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**FILED**  
ALAMEDA COUNTY

DEC 06 2016

CLERK OF THE SUPERIOR COURT  
By A. J. [Signature]

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

10 LATASHA NAILAH SPEARS  
WINKFIELD; MARVIN WINKFIELD;  
11 SANDRA CHATMAN; and JAH  
McMATH, a minor, by and through her  
12 Guardian Ad Litem, LATASHA NAILAH  
SPEARS WINKFIELD,

13 Plaintiffs,

14 vs.

15 FREDERICK S. ROSEN, M.D.; UCSF  
16 BENIOFF CHILDREN'S HOSPITAL  
OAKLAND (formerly Children's Hospital &  
17 Research Center of Oakland); MILTON  
McMATH, a nominal defendant, and DOES  
18 1 THROUGH 100,

19 Defendants.

No. RG15760730  
ASSIGNED FOR ALL PURPOSES TO:  
Judge Stephen Pulido  
DEPARTMENT 16

REPLY IN SUPPORT OF MOTION FOR  
ORDER TO UNSEAL REPORTER'S  
TRANSCRIPTS BY DEFENDANT  
FREDERICK S. ROSEN, M.D.  
[Cal. Rules of Ct., Rule 2.551(h)]

Date: December 13, 2016  
Time: 3:00 p.m.  
Dept: 16  
Judge: The Hon. Stephen Pulido

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

21 I

22 INTRODUCTION

23 In December 2013, Jahi McMath's Constitutional right to privacy of medical information  
24 was a legitimate basis to seal the December 2013 reporter's transcripts. However, McMath's right to  
25 privacy was waived long ago. Since there is no longer an "overriding interest" that overcomes the  
26 strong presumption of public access to court proceedings and its records, the transcripts should be  
27 unsealed. (California Rule of Court, Rule 2.551(h).) This court has authority to unseal the  
28 transcripts. (See *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566 [holding that a successor

**BY FAX**

1 judge has authority to modify sealing orders].)

2 For the past three years plaintiffs have broadcast the most intimate details of Jahi McMath's  
3 medical condition to the public via social media, news interviews, press conferences, newspaper  
4 editorials, physicians' declarations and in court papers filed in numerous courts. In the instant  
5 personal injury complaint (which was not filed under seal), plaintiffs allege that McMath is not dead  
6 because, among other things, she allegedly has menstrual cycles and breast development. Plaintiffs  
7 and their attorneys have disclosed to the public the details of the alleged medical examinations  
8 performed by their consultants following McMath's death. Plaintiffs' consultants have even  
9 conversed with the media about the intimate details of McMath's medical condition. In their  
10 opposition brief (which was not filed under seal), plaintiffs discuss their consultants' medical  
11 examinations of McMath under the heading "**Jahi's Present Condition.**"

12 Yet, with an astonishing degree of hypocrisy, plaintiffs object to the public disclosure of the  
13 testimony of the two pediatric neurologists who performed valid brain death examinations on  
14 McMath and lawfully determined she was deceased. Although plaintiffs assert that McMath has a  
15 Constitutional right to privacy that prevents public disclosure of this medical information, plaintiffs  
16 utterly failed to address the authority cited by Dr. Rosen that establishes plaintiffs have waived  
17 McMath's right to privacy.

18 The California Supreme Court and Legislature wholly disagree with plaintiffs' position.  
19 (See *In re Lifschutz* (1970) 2 Cal.3d 415, 433-435; Evidence Code sections 912 and 996.) The right  
20 to privacy of medical information is far from absolute. Plaintiffs' public disclosure of McMath's  
21 medical condition and the tendering of her medical condition in the instant personal injury action  
22 waives the right to privacy that existed at the time Judge Grillo issued his order sealing the reporter's  
23 transcripts in December 2013. The California Supreme Court has explained that the plaintiff, "in  
24 raising the issue of a specific ailment or condition in litigation, in effect dispenses with the  
25 confidentiality of that ailment and may no longer justifiably seek protection from the humiliation of  
26 its exposure." (*In re Lifschutz* (1970) 2 Cal.3d 415, 433-435.) Plaintiffs "cannot have [their] cake  
27 and eat it too." (*City & County of S. F. v. Superior Court* (1951) 37 Cal.2d 227, 232.)

