evinces a disregard for the import of our state Utah Constitution. As the Honorable Chief Justice Marshall observed in the Supreme Court's seminal case of *Marbury v. Madison*, a right without a remedy is not a right. 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

For longer than this country has been organized as a collective union, legal scholars have recognized the importance of providing a remedy for the violation of a constitutional right. In Federalist Paper No. 80, Alexander Hamilton wrote:

... there ought always to be a constitutional method of giving efficacy to constitutional provisions. ... No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.

Without the availability of a remedy, a constitutional right is but a hollow shell protecting the citizenry in name only. In the absence of a means to punish the government for violating a provision of a state constitution and to provide Utah citizens with redress for Utah constitutional

injury, Utah's constitution will never deter egregious conduct or protect the rights of citizens. This Court should conclude that any available common law remedies are insufficient to redress the myriad of violations of the Utah Constitution effectuated by Defendants.

D. Equitable Relief

Defendants also suggest that unspecified "equitable relief" might have fixed everything for the Jensens. The Defendants do not indicate what equitable procedure would have compelled them to stop making misrepresentations, or gotten Daren Jensen his job back, or unlocked the handcuffs on his wrists, or paid the Jensens' legal bills, or reimbursed their bond, or salvaged their reputation, or erased their emotional distress. No form of equitable relief could or can compensate the Jensens for their losses. It has been recognized that violation of constitutional rights cannot always be effectively remedied by injunctive relief. *See Spackman*, 2000 UT 87, ¶ 25. *id.*, citing *Bott* ("if prisoners' rights under article I, section 9 are violated, injunctive relief may not be adequate to remedy prisoners' injuries") and citing *Davis v. Passman*, 442 U.S. 228 (1979) (damages were appropriate remedy for unconstitutional termination in light of fact that her former employer was no longer a Congressman). In *Spackman*, the Supreme Court cited the court's observation in *Rockhouse Mountain Property Owners Ass'n, Inc. v. Town of Conway*, 503 A.2d 1385, 1388 (N.H. 1986) that "damages are an inappropriate remedy for a constitutional violation where the alleged injury 'can be undone' by the judiciary." The harm suffered by the Jensens cannot be "undone"; they can only be made whole after the fact, as the Framers would have intended. *See Deseret Irrigation Co. v. McIntyre*, 16 Utah 398, 52 P. 628, 629 (1898)

(“All wrongs are regarded as merely a privation of right, and the natural remedy is to put the injured party in the same position as he was before the wrong was committed”).

**VI EISENMAN IS NOT ENTITLED TO JUDICIAL IMMUNITY FOR HER ACTIONS, OR ALTERNATIVELY, THERE IS A DISPUTE OF FACT IN THAT REGARD.**

Eisenman contends that she is entitled to absolute immunity for all of her actions in this case, because they stemmed from her job as Assistant Attorney General. In support of her arguments regarding absolute immunity, Eisenman cites to the decision of the federal court on Plaintiffs’ federal constitutional claims. However, as explained above, this Court must engage in its own independent analysis and evaluation of the record and facts before it, and may not rely on the federal court’s decision.

When analyzing Eisenman’s conduct under Utah law, it becomes apparent that she is not entitled to absolute judicial immunity for any of her conduct in this case. Utah recognizes judicial immunity for judicial officers and those individuals who perform “functions closely related to the judicial process.” *Sanders v. Leavitt*, 37 P.3d 1052, 2001 UT 78, ¶ 19. “Whether a person or entity should be afforded judicial immunity depends upon the specific work or function performed.” *Bailey v. Utah State Bar*, 846 P.2d 1278, 1280 (Utah 1993). Although judicial immunity extends to acts closely related to the judicial process, judicial immunity does *not* extend to administrative or investigatory functions. *Cline v. State, Div. of Child and Family Services*, 142 P.3d 127, 2005 UT App 498, ¶ 40.

Although neither the Utah Supreme Court nor the Utah Court of Appeals has addressed the specific issue, this Court should conclude that a prosecutor is not entitled to judicial

immunity for actions involving wrongful misrepresentations and material omissions. In *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), the United States Supreme Court held that a prosecutor who engages in misrepresentations and omissions is not entitled to absolute immunity under federal law. The result would be the same under the Utah Constitution, particularly in light of the unique hardships visited upon early Utahns by misrepresentations and false testimony by government actors. *See* pp. 2-23, *supra*.

