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FILED
ALAMEDA COUNTY

JAN 21 2016

CLERK OF THE SUPERIOR COURT
By  Deputy

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 ROBERT B. FREEDMAN
DEPARTMENT 20

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

Reservation #: R-1687987, 16869755

Date: January 29, 2016

Time: 2:00 p.m.

Dept: 20, Hon. Robert B. Freedman

Complaint Filed: 3/3/15

First Amended Complaint Filed: 11/4/2015

22 Defendant FREDERICK ROSEN, M.D., submits the following Supplemental Brief in
23 response to the court's tentative ruling dated January 8, 2016.

24 **A. Judge Grillo Has Exclusive Jurisdiction of the Question of Jahi McMath's
25 Brain Function**

26 The record in Case No. RP13-707598 confirms that Judge Grillo retained jurisdiction of the
27 question of Jahi McMath's brain death when the instant action was filed on March 3, 2015.

28 In October 2014, Mrs. Winkfield attorney, Christopher Dolan, filed "Writ of Error Coram

1 Norbis” requesting that Judge Grillo reconsider his determination and judgment of brain death.
2 Judge Grillo accepted jurisdiction and agreed to consider Mrs. Winkfield’s new evidence of alleged
3 brain function. (Ex. K to Still Decl.)

4 On October 1, 2014, Judge Grillo entered an Order appointing Dr. Paul Fisher as the court’s
5 expert to consider Mrs. Winkfield’s new evidence. In his Order, Judge Grillo expressly denied Mrs.
6 Winkfield’s request for an evidentiary hearing. He ruled: “The court will hear the matter on the
7 papers, including any audiovisual recordings. The court will not hear live testimony.” A hearing date
8 was scheduled for October 9, 2014, at 9:00 a.m. Judge Grillo further ordered that Mr. Dolan give
9 notice of the Order to the Alameda County Coroner and the California Department of Public Health
10 given that a death certificate had been issues. Regarding death certificate, Judge Grillo opined that
11 Mrs. Winkfield “could file an action asserting a claim of some form of relief against appropriate
12 defendants (E.g., California Department of Public Health Vital Records, Alameda County Coroner,
13 etc.) seeking declaratory and/or injunctive relief.” (Exhibit J to Still Decl.)

14 After Dr. Fisher submitted his letter, wherein he opined that Mrs. Winkfield’s new
15 evidence did not cause him to change his prior opinion that Jahi met the criteria for brain death, Mr.
16 Dolan filed motions objecting to the appointment of Dr. Fisher as well as Judge Grillo’s denial of the
17 request for an evidentiary hearing. On October 8, 2014, the day before Judge Grillo was expected to
18 rule against Mrs. Winkfield, Mr. Dolan emailed Judge Grillo, wherein he advised:

19 It is my intention to try and take the hearing on the Writ off
20 calendar for tomorrow and re-file it, **requesting a hearing date of**
21 **November 14 [2014]**. This will give every party ample time to
22 brief the very complex issues in this matter.

23 Thereafter, in his Order dated October 8, 2014, Judge Grillo instructed Mr. Dolan, as well
24 as legal counsel for the Alameda County Coroner and the California Department of Public Health
25 that, if at a later date, Mrs. Winkfield sought “relief in this case” she could request a CMC. At that
26 time Judge Grillo would set the matter for hearing and any briefing schedule. In other words, it was
27 Judge Grillo’s intent that he would continue to make himself available to rule on plaintiffs’ new
28 evidence. Judge Grillo also instructed that if Mrs. Winkfield “elected to file a different case, then
any CMC proceedings in that case should be held in that case.”

1 Mrs. Winkfield declined to avail herself of the remedy of an extraordinary writ seeking
2 appellate review of Judge Grillo's October 1, 2014, Order appointing Dr. Fisher as the court's expert
3 and denial of her request for "live testimony." Instead, Mrs. Winkfield filed the instant action
4 wherein she seeks the same relief, based on the same evidence, that she presented to Judge Grillo six
5 months previous.

6 This court states in its tentative ruling, that "The fact that Judge Grillo issued a Case
7 Management Order on October 8, 2014, stating that '[i]f petitioner elects to seek relief in this case,
8 then petitioner may request a CMC at a later date in this case' at which 'the court will decide
9 whether to set the matter for further hearing,' does not establish that Judge Grillo retained
10 jurisdiction over any matter - civil action or otherwise - relating in any way to Jahi, nor would he
11 likely have the authority to do so. To the contrary, his order expressly states that '[i]f petitioner elects
12 to file a different case, then any CMC regarding proceedings in that case should be held in that case'
13 and that a notice of related case is to be filed."

14 Dr. ROSEN submits that at the time Judge Grillo prepared the December 8, 2014 Order, the
15 court was under the impression that it was Mr. Dolan's intention to return to Judge Grillo's court in
16 November 2014 for reconsideration of the brain death question. Judge Grillo advised that he would
17 schedule a CMC as well as a hearing and briefing schedule. Judge Grillo anticipated that he would
18 continue to consider all questions pertaining to his initial determination of brain death. There is no
19 question that Judge Grillo left the door open for Mrs. Winkfield to return to his court for his ruling
20 on Jahi's brain function.

21 The "different case" referred to in Judge Grillo's order referred to Mr. Dolan's quest to
22 have the death certificate rescinded or voided. This is the reason the Department of Public Health,
23 the Coroner's office and the Alameda County Counsel's office were included in the October 2014
24 proceedings. In fact, Judge Grillo invited Mrs. Winkfield to file such an action in his October 1,
25 2014 Order. A few weeks ago, Mrs. Winkfield filed a complaint in federal court that seeks to void
26 the death certificate. Certainly Judge Grillo did not contemplate that Mrs. Winkfield would file a
27 separate action wherein she sought to vacate Judge Grillo's judgment of brain death based on the
28 identical "new" evidence she presented to him for consideration in October 2014, since any such

1 ruling would be void due to lack of jurisdiction.

