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Attorneys for Defendant FREDERICK S. ROSEN, M.D.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; and JAHI 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 R. FREEDMAN
DEPARTMENT 20

REPLY IN SUPPORT OF DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.,

Date: July 30, 2015
Time: 2:00 p.m.
Dept: 20
Judge: Hon. Robert B. Freedman

BY FAX

Complaint Filed: March 3, 2015

Reservation #: R - 1640356

I

INTRODUCTION

Unable to accept Jahi McMath's irreversible brain death, plaintiffs have moved her body to the State of New Jersey, where that state's Medicaid program apparently pays for the services that keep her body from its natural post-mortem state. This is plaintiffs and the State of New Jersey's prerogative. However, this court should not indulge plaintiffs' dubious and ill-conceived attempt to have the defendants pay for these medical services, as if Jahi were alive and required ongoing medical care and treatment. It is respectfully submitted that the healthcare defendants are entitled to

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rely on the finality of the sound legal and medical judgments of Judge Grillo and the expert neurologists who determined that Jahi suffered irreversible brain death as of December 24, 2013. Any other result would be contrary to the law, public policy, medical science and ethics, and the intent of the California Legislature.

The doctrine of collateral estoppel precludes plaintiffs from re-litigating their claim that Jahi is now alive. The question of her brain death was conclusively resolved following an evidentiary hearing on December 24, 2013. Plaintiffs had their opportunity to dispute the medical opinions of the neurologists who examined Jahi in December 2013. Plaintiffs accepted (and apparently still accept) the independent medical opinion of neurologist Dr. Paul Fisher, rendered at the hearing on December 24, 2013, that Jahi had suffered irreversible brain death. At that time, plaintiffs also withdrew their request to have their purported medical expert examine Jahi. Plaintiffs did not take a writ, appeal, or seek reconsideration of Judge Grillo's orders, findings of fact, conclusions of law or judgment. Even in the instant action, plaintiffs do not allege that a mistake was made in December 2013, or that a fraud was perpetrated, in connection with the finding of irreversible brain death. They do not allege that, as of December 24, 2013, Jahi was anything other than irreversibly brain dead per accepted medical standards.

Plaintiffs recognize that they cannot pursue the first cause of action for personal injuries on behalf of Jahi McMath unless they can establish that, somehow, in the time since Judge Grillo's ruling on December 24, 2013, Jahi has miraculously managed to reverse her irreversible brain death, and she is now a living person. In their attempt to get around the obvious bar of collateral estoppel, plaintiffs acknowledge that they must show that there has been a change in her medical condition since the date Judge Grillo made his finding of irreversible brain death. To this end, plaintiffs submit in their opposition brief that there have been "changes and developments" which show Jahi now has brain function and is "alive." Dr. Rosen requests that this court refrain from giving any legitimacy to plaintiffs' incredible claim that Jahi has regained brain function after sustaining irreversible brain death in December 2013. Brain death is an irreversible condition by accepted medical science and statutory definition. The court should sustain the demurrer to Jahi McMath's first cause of action for personal injuries. Dr. Rosen has no objection to plaintiffs attempting to amend their complaint to

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state a proper survival action.

Nor can plaintiffs state a claim for negligent infliction of emotional distress against Dr. Rosen. Plaintiffs have not alleged, and cannot prove, that they had a contemporaneous awareness of some *negligent misconduct* by Dr. Rosen while Jahi was in the PICU. Nor can plaintiffs plead and prove that they contemporaneously perceived that this same *negligent misconduct* by Dr. Rosen was the reason Jahi was receiving inadequate care in the PICU. It is not enough to allege that plaintiffs *hoped* Dr. Rosen would return to the PICU to check on Jahi, but he failed to do so. Since plaintiffs cannot allege that *they were informed* that (1) Dr. Rosen would be checking on Jahi in the PICU, or (2) that Dr. Rosen was made aware of Jahi's bleeding, their bystander NIED cause of action fails as a matter of law.

As to Dr. Rosen, plaintiffs may pursue a survival action (if properly pled) and a wrongful death claim, nothing more. Dr. Rosen respectfully requests the court should sustain the demurrer to the first cause of action for personal injuries and the second cause of action for negligent infliction of emotional distress without leave to amend.