As discussed at pp. 43-51, above, Eisenman's conduct was replete with material misrepresentations and omissions. Accordingly, she is not entitled to absolute immunity for flagrant violations of the Utah Constitution. Furthermore, a fact issue exists as to whether Eisenman's conduct was investigatory in nature, which would also preclude any entitlement to absolute immunity. There is evidence in the record that Eisenman conducted her own investigation in the Jensen case, which she deliberately skewed. For example, when Eisenman faxed certain records to Dr. Albritton prior to the July 10 hearing, she omitted all documents supportive of the Jensens' questions about the diagnosis, such as: the original PCMC pathology report, which suggested that cytogenetic testing might be informative; the original LabCorp report, which had a different diagnosis than PCMC; and Dr. Birkmayer's letters, which explained why he questioned whether Parker had Ewing's at all. (Pl.St.Facts, ¶¶ 228-229.) Eisenman also represented in an e-mail to Dr. Birkmayer that the American Academy of Pediatrics had enacted a standard of care for the United States, which she knew was untrue. (*Id.*, ¶¶ 214-215.)

**VII THE UNDISPUTED FACTS REGARDING DEFENDANTS' CONDUCT SATISFY THE ELEMENTS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, OR ALTERNATIVELY, THERE IS A GENUINE DISPUTE OF FACT THAT THAT REGARD.**

A plaintiff proves intentional infliction of emotional distress by demonstrating that the defendant acted (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality. *Gulbraa v. Corporation of the President of the Church of Jesus Christ*, 159 P.3d 392, 2007 UT App 126 (Utah App. 2007). Moreover, pursuant to the Utah Model Uniform Jury Instructions Reckless conduct is sufficient to satisfy the state of mind requirement of intentional infliction of emotional distress. It is sufficient that:

the defendant either intended to cause emotional distress, or acted with reckless disregard of the probability of causing that distress. This means that the plaintiff must show that the defendant's conduct (1) was for the purpose of inflicting emotional distress, or (2) that a reasonable person would have known that emotional distress would result.

Utah Model Uniform Jury Instruction 22.4.

If a jury believes plaintiffs' evidence, it will conclude that the defendants relied on misrepresentations and half-truths to force a 12-year-old boy to have unnecessary chemotherapy. Defendants' alleged actions would offend any generally accepted standard of decency and morality, and a fact issue exists in that regard.

**VIII DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' MALICIOUS PROSECUTION CLAIM, OR AT THE LEAST, THERE IS A DISPUTE OF FACT IN THAT REGARD.**

A. Utah does not recognize absolute immunity as a defense to malicious prosecution claims for social workers like Cunningham who make wrongful misrepresentations and omissions.

Utah has established judicial immunity for judicial officers and those individuals who perform functions closely related to the judicial process. *Sanders, supra*, at ¶ 19. Although neither the Utah Supreme Court nor the Utah Court of Appeals has addressed the specific issue, a child social worker is not entitled to judicial immunity for actions involving wrongful misrepresentations and material omissions. Additionally, judicial immunity does not extend to administrative or investigatory functions. *Cline v. State, Div. of Child and Family Services*, 142 P.3d 127, 2005 UT App 498, ¶ 40. As set forth in pages #-#, above, Cunningham's conduct was replete with material misrepresentations and omissions that flagrantly violated Article I, Sections 1, 7, and 14, and was investigatory in nature. Cunningham is not entitled to absolute immunity for flagrant constitutional violations for investigative activities.

B. Criminal Proceedings

i. *The criminal proceedings were not supported by probable cause.*

Eisenman and the other defendants argue that the criminal charges against Barbara and Daren Jensen were supported by probable cause, and therefore cannot form the basis of a malicious prosecution claim. That is a contested issue. For example, one component of the

criminal charges was the false statement (by Eisenman, apparently) that the Jensens had “fled the state” after entry of an order. *See* Pls’ St. Facts ¶¶ 344-346.

Defendants’ argument is that plaintiffs cannot demonstrate that the criminal charges against were not supported by probable cause, because Barbara and Daren entered into pleas in abeyance and, defendants argue, in so doing admitted the existence of probable cause. *See* Eisenman Memo at 21, Anderson Memo at 17.

Initially, plaintiffs note that both Barbara and Daren Jensen were arrested on the criminal charges. (*See* Pl.St.Facts, ¶ 401.) In any event, however, Judge Cassell ruled that the plea bargains do not bar the Jensens’ claims, so long as evidence is offered that: (1) the criminal charges were a result of misrepresentations or omissions; and/or (2) Barbara and Daren were coerced into signing it. *P.J. ex rel. Jensen v. Utah*, 2006 WL 1702585 at \* 11 (D.Utah 2006). Such evidence has been adduced. (Pl.St.Facts, ¶¶ 328, 344-345, 347, 427.)

