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FILED
ALAMEDA COUNTY

DEC 30 2015

CLERK OF THE SUPERIOR COURT
By Christa Hill Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

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

Plaintiffs,

vs.

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

Defendants.

No. RG15760730
ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN
DEPARTMENT 20

**REPLY IN SUPPORT OF DEMURRER
TO FIRST AMENDED COMPLAINT BY
DEFENDANT FREDERICK ROSEN,
M.D.**

Reservation #: R-1687987, 16869755

Date: January 8, 2016
Time: 11:00 a.m.
Dept: 20, Hon. Robert B. Freedman

Complaint Filed: 3/3/15
First Amended Complaint Filed: 11/4/2015

I
INTRODUCTION

Plaintiffs' opposition fails to counter the crux of Dr. ROSEN's demurrer: Judge Grillo has exclusive jurisdiction of the question of Jahi McMath's brain function. Judge Grillo has twice accepted jurisdiction and issued rulings on Mrs. WINKFIELD's claim that Jahi McMath does not meet the criteria for brain death. First, in December 2013, and then again in October 2014. Judge Grillo's order dated October 8, 2014, confirms that he maintains jurisdiction of the issue of Jahi

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BY FAX

1 McMath's brain function. Furthermore, the petition for relief that Mrs. WINKFIELD presented to
2 Judge Grillo's in October 2014 was not resolved or disposed of. Mrs. WINKFIELD merely moved
3 her petition for relief to this court as part of the first cause of action for personal injuries.
4 Accordingly, California law dictates that it is beyond the jurisdictional authority of this court to
5 interfere with the exercise of the power of the department to which the question was initially
6 assigned. (*Williams v. Superior Court of Los Angeles County* (1939) 14 Cal.2d 656, 662.)
7 Dr. ROSEN's demurrer to the first cause of action should be sustained without leave to amend
8 because this court does not have jurisdiction to review, interfere with, or overrule the rulings of
9 Judge Grillo.

10 Nor do plaintiffs address the evidence appended to Dr. ROSEN's Request for Judicial Notice
11 that demonstrates Mrs. WINKFIELD is engaging in brazen forum shopping. Mrs. WINKFIELD
12 skirts the fact that she has already been afforded *two hearings* on the issue of Jahi McMath's brain
13 function. Dissatisfied with Judge Grillo's decisions, rather than seek appellate review of Judge
14 Grillo's rulings, or *again* request reconsideration from Judge Grillo, plaintiffs seek a third hearing in
15 what they perceive to be a more favorable forum. Plaintiffs' tactical maneuvers are contrary to the
16 law and public policy. Dr. ROSEN's demurrer to Jahi McMath's first cause of action for personal
17 injuries should be sustained without leave to amend on the grounds that doctrines of judicial estoppel
18 and collateral estoppel bar plaintiffs from obtaining a third hearing on Jahi McMath's brain function.

19 It is undeniable that when plaintiffs filed the instant action in March 2015, they failed to
20 disclose to the court and Dr. ROSEN that they sought identical relief, based on the same evidence,
21 from Judge Grillo in October 2015. At that time, Mrs. WINKFIELD implored Judge Grillo to
22 consider their "new evidence" of Jahi's brain function. Mrs. WINKFIELD insisted that Judge Grillo
23 (and only Judge Grillo) had jurisdiction and that he "must consider the change in circumstances."
24 Mrs. WINKFIELD contended that Jahi's "right to due process" required that Judge Grillo continue
25 to exercise jurisdiction and provide a forum to reverse his prior determination of her death. She
26 further argued that Judge Grillo made an "error" in his previous determination and a "grave
27 injustice" would be perpetrated if Judge Grillo did not agree to hear the new evidence. (See Exhibits
28 I and J to Dr. Rosen's Request for Judicial Notice.)

1 Judge Grillo agreed to consider Mrs. WINKFIELD's new medical evidence. Judge Grillo
2 appointed neurologist, Paul Fisher, M.D., to be the court's expert. Dr. Fisher reviewed all of Mrs.
3 WINKFIELD's new evidence. By letter dated October 6, 2014, Dr. Fisher opined that the new
4 evidence did not change his opinion that Jahi McMath met the criteria for brain death. (Exhibits Q
5 and R.)