28 Contrary to plaintiffs' assertion, there is no case or statutory law that states a minor is not

1 held to the same rules that apply to adults in deciding whether the right to privacy of medical  
2 information has been waived. In fact, the Law Revision Comments to Evidence Code section 912  
3 explicitly state that the patient-litigant exception applies equally to minors.

4 I

5 ARGUMENT

6 A. **Plaintiffs Waived Jahi McMath's Constitutional Right to Privacy of her**  
7 **Medical Condition**

8 Judge Grillo's rationale for sealing the transcripts no longer exists since McMath's  
9 Constitutional right to privacy has been waived on two fronts: (1) Plaintiffs have repeatedly  
10 publicized the intimate details of McMath's medical condition; and (2) Plaintiffs tendered McMath's  
11 medical condition by alleging a claim for personal injuries on behalf of McMath wherein it is alleged  
12 that McMath is not dead.

13 1. **Plaintiffs' publication of McMath's medical condition has waived**  
14 **McMath's right to privacy**

15 "[T]here simply can be no right to privacy in that which is already public." (*Stackler v.*  
16 *Department of Motor Vehicles* (1980) 105 Cal.App.3d 240, 247.) Pursuant to Evidence Code section  
17 912, a waiver of a privilege – such as the right to privacy of medical information – occurs if the  
18 person holding the privilege, "without coercion, discloses a significant portion of the communication  
19 or has consented to disclosure. Consent to disclosure is manifested by any statement or other  
20 conduct of the holder of the privilege indicating consent to the disclosure." (*Los Angeles Gay &*  
21 *Lesbian Center v. Superior Court* (2010)194 Cal. App. 4th 288, 311.) (See also *In re Lifschutz*  
22 (1970) 2 Cal.3d 415, 430.)

23 "[W]hat is made public by pleadings and evidence in a court of justice can by no  
24 possibility be privileged to benefit the party who thus gives it such wide publicity." (*Moreno v. New*  
25 *Guadalupe Min. Cod* (1917) 35 Cal.App.744, 754, citation omitted.) The right to privacy of medical  
26 information cannot be used as a sword and a shield. (*Id.*)

27 The Supreme Court explains that "clearly a patient should not be permitted to describe at  
28 length to a jury in a crowded courtroom the details of his supposed ailment, and then neatly suppress

1 the available proof of his falsities by wielding a weapon, nominally termed a privilege.’” (*In re*  
2 *Lifschutz* (1970) 2 Cal.3d 415, 434, fn 16, citing *Moreno v. New Guadalupe Min. Cod* (1917) 35  
3 Cal.App.744, 755.)

4 Plaintiffs attempt to conceal from the public the medical evidence that determined McMath  
5 was dead should not be permitted. Plaintiffs’ publication of their ‘version’ of McMath’s medical  
6 condition prevents them from now raising McMath’s right to privacy as a basis to prevent public  
7 disclosure of medical information that may not fit their agenda. A ruling that prevents the unsealing  
8 of the transcripts would be contrary to the state interest of facilitating the ascertainment of truth in  
9 connection with legal proceedings. (*In re Lifschutz* (1970) 2 Cal.3d 415, 432.) “If public court  
10 business is conducted in private, it becomes impossible to expose corruption, incompetence,  
11 inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence  
12 distrusts secrecy in judicial proceedings and favors a policy of maximum public access to  
13 proceedings and records of judicial tribunals.” (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 784.)

14 **2. Plaintiffs have tendered McMath’s medical condition in this litigation**

15 By filing the instant personal injury action, wherein plaintiffs have put McMath’s brain  
16 function in issue, plaintiffs waived McMath’s Constitutional right to privacy of her medical  
17 condition. The patient-litigant exception to the physician patient privilege at Evidence Code section  
18 996 is the Legislature’s statutory recognition of the waiver of the right to privacy in the circumstance  
19 where the patient tenders his or her medical condition in a personal injury action. A plaintiff is  
20 recognized as waiving the Constitutional right to privacy of medical information to the extent he or  
21 she has put his or her medical condition in issue in a lawsuit. (*In re Lifschutz* (1970) 2 Cal.3d 415,  
22 432, 435; Evid. Code section 996.) “When a party raises her physical condition as an issue in a  
23 case, she waives the right to claim that the relevant medical records are privileged.” (*Vesco v.*  
24 *Superior Court* (2013) 221 Cal.App.4th 275, 279.)