Furthermore, the Jensens never admitted that the juvenile court’s orders were based upon truthful allegations, they never admitted that any of the Defendants’ conduct did not violate their constitutional rights, they never admitted that they were not justified in declining compliance with the juvenile court’s custody order, and they never admitted that they did not have any otherwise cognizable defenses to the criminal charges. (*See* Pl.St.Facts, ¶ 428) (plea bargain does not concede absence of defenses to elements of offense).) Accordingly, defendants may not now claim that Plaintiffs’ pleas in abeyance preclude them from establishing that the criminal charges were not supported by probable cause.

- ii. *Eisenman and Cunningham were complaining witnesses in the criminal court proceedings.*

Cunningham contends that she was not a complaining witness in the criminal case against the Jensens, and that as a result she cannot be held liable for malicious prosecution. Cunningham testified that she did not say anything to the Deputy District Attorney before or during the meeting with Ms. Micklos. However, defendant Eisenman contends that Officer Peterson, who provided the probable cause statement for the criminal proceedings, obtained some of his information from Cunningham (Eisenman depo., pp. 230-231), and Cunningham's name does indeed appear on the statement. Therefore, unless defendant Eisenman concedes that Cunningham did not provide any of the information that led to the criminal charges, a factual basis exists on which a jury could find Cunningham at least contributed to the charges. There is also no dispute that Eisenman was a complaining witness, as identified on Officer Peterson's statement. Pls' St. Facts, ¶ 349.<sup>14</sup>

- iii. *Barbara was arrested and otherwise seized in the criminal proceedings.*

Defendants also argue that Barbara Jensen was never arrested and therefore never seized, but that is factually incorrect. Barbara was booked into jail for the felony kidnapping charges on September 10, 2003. Pls' SOF ¶¶ 400. In addition, the Utah Supreme Court would recognize that the substantial restrictions on her liberty rose to the level of a seizure. *See* pp. 66-69, *supra*.

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<sup>14</sup> Cunningham would also be liable for the criminal charges under a theory of inseparable liability, given that her actions combined with the other defendants' to produce a single result, and as a foreseeable consequence of her conduct in the juvenile court case.



- iv. *Plaintiffs are not judicially estopped from disputing certain facts related to the criminal proceedings.*

Defendants, by incorporation, assert that plaintiffs should be judicially estopped from making certain factual allegations in the course of their constitutional claims, because plaintiffs allegedly admitted the elements of the crime of custodial interference in the criminal court proceedings. Defendants' argument fails because, in Utah, judicial estoppel is only available against a party who has acted in "bad faith." See *Orvis v. Johnson*, 177 P.3d 600, 2008 UT 2, ¶ 11, n. 1. ("...the purpose of judicial estoppel is not served 'where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding and where the party seeking to invoke judicial estoppel had equal or better access to the relevant facts'" )(citing *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731 (Utah 1995)).

There is no evidence in the record that Daren or Barbara Jensen acted in bad faith or misrepresented any facts in the criminal proceedings. Rather, as demonstrated by plaintiffs' statement of facts, there is little doubt that the Jensen family was railroaded by defendants, and that defendants' affirmative misrepresentations and material omissions made to the juvenile court, the District Attorney's Office, and the criminal court, all caused independent violations of the Jensens rights guaranteed under the Utah Constitution. As a result, Defendants are precluded from asserting that any factual admissions made in the course of the criminal proceedings affect Plaintiffs' malicious prosecution claim.

- v. *Plaintiffs are relieved from showing that the criminal proceedings terminated in their favor because their pleas in abeyance were coerced.*

Defendants argue that Plaintiffs' claim fails because the criminal proceedings did not terminate in their favor. Defendants argue that, under the common law, the general rule is that dismissal of charges pursuant to agreement by the defendant does not establish termination of those charges in the individual's favor. However, Defendants fail to recognize that, if a jury finds that Plaintiffs' pleas in abeyance to the criminal charges were procured by coercion, they are relieved from showing a favorable termination relative to those proceedings. Defendants' theory works this way: Eisenman and Cunningham, through material misrepresentations and omissions, were able to induce Salt County to file groundless felony kidnapping charges as well as misdemeanor custodial interference charges. Child kidnapping was a first-degree felony for which Utah law imposed mandatory imprisonment upon conviction "of not less than 6, 10, or 15 years and which may be for life." Utah Code Ann. § 76-5-301.1 (2003). (The presumptive minimum sentence was the middle of the three, 10 years. Utah Code Ann. § 76-3-201(7)(a).) "Custodial interference" was a Class A misdemeanor for which the court had discretion to order no imprisonment, or for no more than one year. Unlike felony kidnapping charges, the misdemeanor charge was eligible for a plea in abeyance, pursuant to which no conviction would be entered, and the plea would be withdrawn and the charge dismissed after 12 months. Utah Code Ann. §§ 76-3-204, 76-3-201(2), 77-2a-1, *et seq.* Because the Jensens ultimately agreed to plead in abeyance to the misdemeanor, Defendants say, they are precluded from claiming malicious prosecution as to either of the criminal charges.