6 On the eve of Judge Grillo's likely ruling that Jahi McMath remained irreversibly brain dead,
7 Mrs. WINKFIELD abruptly withdrew her petition. Her attorney advised Judge Grillo that Mrs.
8 WINKFIELD would refile the petition the following month. On October 8, 2014, Judge Grillo
9 prepared an order confirming the withdrawal of the petition. In his October 8, 2014 order, Judge
10 Grillo instructed Mrs. WINKFIELD that, if in the future, she desired to "seek relief in this case," she
11 could "request a case management conference at a later date in this case." Judge Grillo advised that
12 at that time he would provide a hearing and briefing schedule. (Exhibit U.)

13 At no time did Mrs. WINKFIELD inform Judge Grillo that she intended to seek a hearing,
14 from a different judge in the same Superior Court, for the purpose of reversing Judge Grillo's
15 judgment of brain death.

16 Less than six months later, Mrs. WINKFIELD filed the instant action. She violated Judge
17 Grillo's order that she file a Notice of Related Case.^{1/} (Exhibit U.) Although the initial complaint
18 was vague as to the claims and relief plaintiffs sought, defendants have since learned that plaintiffs
19 seek to have Judge Grillo's finding and judgment of brain death reversed. Plaintiffs do not dispute
20 that their request for a rehearing is based on the same evidence that was considered by Judge Grillo
21 and Dr. Fisher in October 2014.

22 Plaintiffs have boldly disregarded the legal process. Plaintiffs' recourse was to either return to
23 Judge Grillo or seek appellate review in the appellate court. Dr. ROSEN respectfully requests the
24 court sustain his demurrer to the first cause of action without leave to amend. This court is not the
25 proper forum to review and reverse Judge Grillo's determination and judgment that Jahi McMath has
26 sustained irreversible brain death.

27 _____
28 1. Dr. ROSEN has filed the Notice of Related Case in this action, and has provided courtesy copies
to the presiding judge and Judge Grillo.

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II

QUESTIONS TO BE DECIDED

Dr. ROSEN has identified three questions for this court to resolve on his demurrer:

- (1) Does this court have jurisdiction to interfere with the rulings made by Judge Grillo?
- (2) Do public policy considerations preclude Mrs. WINKFIELD from relying on the change of circumstances exception to the application of collateral estoppel?
- (3) Does the doctrine of judicial estoppel preclude a third hearing on the issue of Jahi McMath's brain death?

Dr. ROSEN submits the above legal principles provide three independent bases to sustain his demurrer to plaintiffs' first cause of action without leave to amend.

III

ARGUMENT

A. The Demurrer to the First Cause of Action Should Be Sustained on The Grounds That this Court Does Not Have Jurisdiction to Interfere with Judge Grillo's Orders and Judgment

Plaintiffs failed to coherently address or refute the extensive authority that holds Judge Grillo has exclusive jurisdiction over the question of Jahi McMath's brain function. Plaintiffs do not dispute that Judge Grillo retained jurisdiction of the issue of Jahi McMath's brain function. However, without citation to any authority, they simply claim that another judge is free to reverse Judge Grillo's January 17, 2014 judgment and consider the same question that was presented to Judge Grillo in October 2014, i.e., that there is new medical evidence that allegedly shows Jahi McMath has brain function. It is not surprising that, in their opposition brief, plaintiffs elected to parse words rather than address the substance of their insurmountable jurisdiction problem.

It is long been established that a superior court judge cannot interfere with the findings, orders and judgment of a judge sitting another department of the same superior court unless the proceeding has been finally disposed of and legally removed therefrom. In *Williams v. Superior Court* (1939) 14 Cal.2d 656, a judge of a department of a superior court made an order purporting to invalidate the contempt order of another department of the same court while proceedings in the contempt matter were still pending in the court which had issued the contempt order. The Supreme Court held that

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1 the order purporting to void the contempt order was null and void. (*Id.*, at p. 662.) The Court
2 reasoned:

3 [Where] a proceeding has been duly assigned for hearing and
4 determination to one department of the superior court . . . in conformity
5 with the rules thereof, and the proceeding so assigned has not been finally
6 disposed of therein or legally removed therefrom, it is beyond the
7 jurisdictional authority of another department of the same court to interfere
8 with the exercise of the power of the department to which the proceeding
has been so assigned. [Citation] . . . If such were not the law, conflicting
adjudications of the same subject-matter by different departments of the
one court would bring about an anomalous situation and doubtless lead to
much confusion. [Citation.]" (*Williams v. Superior Court of Los Angeles
County* (1939) 14 Cal.2d 656, 662.)

