

***Winkfield v. Rosen*, No. RG15760730 (Alameda County Superior Court, Calif.) (July 29, 2015)**

Alameda County Superior Court Judge Freedman issued the following tentative ruling on the demurrer to the Jahi McMath medical malpractice action on which there will be a hearing this afternoon. This is a direct copy and paste from the court's website, except that I added some paragraph breaks.

-- Thaddeus Pope

This Tentative Ruling is made by Judge Robert B. Freedman On the Demurrer to Complaint by Defendant Frederick S. Rosen, M.D. ("Dr. Rosen"), filed on June 16, 2015, COUNSEL ARE TO APPEAR, in person or by CourtCall, at the hearing at 2:00 p.m. on July 30, 2015. The hearing will take place in Department 16, instead of Department 20, which is on the third floor of the Administration Building, 1221 Oak Street, Oakland. This is solely a location change for this hearing (at which Judge Freedman will preside) and not a reassignment.

(1) As to the demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi"), the court is inclined to sustain the demurrer, but wants counsel to address the collateral estoppel argument in more detail at the hearing, as set forth in the court's accompanying tentative ruling on the demurrer by Dr. Rosen.

(2) The court is inclined to drop the motion to strike the allegation as to "medical, nursing and other related expenses in the future" (Complaint, ¶ 36) as moot in light of whatever ruling the court makes on the demurrer to the First Cause of Action.

(3) The court will address the motion to strike the language "[i]n the event that it is determined Jahi McMath succumbed" (Complaint, ¶ 44), and whether it is necessary to have a successor in interest or personal representative pursue a malpractice claim on Jahi's behalf, in the context of its determination as to the First Cause of Action.

(4) The court intends to grant the motion to strike the inclusion of Marvin Winkfield as a plaintiff on the wrongful death cause of action as unopposed.

(1) As to the demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi"), the court is inclined to sustain the demurrer but wants counsel to address the collateral estoppel argument in more detail at the hearing, including (among other things) the following:

(a) Aside from their arguments that there are "new facts or changed circumstances" and that "the public policies underlying collateral estoppel" should preclude its application here, do the plaintiffs contend that any of the traditional criteria for application of the doctrine has not been established here? Plaintiffs' argument in

section B of the opposition memorandum is vague in this regard. It appears to the court, based solely on the text of the Amended Order of January 2, 2014 in Case No. RP13-707598 ("Amended Order"), that is a proper subject of judicial notice, that "the issue sought to be precluded from relitigation ... [is] identical to that decided in a former proceeding." (Lucido v. Superior Court (1990) 51 Cal.3d 335, 342.) More specifically, the Amended Order expressly states that the "issues in this case as presented by the petitioner necessarily required the court to reach the threshold issue of whether petitioner's daughter was legally dead." (Amended Order, p. 3, n. 2.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (Lucido v. Superior Court (1990) 51 Cal.3d 335, 342.) It also appears from the face of the Amended Order that the "issue [was] actually litigated in the former proceeding" and that it was "necessarily decided in the former proceeding." (Lucido, supra, at p. 342; Amended Order, pp. 1-19.) It also appears from the matters of judicial notice that "the decision in the former proceeding [is] final and on the merits" (Lucido, supra, at p. 342), as it resulted in a "Final Judgment Denying Petition for Medical Treatment," filed on January 17, 2014, as to which there is no evidence or argument that it is the subject of a pending appeal or should otherwise be considered non-final. Finally, there appears to be no dispute that the "party against whom preclusion is sought" - Jahi McMath - is "the same as, or in privity with, the party to the former proceeding," which was brought by Latasha Winkfield (a plaintiff herein) as Jahi's mother. (Amended Order, p. 1; Final Judgment, p. 1; Lucido, supra, at p. 342.)

(b) Aside from the order and judgment in the prior case, there is also an official death certificate issued by the County of Alameda, of which Dr. Rosen has requested judicial notice. The court believes this is a proper subject of judicial notice, as the matter sought to be noticed is not a fact such as the time or cause of death but the very fact that there has been an official determination of death and that a death certificate has been issued. Neither side has devoted much attention to the significance of the issuance of the death certificate on the standing of an individual (declared dead in the certificate) to bring a lawsuit. Is there any applicable authority? (Cf. C.C.P. Â§ 377.32(c) [person seeking to commence an action as successor in interest to a decedent must file a declaration attaching a "certified copy of the decedent's death certificate."])

(c) As to the argument about "new facts or changed circumstances," neither side has cited authority that the court finds particularly analogous or instructive as applied here. The court is not persuaded, for example, that Blanca P. v. Superior Court (1996) 45 Cal.App.4th 1738, 1754, or Jessica C. (2001) 93 Cal.App.4th 1027, 1038, provides a useful analogy, as those cases involved juvenile dependency or review proceedings in which a court is tasked to consider the circumstances existing at the time of the later proceeding and in which there was new evidence as to alleged molestation. Here, while plaintiffs allege that "[r]ecent evaluations by doctors, including a board certified pediatric neurologist, confirm that Jahi does not meet the definition of brain death" (Complaint, Â¶ 26), are such allegations in themselves sufficient to reopen a

factual issue determined in a judicial proceeding and official death certificate? Does either side have additional analogous authority in this regard?

(d) If the court were to sustain the demurrer with leave to amend, what additional factual allegations would Jahi be able to include that could affect the application of collateral estoppel to the issue of whether she is legally alive so as to have individual standing?

(e) If the court sustains the demurrer to Jahi's cause of action, the court is inclined to grant leave to amend to allow a similar cause of action to be pleaded by Jahi's successor in interest or personal representative. (See C.C.P. Â§ 377.30 et seq.) (2) As to Dr. Rosen's demurrer to the Second Cause of Action for negligent infliction of emotional distress, the court is inclined to SUSTAIN the demurrer, pursuant to C.C.P. Â§ 430.10(e), WITH LEAVE TO AMEND to allege facts sufficient to constitute a cause of action against Dr. Rosen on such a theory, including allegations that the plaintiffs were "present at the scene of the injury-producing event at the time it occur[red] and [were] then aware that it [was] causing injury to the victim..." (Bird v. Saenz (2002) 28 Cal.4th 910, 915; Thing v. La Chusa (1989) 48 Cal.3d 644, 667-668.) As in Bird, "plaintiffs cannot prevail on a claim for NIED based solely on the" allegedly negligent surgery performed by Dr. Rosen, as "no plaintiff was present in the operating room at the time that event occurred." (Bird, supra, 28 Cal.4th at p. 916.) To the extent that the "injury-producing event" was Dr. Rosen's failure to "diagnose and treat" Jahi's medical condition after the surgery, plaintiffs do not have sufficient factual allegations that they "meaningfully ... perceived any such failure" on the part of Dr. Rosen as distinguished from the acts and omissions of Children's Hospital Oakland ("CHO") nurses and other personnel. (Cf. Bird, supra, 28 Cal.4th at p. 917.)