



FILED
ALAMEDA COUNTY

JUL - 7 2017

CLERK OF THE SUPERIOR COURT

By [Signature] DEPUTY

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10 FREDERICK S. ROSEN, M.D.

11 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

12 LATASHA NAILAH SPEARS
13 WINKFIELD; MARVIN WINKFIELD;
14 SANDRA CHATMAN; AND JAH
15 MCMATH, A MINOR, BY AND
16 THROUGH HER GUARDIAN AD LITEM,
17 LATASHA NAILAH SPEARS
18 WINKFIELD,,
19

20 Plaintiffs,

21 v.

22 FREDERICK S. ROSEN, M.D.; UCSF
23 BENIOFF CHILDREN'S HOSPITAL
24 OAKLAND (formerly Children's Hospital &
25 Research Center of Oakland); MILTON
26 McMATH, a nominal defendant, and DOES
27 1 THROUGH 100,
28

Defendants.

No.: RG15760730
ASSIGNED FOR ALL PURPOSES TO
STEPHEN PULIDO
DEPARTMENT 16

**SECOND SUPPLEMENTAL
DECLARATION OF JENNIFER
STILL, ESQ., ADDRESSING
PLAINTIFFS' REFUSAL TO
PROVIDE AUTHENTICATION OF
THE VIDEO RECORDINGS**

Reservation #: R-1838158

Date: July 13, 2017
Time: 3:00 p.m.
Dept: 16

Complaint Filed: March 3, 2015
Date of Trial: None set

BY FAX

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Attorneys for Defendant
ROBERT M. WESMAN, M.D.

1 I, Jennifer Still, Esq., declare:

2 1. I am an attorney at law duly licensed to practice before the courts of the State of
3 California. I am a member of the law offices of Hinshaw, Marsh, Still & Hinshaw LLP,
4 attorneys for defendant Frederick S. Rosen, M.D., herein.

5 2. In preparing defendants' reply brief filed in support of defendants' motion for
6 summary adjudication, I neglected to attach a relevant letter to the "Supplemental Declaration
7 of Jennifer Still, Esq., Addressing Plaintiffs' Refusal to Provide Authentication of the Video
8 Recordings" filed July 6, 2017 ("Supplemental Declaration"). The letter, attached hereto,
9 pertains to plaintiffs and their attorneys' refusal to provide documentation that authenticates
10 and lays for proper foundation for the admissibility of any video recordings taken of Jahi
11 McMath and, in particular, the video recordings that were allegedly provided to Dr. Shewmon
12 and are the basis of his opinion that McMath is not dead.

13 3. After receipt of plaintiffs' objections to Dr. Rosen's Custom Interrogatories
14 Nos. 22 and 23, appended to my Supplemental Declaration at Exhibits C and D, on October
15 17, 2016, I wrote to plaintiffs' counsel regarding their objections to my requests seeking
16 authenticating and foundational information regarding the random, uncategorized video
17 recordings produced by plaintiffs. In my letter, dated October 17, 2016, I stated, at page 2:

18 This information is not protected by the attorney-client / work product
19 privilege, or the expert disclosure rules. How do you intend to authenticate the
20 videos if you cannot identify the date of each recording, the location of each
21 recording and the person who made the recording? Defendant has the right to
22 take the deposition of the person(s) who took the videos. If plaintiff does not
23 have the requested information, please so state.

24 With respect to the dates on the CD, it is obvious that the dates that [are] listed
25 on the index to the CD are the dates the recordings were copied. Dr. Shewmon
26 stated in his declaration that he reviewed the 22 recordings in October 2014.
27 Please take a look at the dates of the recordings on the second disc. With
28 exception of the video dated 1/29/14, they are all dated after October 2014.
Four are dated 8/11/16, seven are dated 12/14/15, nine are dated 12/15/15, and
twelve are dated 8/6/16.

Please provide responsive answers.

1 4. A true and correct copy of my October 17, 2016, letter to plaintiffs' counsel is
2 appended hereto. I am informed and believe that I received no response to my letter.

