FILED
NOV 0 4 2008
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

--------------------------------------)
IN RE:

M.B.

Case: 1:08-cv-01898
Assigned To : Kennedy, Henry H
Assign. Date : 11/4/2008
Description: Civil Rights - Non. Employ.

NOTICE OF REMOVAL
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§1441, 1446, the real defendants in interest, Eluzer Brody and Miriam Brody as the parents of Motl Brody (a minor), by their undersigned attorney, hereby remove this action to the United States District Court for the District of Columbia, on the grounds that:

1. On information and belief, on or about November 3, 2008, Children's National Medical Center (commonly known as "Children's Hospital") commenced an action in the Superior Court of the District of Columbia, Family Court – Domestic Relations Branch, styled "In Re: M.B.", Jacket Number 08FSP310 ("the Action").

2. The complaint in the Action asks the Superior Court, *inter alia*, to permit the Medical Center to "stop all treatment" of Motl Brody, the 12-year-old son of Eluzer and Miriam Brody who is a patient in the Intensive Care Unit of the Medical Center.

3. The summons and complaint in the Action were served upon counsel for Eluzer and Miriam Brody on November 3, 2008.

4. The real parties in interest in the Action are Children's National Medical Center as plaintiff, and Eluzer Brody, Miriam Brody and Motl Brody as defendants.

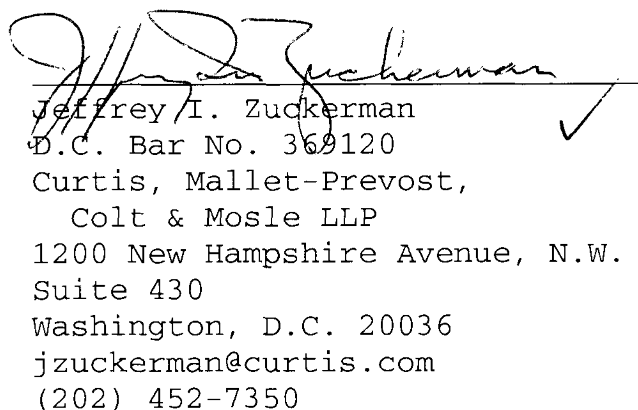
5. The Action is a civil action of which the district courts of the United States have original jurisdiction, pursuant to 28 U.S.C. §1332, because (a) the matter in controversy exceeds the sum or value of $75,000; (b) on information and belief, the Medical Center is incorporated, and has its principal place of business, in the District of Columbia, and thus is a citizen of the District of Columbia; and (c) Eluzer Brody, Miriam Brody and Motl Brody are all citizens of the State of New York.

6. No defendant is a citizen of the District of Columbia.

7. A copy of all process, pleadings and orders served upon Eluzer and Miriam Brody is attached hereto, to wit: "Summons" and "Complaint (for Injunctive Relief and Declaratory Judgment)."

Dated: November 4, 2008

Yours, etc.,



Jeffrey I. Zuckerman
D.C. Bar No. 369120
Curtis, Mallet-Prevost,
Colt & Mosle LLP
1200 New Hampshire Avenue, N.W.
Suite 430
Washington, D.C. 20036
jzuckerman@curtis.com
(202) 452-7350

Attorney for Eluzer Brody,
Miriam Brody and Motl Brody

TO: CLERK
United States District Court
for the District of Columbia
333 Constitution Avenue, Room 1225
Washington, D.C. 20001

KENNETH H. ROSENAU, ESQUIRE
Rosenau & Rosenau
1304 Rhode Island Avenue, N.W.
Washington, D.C. 20005

Attorney for
Children's National Medical Center

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
FAMILY COURT - DOMESTIC RELATIONS BRANCH
JUZGADO DE FAMILIA- DIVISIÓN DE RELACIONES DOMÉSTICAS
500 Indiana Avenue, N.W., Washington, D.C. 20001

A Complaint for: *Demanda de:*

- [ ] Divorce *Divorcio*
- [ ] Legal Separation *Separación Legal*
- [ ] Annulment *Anulación*
- [X] Other: *Otro*
- [ ] Custody *Tutela*
- [ ] Standby Guardianship *Tutoría de Reserva*
- [ ] Visitation *Visitas*

In the Matter of: *En la causa de:* [illegible] M.B.

Plaintiff *Demandante*

Jacket Number *Número del expediente* 08 FSP 310

vs.