9 Subsequent courts are in accord and have elaborated on *Williams, supra*, as follows:

10 One department of the superior court cannot enjoin, restrain, or otherwise
11 interfere with the judicial act of another department of the superior court.
12 Even between superior courts of different counties, having coequal
13 jurisdiction over a matter, the first court of equal dignity to assume and
exercise jurisdiction over a matter acquires exclusive jurisdiction.
[Citations.] . (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742.)

14 An order made in one department during the progress of a cause can
15 neither be ignored nor overlooked in another department" [Citations.]
(*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742.)

16 A judgment rendered in one department of the superior court is binding on
17 that matter upon all other departments until such time as the judgment is
18 overturned. [Citation.] Appellate jurisdiction to review, revise, or
19 reverse decisions of the superior courts is vested by our Constitution only
20 in the Supreme Court and the Courts of Appeal. (Cal. Const., art. VI, §
11.) (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742.) (*In re
Ramirez*, 89 Cal.App.4th 1312, 1317.)

21 The doctrine avoids the risk of simultaneous proceedings or conflicting
22 decisions. (*Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1040-104.)

23 The question of whether Jahi McMath met the criteria for brain death was duly assigned to
24 Judge Grillo in December 2013. In his reasoned opinion, Judge Grillo addressed the court's
25 jurisdiction to make a judicial determination on question of brain death. Judge Grillo concluded that
26 the facts were sufficient to invoke the jurisdiction of the court to review whether the diagnosis was
27 made by an independent physician in accord with medical standards. (Exhibit F, 10:7-9.) Judgment
28 was entered on January 17, 2014. Mrs. WINKFIELD did not appeal the judgment or any rulings
made by Judge Grillo. Ten months later, in October 2014, Mrs. WINKFIELD's petitioned Judge
Grillo to reconsider his prior determination of brain death based on her claim that there was new

1 medical evidence that showed her daughter had brain function. Judge Grillo agreed that he had
2 jurisdiction to reconsider his finding and judgment of brain death. When Mrs. WINKFIELD
3 withdrew her petition on October 8, 2014, Judge Grillo left the door open for Mrs. WINKFIELD to
4 return to his court for his further reconsideration of Mrs. WINKFIELD's medical evidence. Mrs.
5 WINKFIELD's attorney represented that he would resubmit the petition for further hearing in
6 November 2014. Judge Grillo advised he would schedule a case management conference, hearing
7 date and briefing schedule in the event plaintiffs desired to seek relief in the future.

8 It is unequivocal that Judge Grillo retained jurisdiction of the question of Jahi McMath's brain
9 function. By plaintiffs' admission, the question has not been disposed of. Indeed, as this court
10 previously ruled, plaintiffs must establish that Jahi has brain function in order to proceed on the first
11 cause of action. Accordingly, this court cannot usurp or interfere with the jurisdiction of Judge
12 Grillo. Nor can this court ignore the prior determinations and judgment issued by Judge Grillo. "An
13 order made in one department during the progress of a cause can neither be ignored nor overlooked
14 in another department." (*People v. Madrigal* (1995) 37 Cal.App.4th 791.) Judge Grillo's judgment
15 is binding on this court. Thus, any rulings or orders made by this court regarding Jahi McMath's
16 standing to state a cause of action for personal injuries would be in excess of its jurisdiction and
17 void. (See *People v. Batchelor* (1976) 56 Cal.App.3d 278.)

18 If Mrs. WINKFIELD disagreed with Judge Grillo's orders and judgment, her recourse was to
19 file an appeal – not attempt seek what is tantamount to appellate review by a different judge in the
20 same superior court. Jurisdiction to review decisions of the superior court is vested in the court of
21 appeal and Supreme Court. (See *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742; *In re*
22 *Ramirez*, 89 Cal.App.4th 1312.)