II

ARGUMENT

A. Dr. Rosen's Request for Judicial Notice of Judge Grillo's Orders, Findings of Facts, Conclusions of Law and Judgment is Proper

Judge Grillo's determination that Jahi suffered irreversible brain death was made following an evidentiary hearing where both parties had an opportunity to present evidence and argument. Defendant has requested the court take judicial notice of Judge Grillo's findings of fact, conclusions of law and judgment in the underlying probate matter. The request is properly before the court.

"'Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.'" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882, citation omitted.) The court may in its discretion take judicial notice of any court record in the United States. (Evid. Code, § 451.) "**This includes any orders, findings of facts and conclusions of law, and judgments within court records.**" (*In re*

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Vicks (2013) 56 Cal.4th 274, 314, citing *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882, emphasis added.) Courts may take judicial notice of any factual findings that were the product of an adversary hearing which involved the question of their existence or nonexistence. (*See Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)

As for the Certificate of Death, this document is offered to show that Jahi McMath has been legally declared dead by the County of Alameda. The death certificate was not offered to show the cause of death, time of death or place of death, as plaintiffs suggest. Rather, the very existence of the Certificate of Death is proof that Jahi McMath is considered legally dead by the State of California. How can Jahi McMath pursue a personal injury action in the State of California given that the State of California has legally determined Jahi McMath to be dead?

B. The Demurrer to the First Cause of Action for Personal Injuries Should Be Sustained Without Leave to Amend Because the Judge Grillo's Finding of Legal Brain Death is Final and Irreversible

1. Judge Grillo's determination of legal death under the Uniform Determination of Death Act is not subject to reconsideration

From a legal and scientific perspective, death is a definable event, not subject to reversal. It is uniformly accepted by medical professionals and society at large that a person is dead when he or she has irreversibly lost all functions of the entire brain, including the brain stem. This consensus is reflected in the Uniform Determination of Death Act ("UDDA"), a model law which has been adopted by the California Legislature and nationwide as the legal framework for defining death. States have embraced the view that there are societal interests in a uniform standard of death. These interests include certainty about an individual's legal status after death, including the laws governing any ensuing criminal prosecution and tort litigation, property, social security, life insurance, and the withdrawal of life support. There are also heavy societal costs associated with delaying a determination of death. A brain dead body being maintained on life support begins to deteriorate and is soon unsuitable for organ donation. Medical resources are scarce and should not be devoted to a body's maintenance on life support. There are also emotional consequences to delaying the withdrawn of life support: Death and burial rituals are postponed and artificially maintaining the

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appearance of life in a dead body exacts an emotional toll on family members and the medical professionals tending to the body. These interests are too important to allow individuals to reject or opt-out of the neurological criteria for determination of death.

The Legislature recognizes that following brain death, medical technologies, such as ventilators and feeding tubes, can maintain certain life functions. The Legislature has declared that this sort of 'life after death' is both medically unnecessary and a violation of the patient's dignity.[1] Further, in giving healthcare providers the right to decline medical services to a person determined to be deceased under the UDDA, the Legislature recognizes both the futility and ethical transgressions posed by medically treating individuals who have died.[2]

When the California Legislature adopted the UDDA as the standard for determining death, it intended for there to be a concrete definition of death for legal purposes, i.e., a clear line between life and death. The purpose of the UDDA is to align the legal definition of death with criteria largely accepted by the medical community. The UDDA's definition of brain death requires that two physicians confirm there has been an ***irreversible*** cessation of brain function. (Health and Safety Code section 7181.) By the plain language of the Health and Safety Code sections 7180 and 7181, a determination of brain death is "irreversible" and, therefore, cannot be subject to reconsideration based on a claim of "new facts" or "change of condition." The Legislature enacted the UDDA, in part, to prevent the bizarre post-mortem claims being pursued by plaintiffs herein.

Jahi McMath has been declared *legally* dead. Plaintiffs' contention that Jahi's brain death is medically reversible runs afoul of the UDDA, science, and the societal interests identified above. Plaintiffs failed to provide any authority–let alone a single legitimate public policy interest–that supports their unprecedented request to re-open the question of Jahi's brain function. Unlike in December 2013, when the interest at stake issue was whether the hospital could take Jahi off life

---

1. Probate Code section 4650(b) provides: "Modern medical technology has made possible the artificial prolongation of human life beyond natural limits", and that, "[i]n the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person."

2. Physicians and hospitals may lawfully decline to provide medically ineffective health care or health care that is contrary to generally accepted heath care standards. (Probate Code section 4735.)