All general rules have exceptions, and the Defendants' argument overlooks a big one: The rule upon which they rely does not apply if the individual's agreement was procured unfairly, such as through fraud, duress, or coercion. See *P.J. ex rel. Jensen v. Utah*, 2006 WL 1702585, \*11 (D.Utah 2006); see also *Robertson v. Bell*, 57 Wash.2d 505, 358 P.2d 149 (Wash. 1961)(Rule that favorable termination of a criminal proceeding may not be made a basis of action for malicious prosecution if termination is predicated upon a dismissal without regard to merits as result of compromise or settlement of parties is not applicable if settlement was not voluntarily and understandingly made but was made under coercion or duress, nor where dismissal is not shown to have been the result of a valid compromise or settlement.); *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir. 2001); *Blase v. Appicelli*, 489 N.W.2d 129, 132 (Mich. 1992) ("Although no published opinion in Michigan has addressed this issue, other jurisdictions have held that a settlement or compromise brought about by duress or coercion will not bar an action for malicious prosecution"); *Garrick v. Kelly*, 649 F.Supp. 607, 611 (E.D. Va. 1986) ("weight of authority" is that invalid compromise does not bar malicious prosecution claim; "the defense of compromise is for the jury unless it is uncontested as a factual matter"); *Gowin v. Heider*, 386 P.2d 1, 13-14 (Or. 1963) (recognizing general rule, but noting that "[I]f... a settlement is not the free and voluntary act of the plaintiff in malicious prosecution, but is brought about by duress practiced upon him by the defendant, the rule just stated is without application"); *Robertson v. Bell*, 358 P.2d 149, 153 (Wash. 1961) ("The [general] rule is not applied in cases where the settlement was not voluntarily and understandingly made, but was made under coercion or duress, nor where the dismissal is not shown to have been the result of a

valid compromise or settlement”); *George v. Leonard*, 71 F.Supp. 665, 666 (E.D.S.C. 1947) (compromise not voluntarily or freely made, or made under duress or coercion, does not bar malicious prosecution claim); *Piechowiak v. Bissell*, 9 N.W.2d 685, 689 (Mich. 1943) (plea bargain is not conclusive evidence of probable cause on charge to which party pled guilty if “such plea was accomplished by fraudulent means”); *Schwartz v. Schwartz*, 240 N.W. 177, 181 (Wis. 1932) (agreement entered into by woman to avoid being taken to jail on arrest warrant did not bar later malicious prosecution action; recognizing exception to general rule “where the procurement or compromise was induced by duress”); *Lyons v. Davy-Pocahontas Coal Co.*, 84 S.E. 744 (W. Va. 1915) allowing malicious prosecution claim by plaintiff who was wrongfully arrested at instigation of his landlord and who procured release by signing agreement not to sue; “Such wrongs ought not to occur in a free country, governed by law. . . . [Plaintiff] had a right, under the circumstances of this case, to prove that he signed it in order to obtain his liberty”); *White v. Int’l Text-Book Co.*, 136 N.W. 121, 123, 124 (Iowa 1912) (“exceptions [to general rule] are created to the effect that the settlement must have been voluntarily and understandingly made. . . . if the settlement is procured by fraud or duress, the dismissal of the proceedings by the prosecutor is such a termination of the case as will authorize an action for malicious prosecution”); *Morton v. Young*, 55 Me. 24, 27-28 (1867) (regarding allegation that resolution of underlying proceedings by agreement barred malicious prosecution claim, “[t]he same legal consequences do not follow acts done under duress of arrest and protest, as when done freely and voluntarily,—under the abuse, as under the legitimate use of legal process . . . The law does not make successful wrong a shield to protect its perpetrator from liability to afford redress to the

injured party”); *Watkins v. Baird*, 6 Mass. 506 (1810); 52 AM JUR 2D MALICIOUS PROSECUTION § 38.

To illustrate, New York’s high court once offered this hypothetical:

Take a case like this: A poor and helpless woman is arrested and the police justice informs her before he makes his final decision that he is inclined to hold her to bail, and she being friendless and unable to furnish bail, promises good behavior in the future if he will discharge her, and then he enters a discharge. What reason can there be for holding in such a case, if she can show that the criminal proceeding was instituted maliciously and without probable cause, that she may not maintain her action for malicious prosecution? . . . [P]roof that the discharge was made under such circumstances cannot upon principle furnish an absolute bar to the action.

*Robbins v. Robbins*, 30 N.E. 977, 978 (N.Y. 1892).