23 This court has no power to review, revise, interfere with, reverse or invalidate Judge Grillo's
24 findings, orders and judgment. Accordingly, the demurrer to the first cause of action should be
25 sustained without leave to amend on the grounds that this court cannot interfere with the exclusive
26 jurisdiction of Judge Grillo.

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1 **B. The First Cause of Action Fails to State a Claim for Relief Because Jahi**
2 **McMath Has Been Adjudicated Brain Dead and it Would Be Bad Policy**
3 **to Grant Plaintiffs Relief from the Application of Collateral Estoppel Given**
4 **Plaintiffs' Gamesmanship**

5 There is a second, independent basis for sustaining the demurrer. In his moving papers,
6 including the documents appended to the Request for Judicial Notice, Dr. ROSEN has demonstrated
7 that Mrs. WINKFIELD has engaged in forum shopping for the purpose getting more favorable
8 rulings from a different judge. The integrity of the judicial process is at risk if plaintiffs are relieved
9 from the application of collateral estoppel and afforded a third opportunity to challenge the judicial
10 and medical determination of Jahi McMath's irreversible brain death.

11 "Collateral estoppel ... is intended to preserve the integrity of the judicial system, promote
12 judicial economy, and protect litigants from harassment by vexatious litigation. [Citation.]"
13 (*Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 829.) Accordingly, the public policies
14 underlying collateral estoppel "strongly influence whether its application in a particular circumstance
15 would be fair to the parties and constitutes sound judicial policy." (*Lucido v. Superior Court* (1990)
16 51 Cal. 3d 335, 343.)

17 Plaintiffs insist that public policy dictates that they be given an opportunity to present their
18 alleged new evidence because they did not have a full and fair opportunity to do so before Judge
19 Grillo in December 2013. They argue that the judgment of brain death should be reconsidered
20 because Judge Grillo conducted an "extremely expedited and abbreviated proceeding which altered
21 the legal rights of the parties." (Plaintiffs' Oppo., 8:8-9.) Essentially, plaintiffs are complaining that
22 Judge Grillo failed to provide them with a fair hearing.

23 Of course, plaintiffs gloss over the fact that Judge Grillo afforded Mrs. WINKFIELD *two*
24 *hearings*, first in December 2013 and, then again, in October 2014. On both occasions, Mrs.
25 WINKFIELD objected to the purported parameters of the hearing dictated by Judge Grillo. Yet at no
26 time has Mrs. WINKFIELD sought appellate review of Judge Grillo's findings, rulings or judgment.
27 or Judge Grillo's appointment of Dr. Paul Fisher as the court's expert. Instead, Mrs. WINKFIELD
28 moved her petition for relief to a different department in the same superior court.

 In ruling on defendants' initial demurrer, this court granted plaintiffs leave to amend their

1 complaint to allege facts showing a change of circumstances, i.e., new evidence of brain function.
2 However, at the time of its ruling, this court was unaware that, in October 2014, Judge Grillo had
3 accepted jurisdiction to consider this identical new evidence. This court was also unaware that this
4 new evidence was reviewed by the court's appointed expert, Dr. Paul Fisher, who found that Jahi
5 remained irreversibly brain dead. This court was further unaware that Mrs. WINKFIELD cleverly
6 dodged Judge Grillo's ruling by having her attorney withdraw her petition the day before Judge
7 Grillo was to rule. The withdrawal of the petition, and subsequent filing of the instant action,
8 without the required Notice of Related Case, reeks of legal manipulation. There is no question that
9 Mrs. WINKFIELD engaged in tactical maneuvering to avoid the preclusive effect of yet another
10 finding of brain death. It is no surprise that plaintiffs failed to explain to this court why failed to
11 return to Judge Grillo's court for reconsideration of their evidence that Jahi McMath is no longer
12 brain dead.