2 If Mrs. Winkfield disagreed with Judge Grillo's October 1, 2014 Order appointing Dr.
3 Fisher and denying her request for "live testimony," her recourse was to file an a writ with the
4 appellate court. This court is bound by Judge Grillo's judgment of brain death.

5 **B. This Court Cannot Interfere with Judge Grillo's Determination and Judgment**
6 **of Brain Death**

7 "It has been long established that one department of the superior court cannot enjoin,
8 restrain, or otherwise interfere with the judicial act of another department of the superior court."

9 (*Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742.)

10 "For one superior court judge, no matter how well intended, even if correct as a matter of
11 law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge
12 in the role of a one-judge appellate court." (*In re Alberto* (2002) 102 Cal.App.4th 421,427.)

13 "[T]he rule prohibiting a second judge from interfering with another judge's order is the
14 same whether the second judge acts before or after judgment. [Citations]" (*Id.*, at p. 429.)

15 "If the rule were otherwise, it would be only a matter of days until we would have a rule of
16 man rather than a rule of law. To affirm the action taken in this case would lead directly to forum
17 shopping, since if one judge should deny relief, defendants would try another and another judge until
18 finally they found one who would grant what they were seeking. Such a procedure would instantly
19 breed lack of confidence in the integrity of the courts." (*People v. The Superior Court of Los Angeles*
20 *County (Scofield)* (1967) 249 Cal.App.2d 727, 734 [first judge's ruling upholding search warrant was
21 binding on second judge; order granting Pen. Code, § 995 motion reversed].)

22 This rule has been applied in both criminal and civil cases. (See, e.g., *People v. Madrigal*
23 (1995) 37 Cal.App.4th 791, 795-797 [ruling of second judge imposing a prison sentence after
24 probation violation hearing is unlawful when first judge had earlier reinstated probation]; *Elesa v.*
25 *Saberi* (1992) 4 Cal.App.4th 625, 630-631 [second judge without power to vacate default judgment
26 entered by first judge]; *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060,
27 1068-1071 [reversing order unsealing record after previous judge ordered record sealed]; *Micro/Vest*
28 *Corp. v. Superior Court* (1984) 150 Cal.App.3d 1085, 1088-1091 [second judge may not determine

1 that first judge improperly struck Code Civ. Proc., § 170.6 challenge].)

2 In *In re Marriage of Schenck* (1991) 228 Cal. App. 3d 1474, the Court of Appeal applied
3 the rule stated in *Williams* to a dissolution proceeding. The family law department had entered an
4 order which awarded a wife "exclusive occupancy of the former family residence for three years and
5 expressly reserved jurisdiction over its ultimate 'valuation and disposition.'" (Id. at p. 1476.)
6 Thereafter, the wife sought an order from the law and motion department allowing the sale of the
7 husband's community property interest in the residence to satisfy accumulated child and spousal
8 support arrears. (Id. at pp. 1476-1477.) The law and motion department refused to issue the order
9 and advised the wife to bring the matter before the family law department. (Id. at p. 1477.) The Court
10 of Appeal affirmed, holding that the family law department had "priority of jurisdiction" over the
11 property and thus the wife was required to seek relief from that department in the first instance. (*In*
12 *re Marriage of Schenck, supra*, at pp. 1482-1484, fn. 4.)


13 While there are no cases that permit a second judge to interfere with the judgment of the
14 duly assigned judge, there is a narrow line of cases that appears to authorize one trial judge to
15 reconsider the interim rulings of a colleague who is unavailable to reconsider the motion. (See *Ziller*
16 *Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232.) The court can take
17 judicial notice of the fact that Judge Grillo is currently listed as an active Judge of the County of
18 Alameda (Evid. Code section 452, subd. (h).) Furthermore, it is undisputed that less than six months
19 before plaintiffs filed the instant action, Judge Grillo *agreed* to reconsider his prior determination of
20 brain death. He was prepared to issue his ruling on October 9, 2014. However, Mr. Dolan took
21 objection to Judge Grillo's October 1, 2014 Order and the opinion of Dr. Fisher, therefore, he
22 withdrew Mrs. Winkfield's petition on the eve of Judge Grillo's decision. Mrs. Winkfield did not
23 avail herself of the appropriate remedies, e.g., file an extraordinary writ of the October 1, 2014 Order
24 or appeal the judgment. Instead, she is now asking another judge to interfere with the judgment and
25 orders of Judge Grillo. These tactics are expressly prohibited.

26 Finally, with one limited exception, there is no authority that permits a second judge to
27 reconsider a ruling by the judge who was duly assigned the matter for resolution based on a claim of
28 "changed circumstances." The limited situation where a change of circumstances permits a second-

1 judge to reverse the ruling of the initial assigned judge is in the context of a Criminal Code section
2 995 motion to set aside an indictment. (See *In re Kowalski* (1971) 21 Cal.App.3d 67; *People v.*
3 *Sherwin* (2000) 82 Cal.App.4th 1404.)

4 Plaintiffs do not dispute that the “new” evidence supporting their claim of “changed
5 circumstances” in this case was the same evidence presented to Judge Grillo in October 2014.
6 California case law prohibits a party from shopping their purported “changed circumstances”
7 evidence to multiple judges.

8
9 Dated: January 20, 2016 HINSHAW, MARSH, STILL & HINSHAW

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12 By: 
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14 JENNIFER STILL
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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 January 20, 2016.

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.