3 5. I am informed and believe that plaintiffs have failed to provide any information
4 that purports to authenticate or lay the proper foundation for the admissibility of any of the
5 video recordings purportedly taken of McMath. (See Evid. Code §§ 1400, 1401.) A
6 videotape is equivalent of a "writing" under Evidence Code and, thus, for purposes of laying
7 foundation and to authenticate, the video recordings should comply with all applicable
8 requirements for admission of a writing. (Evid. Code § 250; *Jones v. City of Los Angeles*
9 (1993) 20 Cal.App.4th 436.) "To be admissible in evidence, an audio or video recording must
10 be authenticated. [Citations.] A video recording is authenticated by testimony or other
11 evidence that it accurately depicts what it purports to show. (*People v. Mayfield* (1997) 14
12 Cal.4th 668, 747.)

13 6. To date, plaintiffs have failed to provide any information that authenticates and
14 lays the foundation for the admissibility of the video recording purportedly reviewed and
15 relied upon by Dr. Shewmon as the basis of his expert opinion in his declaration filed in
16 opposition to defendants' motion for summary adjudication. Dr. Shewmon's expert opinions
17 lack the requisite evidentiary foundation, and render his expert declaration inadmissible.
18 (*Garibay v. Hemmatt* (2008) 161 Cal.App.4th 735, 742-743 [hearsay evidence is not
19 sufficient to raise a triable issue of fact when the party relying on it fails to lay a proper
20 foundation for it].)7.

21 7. As established in my Supplemental Declaration, plaintiffs and their counsel,
22 Bruce Brusavich and Chris Dolan, refused to produce the video recordings that Dr. Shewmon
23 claims he relies upon in support of his opinion that McMath is not brain dead. These video
24 recordings, if they exist, are not before the court, much less authenticated. (See *Garibay v.*
25 *Hemmatt* (2008) 161 Cal.App.4th 735, 742-743 [an expert declaration to support plaintiff's
26 opposition to a motion for summary judgment lacks foundation and is inadmissible when it
27 contains a medical expert opinion based upon unauthenticated medical and hospital records
28

1 not properly before the court].)

2 8. Expert declarations must set forth admissible evidence. (Code Civ. Proc. §
3 437c(d).) Unauthenticated materials incorporated by reference into expert declarations may
4 not be considered by the court in determination a motion for summary judgement or summary
5 adjudication. (Evid. Code §§ 1400, 1401; *Garibay v. Hemmatt* (2008) 161 Cal.App.4th 735,
6 743; *Dixon v. Grace Lines, Inc.* (1972) 27 Cal. App. 3d 278, 290.) It is elementary that
7 expert declarations “may be considered only to the extent that they contain admissible
8 evidence. [Citations.]” (*Franklin v. Benevolent & Protective Order of Elks* (1979) 97
9 Cal.App.3d 915, 930.)

10 I declare under penalty of perjury under the laws of the State of California that all of
11 the foregoing is true and correct, and as to those matters stated on my information and belief,
12 I believe them to be true, and if called upon to testify to the matters herein I can competently
13 testify thereto.

14 Executed on July 7, 2017, at Saratoga, California.

15
16 By:  _____

JENNIFER STILL

BARRY C. MARSH
THOMAS E. STILL
BRADFORD J. HINSHAW
JENNIFER STILL
JENNIFER A. WAGSTER
SCOTT R. KANTER
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October 17, 2016

Via Email: ab@agnewbrusavich.com and U.S. Mail

Bruce M. Brusavich, Esq.
AGNEW & BRUSAVICH
20355 Hawthorne Blvd., 2nd Floor
Torrance, CA 90503

Re: *McMath, et al., vs. Rosen, M.D., et al.*
Meet & Confer Letter

Dear Mr. Brusavich:

I am writing to initiate meet and confer discussions on Ms. Winkfield's Responses to Custom Interrogatories, Set No. 2 and Responses to Requests for Production and Inspection of Documents, Set No. 2.

In addition, several of plaintiffs' responses to defendant's first set of written discovery were not verified. Please provide the verifications.

A. Outstanding Verifications

Please provide verifications to the following discovery responses:

- (1) Jahi McMath, a Minor by Her GAL, Latasha Nailah Spears Winkfield's Responses to Custom Interrogatories, Set No. One
- (2) Winkfield's Responses to Form Interrogatories, Set No. One
- (3) Winkfield's Responses to Requests For Production and Inspection of Documents, Set No. One
- (4) Winkfield's Responses to Requests For Production and Inspection of Documents, Set No. Two

Bruce M. Brusavich, Esq.