13 If this scenario does not undermine the public's confidence in the judicial system it is difficult
14 to conceive of what would. Plaintiffs have flouted the rules intended to preserve the integrity of the
15 judicial process. In addition, Judge Grillo and Dr. Fisher devoted substantial time and resources to
16 Mrs. WINKFIELD's claim that her daughter is not brain dead. It is apparent from the papers filed in
17 *Winkfield I*, that Judge Grillo and Dr. Fisher carefully reviewed the medical evidence in both
18 December 2013 and October 2014. Plaintiffs are essentially asking this court to ignore the
19 jurisdiction, rulings and orders of Judge Grillo, as well as the medical opinions of the court's
20 appointed expert, Dr. Paul Fisher.

21 Dr. ROSEN respectfully requests the court sustain the demurrer to the first cause of action on
22 the grounds that it would be bad policy and encourage legal gamesmanship to permit Mrs.
23 WINKFIELD to overcome the bar of collateral estoppel.

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1 **C. The Demurrer to the First Cause of Action Should Be Sustained Pursuant**
2 **To the Doctrine of Judicial Estoppel**

3 Lastly, plaintiffs fail to address Dr. ROSEN's argument that they should be judicially estopped
4 from pursuing a first cause of action for personal injuries. "Judicial estoppel is an equitable doctrine
5 aimed at preventing fraud on the courts. It is applied to keep litigants from playing 'fast and loose
6 with the court.' [Citation.]" (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.) The judicial
7 estoppel doctrine's "dual goals are to maintain the integrity of the judicial system and to protect
8 parties from opponents' unfair strategies." (*Aguilar v. Lerner* (2004) 32 Cal. 4th 974, 986.) The
9 essential function of judicial estoppel is to prevent the use of intentional self-contradiction as a
10 means of obtaining unfair advantage in court. (See *Billmeyer v. Plaza Bank of Commerce* (1995) 42
11 Cal.App.4th 1086, 1092.)

12 The doctrine applies when "(1) the same party has taken two positions; (2) the positions were
13 taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in
14 asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two
15 positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance,
16 fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Judicial
17 estoppel is sometimes referred to as the doctrine of preclusion of inconsistent positions, and its
18 purpose is to protect the integrity of the judicial process. (*Id.*, at p. 181.)

19 Judicial estoppel may be applied on demurrer where the facts pleaded and judicially noticed
20 indicate as a matter of law the doctrine should be applied. (*The Swahn Group, Inc. v. Segal* (2010)
21 183 Cal.App.4th 831, 842-844.)

22 Here, each of the five conditions applies. In October 2014, Mrs. WINKFIELD insisted that
23 only Judge Grillo had jurisdiction to reconsider his determination of brain death. After Judge Grillo
24 agreed to consider the new evidence, Mrs. WINKFIELD objected to Judge Grillo's decisions to
25 appoint Dr. Fisher and deny her an full evidentiary hearing. Mrs. WINKFIELD withdrew her
26 petition the day before Judge Grillo was expected to rule against her. She did not file a writ/appeal
27 to challenge Judge Grillo's rulings regarding the nature of the hearing or the appointment of Dr.
28 Fisher. Nor did she return to Judge Grillo's court for further reconsideration. Instead, in March

1 2015, she filed the instant action where she now contends that this court also jurisdiction to conduct
2 an evidentiary hearing. These positions are wholly inconsistent. Pursuant to the rule of exclusive
3 jurisdiction, two courts cannot have jurisdiction of the same request for relief.

4 Dr. ROSEN requests the court sustain the demurrer to the first cause of action on the grounds
5 that the doctrine of judicial estoppel prevents plaintiffs from attempting to litigate the issue of Jahi
6 McMath's brain death in two different courts.

7
8 Dated: December 30, 2015

HINSHAW, MARSH, STILL & HINSHAW

9
10 By: 

11 THOMAS E. STILL
12 JENNIFER STILL
13 Attorneys for Defendant
14 FREDERICK S. ROSEN, M.D.

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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.

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, 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.

**REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT
BY DEFENDANT FREDERICK ROSEN, M.D.**

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.

XX 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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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 December 30, 2015.



Ursula M. Walters

Court: Alameda County Superior Court
Action No: RG 15760730
Case Name: Spears (McMath) v. Rosen, M.D., et al.