This exception is a corollary of the well-established common law rule that even a conviction does not preclude a malicious prosecution claim if the plaintiff can show it was obtained through fraud or duress. *See Restatement (Second) of Torts*, § 667; *see also Kennedy v. Burbidge*, 54 Utah 497, 183 P. 325, 327 (1919) (conviction “procured by fraud, perjury, or other undue or unfair means employed by the defendant” in malicious prosecution case is “worthless as evidence of probable cause”); *Olson v. Independent Order of Foresters*, 7 Utah 2d 322, 324 P.2d 1012 (1958) (order binding individual over does not establish probable cause for offense if it was “obtained by fraud, perjury or other corrupt means . . . or was procured through by false testimony offered by the prosecutor or given in his behalf”).

The common law exception also relates to the principle that, when two charges or civil claims are brought for which probable cause exists only as to one, a malicious prosecution claim is not barred on the unfounded charge. The courts’ concern in that instance is that parties who

initiate wrongful proceedings should not be able to insulate themselves from liability by trumping up the charges, knowing that the other party will likely be coerced into pleading to the far less serious offense. Thus, the Second Circuit has rejected an argument that a conviction on a lesser charge bars a plaintiff from alleging malicious prosecution on a more serious charge:

As disorderly conduct is a lesser charge than resisting arrest and assaulting an officer, . . . we should not allow a finding of probable cause on this charge to foreclose a malicious prosecution cause of action on charges requiring different, and more culpable, behavior. If the rule were the one followed by the district court, an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses.

*Posr v. Doherty*, 944 F.2d 91, 100 (2nd Cir. 1991).

Quoting from earlier state and extra-jurisdictional decisions, the California Court of Appeal summarized the reasoning of these decisions:

The authorities show . . . that, in order to maintain an action like this [malicious prosecution'], “it is not necessary that the whole proceeding be utterly groundless, for, if groundless charges are maliciously and without probable cause, coupled with others which are well founded, they are not on that account the less injurious, and, therefore, constitute a valid cause of action.

\* \* \*

Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability, because of the injured party’s inability to divide his damages between the two with delicate nicety. Such, we think, is not the law.

\* \* \*

[L]itigation that is groundless and motivated by malice . . . has no place in our judicial system, and we are therefore unwilling to bear its costs. After careful consideration, we see no reason to reach a different result when the litigation in question is the assertion of baseless and malicious grounds of liability in a single

lawsuit: in both instances the balance tips in favor of the policy of making whole the individuals harmed by such abuse of our courts.

*Mabie v. Hyatt*, 61 Cal.App.4th 581, 590, 71 Cal.Rptr.2d 675 (1998), *review denied* (emphasis added; citations omitted); *see also Bertero v. National General Corp.* (1974) 529 P.2d 608, 619 (Calif. 1974) (We see no reason for permitting plaintiffs . . . to pursue shotgun tactics by proceeding on counts and theories which they know or should know to be groundless”).

In accordance with the above principles, the Sixth Circuit recently followed the common law rule and noted that a plea bargain “procured by unfair means” would not bar a malicious prosecution suit:

Thus, if the state threatened to prosecute Kostrzewa on a charge not supported by probable cause and promised to drop that charge if he pleaded guilty to another offense, the resulting plea bargain should not serve as a shield for an officer later charged with malicious prosecution. If Sergeant McWilliams charged plaintiff with obstructing a police officer simply because he demanded medical attention when at the police station, we cannot conclude that it is beyond doubt that there was probable cause to support this obstruction charge. Furthermore, if this charge, potentially devoid of probable cause, was used to procure Kostrzewa’s guilty plea for driving without a valid license, then plaintiff’s malicious prosecution claim would survive the motion to dismiss despite the existence of a plea agreement.

*Kostrzewa v. City of Troy*, 247 F.3d 633, 643 n.6 (6th Cir. 2001) (emphasis added).

The concerns expressed by the above federal and state courts are manifest here. By falsely telling Salt Lake County that the Jensens had kidnapped a child, defendants Eisenman and Cunningham ensured the filing of felony charges that carried mandatory imprisonment and high bail. They did so with the knowledge and/or for the reason that virtually anyone in the Jensens’ position would be forced to plead to the relatively minor offense joined with it.

An issue of fact exists with regard to whether plaintiffs can show that their agreement to the plea in abeyance on the misdemeanor charge was involuntarily, and/or procured by fraud, coercion, duress, or other “unfair means.” The extent of Defendants’ misrepresentations (analogous to fraud) has been addressed above. With respect to duress, the court must look to the standards articulated in Sections 175 and 176 of the *Restatement (Second) of Torts*, §§ 175-176. See *Andreini v. Hultgren*, 860 P.2d 916 (Utah 1993).