October 17, 2016

Page 2

Re: *McMath, et al., vs. Rosen, M.D., et al.*

B. Meet and Confer on Ms. Winkfield's Responses to Custom Interrogatories, Set No. 2 and Responses to Requests for Production and Inspection of Documents, Set No. 2

1. M.s. Winkfield's Responses to Custom Interrogatories, Set No. 2

Plaintiff failed to provide responsive answers to interrogatory Nos. 22-29.

Custom Interrogatory Nos. 22 and 23: These interrogatories asked plaintiff to provide authenticating information for the disc containing 15 video recordings and the disc containing 34 video recordings produced by plaintiffs, including the dates of the recordings, the location of the recording and the identity of the individuals who make the recordings.

This information is not protected by the attorney-client / work product privilege, or the expert disclosure rules. How do you intend to authenticate the videos if you cannot identify the date of each recording, the location of each recording and the person who made the recording? Defendant has the right to take the deposition of the person(s) who took the videos. If plaintiff does not have the requested information, please so state.

With respect to the dates on the CD, it is obvious that the dates that listed on the index to the CD are the dates the recordings were copied. Dr. Shewmon stated in his declaration that he reviewed the 22 recordings in October 2014. Please take a look at the dates of the recordings on the second disc. With exception of the video dated 1/29/14, they are all dated *after* October 2014. Four are dated 8/11/16, seven are dated 12/14/15, nine are dated 12/15/15, and twelve are dated 8/6/16.

Please provide responsive answers.

Custom Interrogatory Nos. 24 - 26: Plaintiffs have alleged that "various health care practitioners" at Rutgers University Medical Center and Saint Peter's University Hospital and "home care providers" supports plaintiff's claim that McMath did not meet the criteria for brain death criteria on December 12, 2013.

This information is not protected by the attorney-client privilege, or the expert disclosure rules. The requested information is discoverable. These individuals are percipient witnesses, not expert witnesses. Please provide a further response that identifies the "various health care providers" and "home care givers" who support plaintiff's claim that McMath did not meet the criteria for brain death. If plaintiff is unaware of any such persons, she must so state in her response.

Please provide responsive answers.

Bruce M. Brusavich, Esq.

October 17, 2016

Page 3

Re: *McMath, et al., vs. Rosen, M.D., et al.*

Custom Interrogatory Nos. 28 and 29: No. 28 asks plaintiffs to provide the names of each and every physician who has performed a neurological examination on McMath since her discharge from Children's Hospital, including the date and location of the exams.

No. 29 asks plaintiffs to provide the names of each and every physician who has performed a brain death examination on McMath applying the criteria set forth in the Guidelines for the Determination of Brain Death in Infants and Children.

This information is not protected by the attorney-client privilege, or expert disclosure rules. The requested information is discoverable. These individuals are percipient witnesses, not expert witnesses. Please provide a further response that identifies the physicians who have performed neurological examinations and complete brain death examinations on McMath. If plaintiff is unaware of any such persons, she must so state in her response.

Plaintiff's response that defendant has equal access to the medical records is simply false. McMath was discharged from Saint Peter's in August 2014. McMath has been in an apartment for more than two years. Defendant is unaware that McMath is under the care of a pediatric neurologist or pediatric intensivist, therefore, how could defendant subpoena records? Furthermore, plaintiff has objected to defendant's discovery of Dr. Shewmon's records and examination.

If there have been any neurologic examinations or brain death examinations attending/treating physicians since McMath was discharged from CHO, please so state. This information is directly relevant to plaintiffs' claim that McMath no longer meets the neurologic criteria for brain death.

Defendant is entitled to know the identities of all physicians who have performed neurologic examinations and brain death examinations on McMath. Please provide responsive answers to Nos. 28 and 29.