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support, here, the only interest at stake is monetary compensation. Plaintiffs apparently believe that if a lay jury sees videotape of Jahi's spontaneous reflex movements, they will find that she is not dead and award monetary damages for her body's emotional distress and medical treatment. Defendant submits that the public policy interests at stake in maintaining the integrity of the medical and judicial decision of brain death, rendered in December 2013, far outweighs plaintiffs' quest for monetary damages.

In adopting the UDDA, the Legislature has declared there is public interest in the finality of death. Dr. Rosen and the hospital should be able to rely on the determination of brain death made by Judge Grillo and the expert neurologists who tested Jahi and confirmed she had no blood flow to her brain and no sign of electrical activity.

Jahi McMath is legally deceased. She cannot pursue personal injury damages. The court should sustain Dr. Rosen's demurrer to the first cause of action without leave to amend.

2. There are no new credible facts or changed of conditions that would prevent the application of collateral estoppel

In their opening briefs, defendants established that the doctrine of collateral estoppel (issue preclusion) precludes plaintiffs from re-litigating the issue of Jahi's brain function. Judge Grillo found that there was clear and convincing evidence that "Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (Exhibit A to Dr. Rosen's Request for Judicial Notice, 16:19-22.)

There is an extremely limited exception to the defense of collateral estoppel. Case law holds that collateral estoppel will not bar a later claim **if the new facts or changed circumstances have occurred *since the prior decision***. "'Collateral estoppel does not apply where there are changed conditions or new facts which did not exist at the time of the prior judgment . . .." (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 616; see also *McGaffey v. Sudowitz* (1961) 189 Cal.App.2d 215, 218; *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 158.) Accordingly, in order to utilize the change of conditions or new facts exception to bar of issue preclusion, **the alleged change of condition or new fact could not have been in existence in December 2013, when the Judge Grillo found Jahi**

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was legally brain dead.

To this end, like a scene in a science fiction movie, plaintiffs argue that although Jahi may have been brain dead in December 2013, there are now new "*changes and developments* which show that Jahi's condition is one in which Jahi has brain function and is indeed a living person." (Opposition, 10:6-7.) Medical science has established that people cannot be brain dead but, with time, develop brain function. If Jahi is truly "alive" today, she would have been "alive" in December 2013. The medical evidence of brain function would have been available to plaintiffs in 2013, when plaintiffs were given the opportunity to challenge Dr. Fisher's opinion and provide their own counter-expert testimony. The court should not entertain plaintiffs' claim that Jahi has risen from the dead. Plaintiffs' argument that the preclusive effect of collateral estoppel should not apply is without merit.

Plaintiffs cite two Juvenile Dependency cases involving allegations of sexual molestation by the father. In both cases, the reviewing court found that where there is new evidence of a parent's guilt or innocence, that was obtained after the initial jurisdictional hearing, collateral estoppel should not prevent the party from presenting that evidence to the court. These cases are inapposite to the instant matter. This is not a Juvenile Dependency case where there can be a reasonable and legitimate dispute as to whether sexual abuse was actually perpetrated.

What plaintiffs seem to be advocating, but decline to state, is that there should be a new medical standard or legal mechanism for the determination of brain death. If that is indeed what plaintiffs are attempting to articulate, this argument should be taken up with the Legislature, not this trial court. It would be a clear violation of the UDDA to allow the trier of fact in a medical malpractice case to decide whether plaintiffs' experts have established that Jahi is no longer brain dead.

3. The State of New Jersey's exception to the UDDA is not evidence that Jahi McMath is "alive"

Attached to plaintiffs' Request for Judicial Notice,[3] are several documents which appear to reflect that New Jersey's Medicaid program is paying for medical services on behalf of Jahi

3. Defendant has filed a formal Objection to Plaintiffs' Request for Judicial Notice.

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McMath. Plaintiffs submit that this is evidence that Jahi is "alive" and does not meet the definition of brain death.

It is no coincidence that Jahi's body was transported from California to New Jersey. Plaintiffs neglect to inform the court that the State of New Jersey is the only state in the county that has concluded the societal interest in uniformity of the standard of legal death should sometimes yield to accommodate a patient's religious or moral objection to being determined dead on the basis of neurological criteria. (See N.J.S.A. Sections 26:6A-5 to 26:6A-7.) New Jersey applies the same definition of brain death as California, i.e., irreversible cessation of all functions of the entire brain, including the brain stem. However, New Jersey's Declaration of Death Act is unique among brain death laws currently in force in all fifty states in that the act expresses a commitment to respect religious values by recognizing the legal right of an individual to claim an exemption from the application of the neurological criteria for determining death. In other words, in New Jersey, if a patient holds religious beliefs that a declaration of brain death would somehow violate, then the individual may not be considered dead.

