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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Spears Plaintiff/Petitioner(s) VS. Rosen Defendant/Respondent(s) (Abbreviated Title)	No. RG15760730 Order Demurrer and Motion to Strike Complaint Denied

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, was set for hearing on 01/29/2016 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. A tentative ruling was published directing counsel to appear.

The matter was argued and submitted, and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

The demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi") is OVERRULED on the grounds asserted.

CHO's demurrer 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.) The court addresses each argument in turn.

(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 Nailah 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 - which is subject to rebuttal and explanation

and is the subject of a pending challenge in federal court - establishes the fact of Jahi's death as a matter of law (at the pleading stage) so as to preclude her from bringing the first cause of action.

(3) As to the amended order and judgment in Case No. RP13-707598, there are essentially two aspects to CHO's argument: (a) the asserted collateral estoppel effect; and (b) the asserted finality of a determination of death under Health and Safety Code sections 7180 and 7181.

As to the asserted collateral estoppel effect, CHO has sound arguments that the court's amended order of January 2, 2014 and judgment in Case No. RP13-707598 - denying Winkfield's petition for medical treatment for Jahi after a hearing at which the court considered declarations of Jahi's examining physicians and a physician (Paul Fisher, MD) appointed by the court to provide a second, independent opinion pursuant to Health and Safety Code section 7181 - may ultimately be entitled to collateral estoppel effect as to the determination "that Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (See Decl. of Joseph E. Finkel, Exh. A, p. 16; see also id., Exh. B; Request for Judicial Notice, items 1(a) and 1(b).) As the court noted at the hearing on this demurrer, Judge Grillo's amended order is detailed as to the court's analysis and consideration of the medical evidence, as well as the procedural posture of the hearing and the parties' opportunity to present evidence and argument as to the "brain death" issue.

Nevertheless, the court is not persuaded that it would be appropriate to determine the collateral estoppel effect of the amended order and judgment in Case No. RP13-707598 at the pleading stage, based solely on the allegations in the FAC and the matters of which judicial notice is taken. Collateral estoppel 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.) There are at least some aspects of the collateral estoppel determination that may require a more developed factual record. The court has concerns, for example, about whether the factual determinations in the context of the expedited probate petition - which was filed for the purpose of determining whether CHO should be ordered to continue providing medical care to Jahi - should necessarily be binding on Jahi in a civil lawsuit for damages brought on her own behalf. There are circumstances in which "[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 § 28(3).) Here, the prior expedited petition did not involve the same type of discovery and presentation of evidence as is involved in a civil action.

In addition, even where the traditional elements of collateral estoppel (privity, finality and necessary determination of identical issue in prior adjudication) are met, there is also 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.) The court believes it would be premature to determine and apply such considerations based solely on the allegations and matters of judicial notice before it, without a more fully developed factual record.

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. (See, e.g., FAC, ¶¶ 30-36.) Such allegations are to be taken as true on demurrer. (See, e.g., Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967.) 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.

As to the asserted finality of a determination of death under Health and Safety Code sections 7180 and 7181, the court does not find the authority cited by CHO sufficient for the court to determine, at the pleading stage, that the determination made in the context of Winkfield's probate petition is to be accorded finality for any and all other purposes, independent of considerations of collateral estoppel discussed above. CHO contends that a determination of brain death in the context of a probate petition 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 § 7151.40.)

Nevertheless, despite the court's continuance of the hearing so the parties could submit further authority in this regard, the only authority cited by CHO in its supplemental memorandum in this regard (aside from a case to the effect that statutes should be construed in a manner consistent with the ordinary meaning of the words used) is Dority v. Superior Court (1983) 145 Cal.App.3d 273. In that case, the court recognized that, while Health and Safety Code sections 7180 and 7181 provide physicians and the guardian of an individual asserted to have suffered brain death with standards for making such a determination, "[w]e find no authority mandating that a court must make a determination brain death has occurred." (Id., p. 278.) Instead, "[n]o judicial action is necessary where the health care provider and the party having standing to represent the person allegedly declared to be brain dead are in accord brain death has occurred." (Id., p. 280.) However, "[t]he jurisdiction of the court can be invoked upon a sufficient showing that it is reasonably probable that a mistake has been made in the diagnosis of brain death or where the diagnosis was not made in accord with accepted medical standards." (Id.) In Dority, for example, "the parents became unavailable by their actions, requiring the court to appoint a temporary guardian. The guardian, faced with a diagnosis of brain death, correctly sought guidance from the court. The court, after hearing the medical evidence and taking into consideration the rights of all the parties involved, found [the individual] was dead in accordance with the California statutes and ordered withdrawal of the life-support device." (Id., p. 280.) The Court of Appeal held that the "court's order was proper and appropriate." (Id.)

While Dority supports the appropriateness of the judicial proceeding in Case No. RP13-707598, in which Winkfield sought the court's intervention because of uncertainty as to the treating physicians' diagnosis of brain death and Winkfield's assertion that CHO should continue providing life support to Jahi, it does not directly address CHO's assertion that a court's determination in the context of a such a dispute is to be accorded finality in any and all other proceedings or disputes that may arise subsequent to the life-support dispute in which the court's intervention was sought. In the absence of other authority addressing this assertion, the court declines to make a final determination in this regard at the pleading stage.

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 or reversal of the matters in the prior probate proceeding or seeking to apply standards other than those set forth in the UDDA. Instead, they have brought a civil action independent of the prior proceeding, which includes a cause of action asserted on Jahi's behalf. CHO, as the party moving for dismissal of that cause of action, bears the burden of showing that it is insufficient or barred as a matter of law, and the court determines that CHO has not met this burden at the pleading stage, based solely on the allegations and matters of which the court takes judicial notice.

CHO's motion to strike the language in paragraph 54 that "[i]n the event that it is determined Jahi McMath succumbed to the injuries" is DENIED. At the pleading stage, Plaintiffs are entitled to use such language to preserve their right to plead in the alternative, regardless of what determinations may subsequently be made herein.

CHO's Request for Judicial Notice, at pages 2-3 of its moving memorandum and accompanied by the Declaration of Joseph E. Finkel in Support of the request, is GRANTED, but the court does not take judicial notice of the truth of matters asserted, or the binding nature of any determinations made, in the accompanying exhibits.

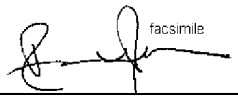
Plaintiffs' Request for Judicial Notice, filed on January 5, 2016, is GRANTED, but the court does not take judicial notice of the truth of the allegations in the attached exhibit and makes no determination that the exhibit is material to the court's determination of this demurrer and motion to strike.

CHO shall have 14 days after the date reflected in the clerk's declaration of service of this order in which to file and serve an answer to the First Amended Complaint.

CHO's Request for Question Certification Under Code of Civil Procedure section 166.1, filed on January 27, 2016, is GRANTED IN PART. The court has issued a separate order setting forth its

belief that there are controlling questions of law involved in the instant order as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation. (See C.C.P. § 166.1.)

Dated: 03/14/2016



Judge Robert B. Freedman

SHORT TITLE:	CASE NUMBER:
Spears VS Rosen	RG15760730

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