2. Ms. Winkfield's Responses to Requests for Production of Documents, #No. 2

Document Request Nos. 14 and 15: Plaintiffs have alleged that records from Children's Hospital Oakland and Saint Peters reflect that McMath did not meet the criteria for brain death on December 12, 2013. These requests ask plaintiff to identify the records that support their claim. It is entirely proper to ask a party to identify the specific documents that support their allegations. Please provide a responsive answer to Nos. 14 and 15.

Bruce M. Brusavich, Esq.

October 17, 2016

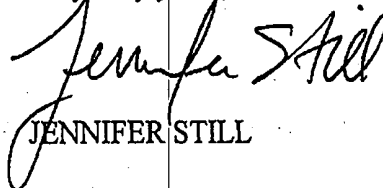
Page 4

Re: *McMath, et al., vs. Rosen, M.D., et al.*

CONCLUSION

I look forward to hearing from you at your earliest convenience. Please let me know if Ms. Winkfield intends to provide responsive answers to the custom interrogatories and document requests. If not, I will be required to file a motion to compel.

Very truly yours,



JENNIFER STILL

js/6-347

Lp.meet.confer.disc.resp.10.10.16.wpd D:10.1716

PROOF OF SERVICE
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070. My electronic service address is: jpicone@hinshaw-law.com.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, electronic service and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

**SECOND SUPPLEMENTAL DECLARATION OF JENNIFER STILL, ESQ.,
ADDRESSING PLAINTIFFS' REFUSAL TO PROVIDE AUTHENTICATION OF THE
VIDEO RECORDINGS**

XX If MAILED VIA U.S. MAIL, said copies were placed in envelopes which were then sealed and, with postage fully prepaid thereon, on this date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the U.S. Postal Service at Saratoga, California on this date in the ordinary course of business; and there is delivery service by U.S. Postal Service at the place so addressed.

_____ If MAILED VIA FEDERAL EXPRESS, said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

_____ If HAND DELIVERED, said copies were provided to _____ a delivery service, whose employee, following ordinary business practices, did hand deliver the copies provided to the person or firm indicated herein.

_____ If VIA FACSIMILE TRANSMISSION, said copies were placed for transmission by this firm's facsimile machine, transmitting from (408) 257-6645 at Saratoga, California, and were transmitted following ordinary business practices; and there is a facsimile machine receiving via the number designated herein, and the transmission was reported as complete and without error. The record of the transmission was properly issued by the transmitting fax machine.

XX If ELECTRONIC SERVICE, I electronically served the documents listed above as follows:

RECIPIENTS:

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3 234 East Colorado Blvd., Suite 975
4 Pasadena, CA 91101
5 Email: Achang@ecbappeal.com

6 I certify (or declare) under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct and that this Declaration was executed on July 7, 2017.

8 Jessica Picone
9 Jessica Picone
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26 Court: Alameda County Superior Court
27 Action No: RG15760730
28 Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*

PROOF OF SERVICE
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070. My electronic service address is: jpicone@hinshaw-law.com.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, electronic service and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

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VIDEO RECORDINGS**

_____ If MAILED VIA U.S. MAIL, said copies were placed in envelopes which were then sealed and, with postage fully prepaid thereon, on this date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the U.S. Postal Service at Saratoga, California on this date in the ordinary course of business; and there is delivery service by U.S. Postal Service at the place so addressed.

_____ If MAILED VIA FEDERAL EXPRESS, said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

_____ If HAND DELIVERED, said copies were provided to _____, a delivery service, whose employee, following ordinary business practices, did hand deliver the copies provided to the person or firm indicated herein.

_____ If VIA FACSIMILE TRANSMISSION, said copies were placed for transmission by this firm's facsimile machine, transmitting from (408) 257-6645 at Saratoga, California, and were transmitted following ordinary business practices; and there is a facsimile machine receiving via the number designated herein, and the transmission was reported as complete and without error. The record of the transmission was properly issued by the transmitting fax machine.

XX If ELECTRONIC SERVICE, I electronically served the documents listed above as follows:

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11 Scott E. Murray
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13 Email: smurray@dndmlawyers.com

14
15 I certify (or declare) under penalty of perjury under the laws of the State of California that the
foregoing is true and correct and that this Declaration was executed on July 7, 2017.

16 Jessica Picone
17 Jessica Picone

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27 Court: Alameda County Superior Court
Action No: RG15760730
28 Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*