25 “The whole purpose of the [physician-patient] privilege is to preclude the humiliation of the  
26 patient that might follow disclosure of his ailments. When the patient himself discloses those  
27 ailments by bringing an action in which they are in issue, there is no longer any reason for the  
28 privilege. The patient-litigant exception precludes one who has placed in issue his physical condition

1 from invoking the privilege on the ground that disclosure of his condition would cause him  
2 humiliation. He cannot have his cake and eat it too." (*City & County of San Francisco v. Superior*  
3 *Court* (1051) 37 Cal.2d 227, 232.)

4 "The reason for the waiver is self-evident. It is unfair to allow a party to raise an issue  
5 involving her medical condition while depriving an opposing party of the opportunity to challenge  
6 her claim. A challenge requires access to the medical records on which a party relies and an  
7 opportunity to be heard. Otherwise, the challenge is in name only." (*Vesco v. Superior Court* (2013)  
8 221 Cal.App.4th 275, 279.)

9 There is no merit to plaintiffs' contention that the patient-litigant exception only applies to  
10 discovery. The Law Revision Comments states: "Section 996 provides that the physician-patient  
11 privilege does not exist **in any proceeding** in which an issue concerning the condition of the patient  
12 has been tendered by the patient. If the patient himself tenders the issue of his condition, he should  
13 not be able to withhold relevant evidence from the opposing party by the exercise of the  
14 physician-patient privilege." Section 996 applies to the entire proceeding, i.e., discovery, motions,  
15 and trial.

16 Nor is there any merit that there is no waiver of the right to privacy because McMath is a  
17 minor. The Law Revision Comment states: "Section 996 also provides that there is no privilege in  
18 an action brought under Section 376 of the Code of Civil Procedure (parent's action for injury to  
19 child). In this case, as in a case under the wrongful death statute, the same rule of evidence should  
20 apply when the parent brings the action as applies when the child is the plaintiff."

### 21 III

### 22 CONCLUSION

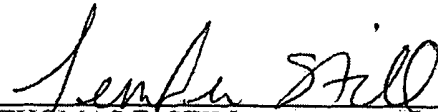
23 Plaintiffs only want their version of McMath's medical condition publicized. Plaintiffs,  
24 their attorneys and consultants are invested in their continued portrayal of the fallacy that McMath is  
25 alive. The publication of medical evidence to the contrary would destroy the myth that McMath is  
26 alive. However, Dr. Rosen and the state have a legitimate interest in the ascertainment of truth in  
27 these legal proceedings in a public forum. The December 2013 reporter's transcripts are central to  
28 Dr. Rosen's defense of the first cause of action for personal injuries. Dr. Rosen cannot adequately

1 defend plaintiffs' allegation that a mistake was made in McMath's brain death determination without  
2 the medical testimony memorialized in the reporter's transcripts.

3 Dr. Rosen is unwilling to settle for plaintiffs' offer to allow defendants access to the  
4 December 2013 transcripts with a protective order for the simple reason that the law governing this  
5 issue is extremely clear: Plaintiffs have waived the right to privacy of McMath's medical condition  
6 by publicizing her medical condition and filing the claim for personal injuries alleging she is not  
7 dead.

8  
9 Dated: December 9, 2016

HINSHAW, MARSH, STILL & HINSHAW

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12 By:   
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1 **PROOF OF SERVICE**  
2 (C.C.P. §§ 1013a, 2015.5)

3 I, the undersigned, say:

4 I am now and at all times herein mentioned have been over the age of 18 years, a resident of the  
5 State of California and employed in Santa Clara County, California, and not a party to the within  
6 action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070.

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

11 **REPLY IN SUPPORT OF MOTION FOR ORDER TO UNSEAL REPORTER'S**  
12 **TRANSCRIPTS BY DEFENDANT FREDERICK S. ROSEN, M.D.**  
13 **[Cal. Rules of Ct., Rule 2.551(h)]**

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

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

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

28 \_\_\_\_\_ 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.

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12 I certify (or declare) under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct and that this Declaration was executed on December 6, 2016.

14   
15 \_\_\_\_\_  
Andrea Elaine Ayala

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27 Court: Alameda County Superior Court  
Action No: RG 15760730

28 Case Name: Spears (McMath) v. Rosen, M.D., et al.