

January 8, 2016

Case Number: RG15760730
Title: Spears VS Rosen
Case Type: Civil
Complaint Type: Medical Malpractice
Case Subtype: General Civil
Filing Date: 3/3/2015
Filing Location: Rene C. Davidson Alameda County Courthouse

This Tentative Ruling is made by Judge Robert B. Freedman On the Demurrer to First Cause of Action and Motion to Strike Portion of First Amended Complaint ("FAC"), filed by Defendant UCSF Benioff Children's Hospital Oakland ("CHO") on November 23, 2015, COUNSEL ARE TO APPEAR (in person or by CourtCall) at the hearing at 11:00 a.m. on January 8, 2016, in Department 20, Administration Building, 4th Floor, 1221 Oak Street, Oakland.

Counsel shall be prepared to address, among other things, the following: CHO's demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi") is based on the argument that Jahi has been declared dead under California law and thus has no standing to sue for personal injury. (Demurrer, p. 2.) The argument is based on: (1) allegations in the FAC itself; (2) the death certificate issued on January 3, 2014; and (3) Judge Grillo's amended order and judgment in Case No. RP13-707598, denying the petition for medical treatment, which included a determination that Jahi "suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (See Request for Judicial Notice, Exhs. A and B, including Exh. A at 16:20-22.) (1)

The court is not persuaded that the cited allegations in the FAC contain admissions that Jahi is brain-dead. (See FAC, ¶¶ 18, 19, 23 and 24.) (2) As to the death certificate, while the court can and will take judicial notice of it, the court cannot take judicial notice of the truth of factual conclusions in it. (See, e.g., *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 164.) By statute, a death certificate is prima facie evidence of the facts stated therein but is subject to rebuttal and explanation. (See Health & Safety Code § 103550; *In re Estate of Lensch* (2009) 177 Cal.App.4th 667, 677 n. 3.) The FAC includes new allegations to the effect that the death certificate is invalid and has been the subject of requests or petitions to rescind, cancel, void or amend it, but that such efforts have been unsuccessful. (FAC, ¶¶ 27-29.)

Further, it appears that, Jahi and her mother Latasha Naila Spears Winkfield ("Winkfield") filed a complaint in federal court seeking declaratory and injunctive relief, including a determination that the death certificate is invalid. (Reply Decl. of G. Patrick Galloway, Exh. A.) The court is not persuaded that the death certificate itself establishes

the fact of Jahi's death as a matter of law so as to preclude her from bringing the first cause of action. Counsel may address this and also the question of what effect the federal complaint should have (if any) on the instant lawsuit. (3)

As to the amended order and judgment in Case No. RP13-707598, there appear to be two aspects to CHO's argument: (a) the collateral estoppel effect; and (b) the finality of a determination of death under Health and Safety Code sections 7180 and 7181. As to collateral estoppel, the court is not currently inclined to determine the collateral estoppel effect of the amended order and judgment in Case No. RP13-707598 based solely on the allegations and matters of judicial notice. This is an affirmative defense as to which the defendants bear a "heavy" burden of proof. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1482.) The court has concerns about whether (purely as a matter of the collateral estoppel doctrine) the court's factual determinations in an expedited probate proceeding - which was filed for the purpose of determining whether CHO should be ordered to continue providing medical care to Jahi - should be binding on Jahi and/or Winkfield in all future proceedings, including the instant civil action.

Though it is possible that the three required elements of collateral estoppel are met (privity, final judgment, and necessary determination of identical issue in prior adjudication), there is an "equitable nature of collateral estoppel" such that the doctrine is to be applied "only where such application comports with fairness and sound public policy." (*Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414.) In this case, the court has some question as to whether "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them" (Rest.2d Judgments Â§ 28(3)), given that the prior expedited petition did not involve the same type of discovery and presentation of evidence as is involved in a civil action. (4)

Further, as both sides recognize (and as Judge Grillo noted in his Order Following Case Management Conference issued on October 1, 2014), California law on issue preclusion permits "reexamination of the same questions between the same parties where in the interim the facts have changed or new facts have occurred which may alter the legal rights of the parties." (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230.)

Jahi has included new allegations in the FAC as to such changed circumstances and the court is hesitant to determine that, at the pleading stage, there is no factual issue as to whether the facts have changed or new facts have occurred. The court requests counsel to address whether the determination of collateral estoppel effect would be more appropriate on a fuller factual record. (5)

The court also requests additional argument as to whether - independent of collateral estoppel arguments - a determination of death in a court proceeding initiated by the

guardian of an individual as to whom there is doubt as to her life or death status, based on the procedures set forth in Health and Safety Code sections 7180 and 7181, is a determination that (at least unless set aside) must be accorded finality to serve the purposes of the Uniform Determination of Death Act (UDDA). As CHO observes, such statutes serve the purpose of allowing the family, physicians and others to take actions based on such a determination, including cessation of life support, removal of organs for transplant, probate of the decedent's estate, and the like. (See, e.g., H&S Code Â§ 7151.40.) Neither side has cited much authority in this regard but the court believes the issue is deserving of serious consideration independent of collateral estoppel. (6)

The court is not persuaded by CHO's argument that Plaintiffs are "improperly asking this court or a jury to reject the accepted medical standards used to determine irreversible brain death." Plaintiffs are not, by way of this action, expressly seeking any redetermination of the matters in the prior probate proceeding or seeking to apply standards other than those set forth in the UDDA. Instead, they have asserted a civil cause of action which the court must evaluate for its sufficiency, taking into account the finality and/or collateral estoppel arguments described above. (7) The court is not inclined to strike the language in paragraph 54 that "[i]n the event that it is determined Jahi McMath succumbed to the injuries...." The court believes Plaintiffs are entitled to use such language to preserve their right to plead in the alternative, however the court rules as to the other issues raised.