Section 175 states that an agreement may be found to have resulted from duress “if a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.” *Andreini*, 860 P.2d at 921. “[W]hether duress existed and was sufficient to void consent is a mixed question of law and fact[.]” *In re B.T.D.*, 2003 UT App 99, 68 P.3d 1021 (applying *Andreini* in case challenging voluntariness of consent to adoption).

Under Section 175, duress can be shown “[i]f a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative . . . .” In analyzing the “threat” component, the *Restatement* notes that “[t]he threat may be expressed in words or it may be inferred from words or other conduct. Past events often import a threat. Thus, if one person strikes or imprisons another, the conduct may amount to duress because of the threat of further blows or continued imprisonment that is implied.” *Id.*, cmt. a.

A threat is improper if “what is threatened is a crime or a tort . . . [or] a criminal prosecution.” *Id.*, § 176(1). A threat may also be improper “if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of



assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.” *Id.*, § 176(2). The threats with which the Jensens were confronted fall under all of these provisions.

When considering whether a reasonable alternative exists, “[t]he standard is a practical one under which account must be taken of the exigencies in which the victim finds himself[.]” *Id.*, cmt. b. Whether the victim has a reasonable alternative is a mixed question of law and fact, to be answered by the court only in “clear” cases. *Id.*

The Utah Supreme Court’s application of these criteria in *Andreini* is instructive. In that case, the plaintiff argued that he had signed a physician’s waiver of liability under duress, because the doctor knew he needed surgery on his hands but was unwilling to perform it without the release. The Supreme Court reversed a summary judgment for the defendant, holding that genuine issues of material fact existed as to whether the defendant had made an improper threat or inducement, in the form of an alleged promise to correct the plaintiff’s medical condition, and whether the “resulting exchange” – a failed surgical procedure for the plaintiff versus a release of all claims for the defendant – was “not on fair terms”. *Id.* at 922. The court likewise found a question of fact regarding the allegation that the doctor knew the condition of the plaintiff’s hands was worsening and that he needed surgery immediately, which a jury could find to have constituted “unfair dealing that significantly increased the effectiveness of [the defendant’s] threat not to undertake the corrective surgery.” *Id.*

Having found a fact issue as to whether the defendant made an improper threat, the court next concluded that a fact issue also existed as to whether the plaintiff had reasonable

alternatives. “[T]he victim does not need to be in a life-threatening situation for a jury to find that there were no reasonable alternatives,” the court noted. *Id.* at 923, *citing* an observation in the *Restatement* that “courts originally restricted duress to threats involving loss of life, mayhem or imprisonment.” Under the modern approach, the reasonable-alternative standard “has been greatly relaxed and, in order to constitute duress, the threat need only be improper.” *Id.* In *Andreini*, the plaintiff’s alternative was not to have this doctor perform the surgery. The jury could find that to mean he had no reasonable alternatives, the court held.

In this case, by October 2003, Daren Jensen had lost his job because of the Defendants’ actions, and would be unable to look for one while charges were pending. The Jensens owed thousands of dollars in attorney fees that they already could not pay. They had been booked into jail on arrest warrants and forced to pay more than \$5,000 in bonds to be released. They had no money and no health insurance for their family. Evidence had consistently been fabricated or manipulated against them by the government official Defendants. They had been excoriated in the media. They had been asked to turn in their LDS Temple recommendation cards because of the pending felony charges. They were facing the potential loss of their children if the State went after them as a result of the criminal charges that the State had procured in the first place.

As most people would be compelled to do under such circumstances, the Jensens took the plea in abeyance on the misdemeanor charge.<sup>15</sup> Under the particular circumstances of this case,

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<sup>15</sup> See Docket, Case No. 031905430, Third District Court, Oct. 2, 2003. (As the University Defendants have stated, court proceedings referenced in the Complaint may be considered within the bounds of a motion to dismiss.) Plaintiffs also note that, although the County filed the charges, as the complaining witnesses and parties, Defendants exercised control over the

a question of fact exists as to whether the Jensens' plea in abeyance was completely voluntary, and/or whether it was procured by unfair means, fraud, duress, coercion, or other wrongful act.

Plaintiffs have adduced evidence to demonstrate coercion through unfair means:

1. The felony charges were filed due to defendants' intentional and/or reckless misrepresentations to the District Attorney's office. (Pl.St.Facts, ¶¶ 197, 201, 214-215, 224-229, 234-236, 249, 283-285, 290-291, 314, 326.) That the felony charges were "trumped up" due to defendants' misrepresentations is further evidenced by the fact that, in attorney Nakamura's experience, it is rare for a plea bargain to drop a first-degree felony charges in exchange for a misdemeanor plea, essentially a three-step reduction. (*Id.*, ¶ 427.)