California does not exempt a patient from a determination of brain death. The court should reject plaintiffs' contention that Jahi is "alive" because she is not considered brain dead by the State of New Jersey. New Jersey law conflicts with California's UDDA.

C. The Demurrer to the Second Cause of Action for Negligent Infliction of Emotional Distress Should Be Sustained Without Leave to Amend Because Plaintiffs Cannot Show They Were Contemporaneously Aware of Any *Negligent* Misconduct by Dr. Rosen

Dr. Rosen's demurrer to plaintiffs' bystander NIED cause of action should be sustained without leave to amend since plaintiffs have not, and cannot, allege that (1) that Dr. Rosen *had a duty to attend to Jahi* in the PICU, (2) that plaintiffs were *aware of this duty* while they were in the PICU, and (3) that plaintiffs perceived that Dr. Rosen's *negligent failure* to come to Jahi's aid in the PICU was causing her suffering. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 918 [bystander NIED plaintiffs must perceive both the defendant's *negligent* conduct and that this *negligent* conduct is causing injury to the patient]; *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668; *Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415, 1427-1428.)

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Plaintiffs' second cause of action as to Dr. Rosen is fatally flawed. Plaintiffs' NIED theory is predicated on the inadequate response by the individuals who were attending to Jahi's while she was in the PICU. Accordingly, at the outset, plaintiffs must necessarily identify how Dr. Rosen was negligent in attending to Jahi in the PICU. Plaintiffs cannot do so. Dr. Rosen was not in the hospital, he was not on-call, and he was not made aware of Jahi's condition in the PICU. How can Dr. Rosen be guilty of inadequately caring for Jahi in the PICU if he was not apprised of her post-operative bleeding? Next, plaintiffs cannot show they had a reasonable expectation that Dr. Rosen would attend to Jahi in the PICU. Dr. Rosen did not advise plaintiffs that he would be checking on Jahi that night while she was in the PICU.

Plaintiffs submit that they have sufficiently stated a claim for bystander NIED because they allege that Mrs. Winkfield and Ms. Chatman were aware that Jahi "was being harmed by her surgeon who had not checked on the status of his patient or by the other medical staff at CHO." (See Opposition, 13:13-15.) They are mistaken. Plaintiffs' allegations as to Dr. Rosen fall woefully short of the heightened pleading requirement imposed by the Supreme Court in *Thing v. La Chusa, supra,* and *Bird v. Saenz, supra,* because they have not alleged that Dr. Rosen had a duty to "check on the status of his patient" while she was in the PICU, or that plaintiffs were aware that Dr. Rosen had a duty to "check on the status of his patient."

Surgeons are not on-call 24-7. The standard of care does not require that surgeons remain in the hospital to attend to the patient until such time as the patient has fully recovered from surgery. After surgery has concluded and the patient is transferred to the PICU, the patient's care is managed by hospital staff, the on-site attending critical-care physicians, and the on-call surgeon. Dr. Rosen was not on-call or in the hospital while Jahi was in the PICU. Unless Dr. Rosen was made aware of a medical condition that required his input, there was no duty of care for him to respond.

The demurrer to the second cause of action should be sustained without leave to amend. Plaintiffs fail to identify how they can cure the defects by amendment. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 319.) Unless plaintiffs can allege facts showing that (1) Dr. Rosen had a duty to check on Jahi while she was in the PICU, (2) that plaintiffs were contemporaneously aware of Dr. Rosen's duty to check on Jahi in the PICU, and (3) that Dr. Rosen negligently failed to come to Jahi's aid in

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the PICU, plaintiffs' bystander NIED claim fails as a matter of law.

III

CONCLUSION

Defendant Frederick S. Rosen, M.D., requests the court sustain the demurrer to Jahi McMath's first cause of action for personal injuries without leave to amend. Jahi McMath was determined to be legally and medically dead as of December 24, 2013. Plaintiffs propose that the court entertain their claim that Jahi's brain function has been restored over time and that she is a living person. Dr. Rosen respectfully requests the court decline to indulge plaintiffs' wishful thinking. The rule of issue preclusion, as well as numerous medical and ethical interests, and laws that address the finality of death, and its irreversibility, override plaintiffs' request that they be permitted to reopen the issue of Jahi's brain function in a medical malpractice case.