2. The felony charges carried mandatory jail time that exceeded the minimum sentence for first-degree murder. (Pl.St.Facts, ¶ 348.)

3. Going to trial on a first-degree felony case would have cost the Jensens thousands of dollars, even if they won, and the Jensens were out of money. (Pl.St.Facts, ¶¶ 395, 426.)

Consequently, Defendants are not entitled to summary judgment on Plaintiffs' wrongful initiation of criminal process claim as it relates to the criminal proceedings.

C. Juvenile court proceedings

1. *The juvenile court proceedings terminated in the Plaintiffs' favor, or alternatively, "unusual circumstances" justify dispensing with such requirement.*

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disposition of those charges. *See, e.g.*, Tape of Hearing, Sept. 3, 2003 (DCFS/State arranging for county warrants to be suspended during appearance of Jensens in court).

In Utah, the wrongful use of civil proceedings “consists in instituting or maintaining civil proceedings for an improper purpose and without a justifiable basis.” *Gilbert v. Ince*, 1999 UT 65, ¶ 19, 981 P.2d 841. “One who takes an active part in the initiation, continuation, or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he [or she] acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) ... the proceedings have terminated in favor of the person against whom they are brought.” *Id.* (quoting Restatement (Second) of Torts § 674).

In seeking dismissal of the plaintiffs’ claim for wrongful initiation of the juvenile court proceedings, Anderson asserts out that he was not involved in initiating the juvenile proceedings originally, and therefore, that he cannot be held liable for wrongful initial of civil process. Although it is true that Anderson was not involved until after the juvenile court proceedings commenced, as noted above, a complaining witness is not only a witness who encourages or initiates the filing of a proceeding, but also includes a person who takes part in the continuation or perpetuation of a proceeding. Anderson continued and perpetuated the juvenile court proceedings by failing to order withdrawal of the medical neglect petition.

Apparently recognizing that principle, Anderson argues that, even though he was Director of DCFS, he did not have the authority to unilaterally drop DCFS’s neglect petition. That is directly contradicted by the evidence. Anderson did unilaterally drop the petition. He testified that he had the authority to sign off on the dismissal, and that he did so. (Pl.St.Facts, ¶

389.) He cannot now deny the same authority that he (1) exercised in 2003, and (2) admitted in his deposition. At the very least, a question of fact exists as to his authority.

Finally, Anderson's allegations to the contrary, the juvenile court proceedings terminated in favor of the Jensens. The medical neglect petition was dismissed and the state's and DCFS's involvement in the Jensen family ceased. Anderson argues that the dismissal of the juvenile court petition was not "on the merits," as is required for a wrongful initiation of civil process claim under *Hatch v. Davis*, 102 P.3d 774, Utah App., 2004, 2004 UT App 378, ¶ 29. In *Hatch*, the Utah Court of Appeals considered whether a proceeding must always be terminated in favor of the plaintiff and "on the merits," or whether the Utah Supreme Court intended to allow a plaintiff to proceed with a claim in "the most unusual circumstances," as the Utah Supreme Court had previously indicated would be allowed in *Baird v. Intermountain School Federal Credit Union*, 555 P.2d 877, 878 (Utah 1976). The Court of Appeals ultimately concluded that the Supreme Court's statement that a wrongful initiation of civil process claim could survive a termination not on the merits in "unusual circumstances" was merely "dicta." *Hatch* at ¶ 29. However, the Utah Supreme Court has cited *Baird* for the "unusual circumstances" exception when analyzing the elements of a wrongful initiation of civil process claim, in order to note how Utah law varies from the approach of the *Restatement (Second) of Torts*. *Gilbert*, 1999 UT 65 at ¶ 19. The *Gilbert* Court did not note any concerns about the viability of the unusual circumstance exception, and presumably the Supreme Court would have noted disagreement with the exception if it had any.

Even if the juvenile court proceedings had not terminated in plaintiffs' favor, Plaintiffs should still be allowed to proceed with their wrongful initiation of civil process claim under the "unusual circumstances" exception to the favorable termination element. The nuances of procedure and practice in the informal juvenile court must be considered in evaluating the importance of a favorable termination on the merits. Although the juvenile court's order of dismissal followed the state's decision to withdraw, the guardian ad litem had not so stipulated, and the dismissal did not occur until after an evidentiary hearing at which the GAL elicited evidence as to the Jensens' alleged neglect. The dismissal was, given the unique procedural structure of juvenile court, "on the merits" for purposes of the Jensens' claim.

Additionally, the misrepresentations Defendants made in the course of the juvenile court proceeding also give rise to unusual circumstances that relieve the Jensens from proving a favorable termination. In other words, but for the misrepresentations and material omissions of Defendants, Plaintiffs would have been able to obtain a favorable termination on the merits. As a result, even if there was not a technical and formal termination on the merits in favor of the Jensens in the juvenile court proceedings, they should nonetheless be allowed to proceed with their wrongful initiation of civil process claim due to the unusual and unique circumstances presented by the juvenile court procedure.

ii. *The juvenile court proceedings were not supported by probable cause.*

Defendants argue that Plaintiffs' wrongful initiation of civil process claim related to the juvenile court proceedings must be dismissed because the juvenile court proceedings was supported by probable cause and brought for a proper purpose. In this case, the purpose for

which the proceedings were brought is a hotly contested issue of fact. Moreover, any alleged probable cause is vitiated by the defendants' material omissions – a half truth can be equally or more misleading than an overt misrepresentation.<sup>16</sup>

**IX. CUNNINGHAM IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT SHE ALLEGEDLY RELIED UPON ADVICE OF COUNSEL.**

In her motion, defendant Cunningham acknowledges that no Utah case has ever held that a social worker may claim reliance on advice of counsel to overcome claims that he or she violated rights guaranteed under the Utah Constitution. The only support cited for her argument is federal law, which is not binding upon this Court.

Moreover, even if advice of counsel were available in constitutional claims, Cunningham would not be entitled to judgment as a matter of law. Advice of counsel is an affirmative defense upon which the defendant bears the burden of proof. *Hodges v. Gibson Products Co.*, 811 P.2d 151, 159-160 (Utah 1991). The defense is only available if the defendant proves that she acted in good faith and made a full disclosure of all material facts to the attorney. *Id.* at 160. See *Perkins v. Stephens*, 28 Utah 2d 436, 437, 503 P.2d 1212, 1212 (1972); *Potter v. Utah Drive-Ur-Self System, Inc.*, 11 Utah 2d 133, 135, 355 P.2d 714, 716 (1960); *Cottrell v. Grand Union Tea Co.*, 5 Utah 2d 187, 189, 299 P.2d 622, 623 (1956); *Sweatman v. Linton*, 66 Utah at 218, 241 P. at 312.

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<sup>16</sup> As an example of this, see *Malik v. Arapahoe County Dept. of Social Services*, 191 F.3d 1306 (10th. Cir. 1999).

Here, Cunningham did not provide all material information to her attorney. For example, attorney Eisenman assumed that Cunningham had performed the statutorily required investigation, Pls' SOF ¶ 196, which Cunningham admits was not true. Cunningham did not disclose that tests necessary to confirm the diagnosis had never been run; that, if Parker did have Ewing's sarcoma, it was an atypical form and manifestation, which was one reason that the Jensens were questioning the use of a standard treatment on a non-standard condition; and that Dr. Corwin was a psychiatrist, and not qualified to provide an "independent assessment" of Parker's medical condition, or render a second opinion, or opine whether the Jensens were medically neglectful. (*See* Pl.St.Facts, ¶¶ 165-167.) These failures – which explain some of the glaring misstatements in the affidavits prepared for her by counsel – preclude Cunningham's advice-of-counsel defense, or an issue of fact exists in that regard.

**XI. WAGNER AND ALBRITTON ARE NOT ENTITLED TO GOVERNMENTAL IMMUNITY BECAUSE THE UNDISPUTED FACTS DEMONSTRATE THEY ACTED WITH FRAUD OR MALICE, OR ALTERNATIVELY, THERE IS A GENUINE DISPUTE OF MATERIAL FACT.**

In 2003, a governmental actor was not entitled to governmental immunity where he or she acted with fraud or malice, or where he or she gave false testimony under oath. U.C.A. § 63-30-4(b)(2003). As set forth above, there is ample evidence upon which this Court may conclude that Defendants Wagner and Albritton acted with fraud and malice, and that they gave false testimony to the juvenile court under oath. Because Plaintiffs have presented sufficient evidence of fraud or malice in addition to false testimony, or at the least have raised a dispute of fact in that regard, summary judgment on the basis of governmental immunity must be denied.



**XI. PLAINTIFFS HAVE SET FORTH SUFFICIENT EVIDENCE TO  
SUPPORT THEIR CLAIM FOR PUNITIVE DAMAGES.**

The evidence set forth in Plaintiffs' Statement of Additional Facts, and as elaborated upon above, is more than sufficient to demonstrate reckless or wanton misconduct. *See pp. 40-69, supra.*

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court deny Defendants' Motions for Summary Judgment.

DATED this 9th day of January, 2009.

CHRISTENSEN & JENSEN, P.C.

/s/ Karra J. Porter

Roger P. Christensen

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*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

This is to certify that on the 9th day of January, 2009, a true and correct copy of the foregoing was e-mailed and mailed, first-class postage prepaid, to:

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