Dr. Rosen further requests the court sustain his demurrer to the second cause of action for negligent infliction of emotional distress, without leave to amend, on the grounds that plaintiffs cannot allege facts showing that (1) Dr. Rosen had a duty to check on Jahi while she was in the PICU, (2) that plaintiffs were contemporaneously aware Dr. Rosen had a duty to check on Jahi in the PICU, and (3) that Dr. Rosen failed to come to her aid.

Dated: July 23, 2015

HINSHAW, MARSH, STILL & HINSHAW

By: _____
THOMAS E. STILL
JENNIFER STILL
Attorneys for Defendant FREDERICK 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 COMPLAINT BY DEFENDANT FREDERICK S. 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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Walnut Creek, CA 94596

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 23, 2015.

Ursula M. Walters

Ursula M. Walters

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

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; and JAHI 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

OBJECTION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE BY DEFENDANT FREDERICK S. ROSEN, M.D.

Date: July 30, 2015 BY FAX
Time: 2:00 p.m.
Dept: 20
Judge: Hon. Robert B. Freedman

Complaint Filed: March 3, 2015

Reservation #: R - 1640356

Complaint Filed: March 3, 2015

Defendant Frederick S. Rosen, M.D., hereby objects to plaintiffs' Request for Judicial Notice, and the five documents appended thereto. Plaintiffs' counsel, Bruce Brusavich, represents that these documents are "Eligibility letters issue by the New Jersey Department of Human Services to Jahi McMath . . . ." Mr. Brusavich submits that these documents support plaintiffs claim that Jahi is alive and does not meet the definition of brain death.

At the outset, only one document was issued by the Department of Human Services. The other four documents are letters from Horizon New Jersey Health, which is not a governmental entity.

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First, none of the documents fall within any of the matters which may be judicially noticed pursuant to Evidence Code section 452. These letters are not an "official act" of a legislative, executive or judicial department. Rather, the documents merely reflect that Jahi's body is receiving medical services paid for through New Jersey's Medicaid insurance program.

Second, the documents do not reflect that Jahi is a "living person" as Mr. Brusavich represents. Rather, they indicate that Jahi's body is receiving life support services that are being paid for by Medicaid. Mr. Brusavich neglects to advise the court that the State of New Jersey, unlike California, has concluded that societal interest in uniformity of the standard of legal death should sometimes yield to reasonably accommodate a patient's religious or moral objection to being determined dead on the basis of neurological criteria. (See New Jersey Declaration of Death Act, N.J.S.A. Sections 26:6A-5 to 26:6A-7.) New Jersey applies the same definition of brain death as California, i.e., irreversible cessation of all functions of the entire brain, including the brain stem. However, New Jersey's Declaration of Death Act is unique among brain death laws currently in force in all fifty states in that the act expresses a commitment to respect religious values by recognizing the legal right of an individual to claim an exemption from the application of the neurological criteria for determining death. In other words, in New Jersey, if a patient holds religious beliefs that a declaration of brain death would somehow violate, then the individual may not be considered dead. California, however, does not exempt a patient from a determination of brain death. The court should reject plaintiffs' contention that Jahi is "alive" because she is not considered brain dead by the State of New Jersey. New Jersey law conflicts with California's UDDA.

Third, the documents cannot be offered to show that Jahi is a living person, as if this is an indisputable fact. There is nothing in the documents to reflect Jahi is alive. Nor has the State of Jersey made a determination or medical finding that she is anything but brain dead.

Fourth, even if the records could be interpreted to reflect that Jahi is not brain dead, a court cannot take notice of the truth of the matters in a public record. (See *People v. Long* (1970) 7 Cal.App.3d 586, 591.)

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For the foregoing reasons, Dr. Rosen respectfully requests the court decline to take judicial notice of plaintiffs' exhibits.

Dated: July 23, 2015 HINSHAW, MARSH, STILL & HINSHAW

By: _____
THOMAS E. STILL
JENNIFER STILL
Attorneys for Defendant 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.

OBJECTION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE BY DEFENDANT FREDERICK S. 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 July 23, 2015.

Ursula M. Walters

Ursula M. Walters

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