Defendant *Demandado*

SUMMONS
NOTIFICACIÓN

TO: *A:* [illegible]

Name *Nombre* [illegible]

Address *Dirección* 1200 N [illegible]

You are hereby SUMMONED to the Family Court of D.C. Superior Court and required to Answer the attached Complaint. Your Answer must be filed with the Clerk of this Court in the Family Court Central Intake Center, D.C. Superior Court, Room JM-520, 500 Indiana Avenue, N.W. Your Answer must be properly filed within twenty (20) days after service of this Summons and Complaint upon you. This 20-day period does not include the day on which you were served. A copy of your Answer must be served upon the plaintiff's attorney or plaintiff, whichever is indicated below. If you do not file your answer on time, the court may make orders affecting your marriage, your property, and custody and visitation of your children. You may be ordered to pay support and attorney fees. It is recommended that you seek the advice of an attorney to assist you in this case.

Por medio de la presente se le ORDENA comparecer en persona al Juzgado de Familia en el Tribunal Superior del Distrito de Columbia y se le exige su contestación a la demanda adjunta. Debe presentar su contestación con el actuario de este tribunal en el "Family Court Central Intake Center" Tribunal Superior del Distrito de Columbia, Oficina JM-520, 500 Indiana Avenue, N.W. La contestación debe presentarse de manera adecuada dentro del plazo de veinte (20) días después de que este citatorio y demanda se le hayan entregado formalmente. Este plazo de 20 días no incluye el día de la notificación formal. Debe entregarse una copia de la contestación formalmente al indicado, ya sea el abogado del demandante o el demandante,

PLAINTIFF'S ATTORNEY OR PLAINTIFF
ABOGADO DEL DEMANDANTE O DEMANDANTE

Name: *Nombre:*	**Address:** *Dirección:*
Kenneth H. Rosenau	304 Rhode Island Ave., NW Washington, DC 2000[illegible]

Witness, the Honorable Chief Judge of the Superior Court of the District of Columbia and seal of said Court.
Doy fe, el Honorable Juez Presidente del Tribunal Superior del Distrito de Columbia y el sello de dicho tribunal.

SEAL *Sello*

Clerk of the Superior Court of the District of Columbia
Actuario del Tribunal Superior del Distrito de Columbia

Date of Issue: *Fecha de emisión:* 11/3/08

By: *Por:* [signature]
Deputy Clerk *Actuario Auxiliar*

***This summons expires 60 days from the date of issue noted above. This case will be dismissed if the Plaintiff fails to comply with Rule 4 (l). (See back)**
** Este citatorio se vence 60 días después de la fecha de emisión. Esta causa será sobreseída si el demandante no cumple con la Regla 4(l).*
Please note that additional information is available on the reverse side of this form.
Favor de notar la información adicional al dorso de este formulario.

FD(10) WHITE-LEGAL RECORD COPY GOLDENROD-SERVER'S COPY YELLOW-SERVICE COPY (ENGLISH) GREEN-SERVICE COPY (SPANISH)

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

IN RE: **M.B.**	)))))))

2008 NOV -3 P 3:36

08 FSP 310

COMPLAINT
(FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT)

COMES NOW, Children's National Medical Center, commonly known as Children's Hospital, (hereinafter "Hospital") and moves by and through the undersigned counsel as follows:

1. The Court has jurisdiction pursuant to D.C. Code § 11-921(a) and D.C. Rules of Civil Procedure (RCP) 57 permits a declaratory judgment.
2. Patient M.B. has been a patient at Children's National Medical Center for approximately six months. He recently succumbed to a brain cancer.
3. M.B. was regrettably evaluated as brain dead on November 02, 2008 at 4:55 p.m. The parents were informed of the result and were informed that the Hospital would perform another examination within twelve hours to confirm the brain death. The Hospital would also do another confirmatory test such as an EEG or cerebral radionuclide study. If these tests confirmed the first results then brain death would be confirmed under D.C. guidelines.
4. Brain death is the medical and legal standard for death in the District of Columbia.

5. The parents requested that the Hospital would defer the next test, however, the Hospital stated that they would proceed with all tests. The Hospital explained what would happen if the Parents did not agree with the results of the confirming tests and reported that the Parents demonstrated an understanding of these procedures. (See Apnea and Brain Death Evaluation results attached as Exhibit A).
6. That the parents' attorney, Mr. Biser, contacted the hospital and stated that they were opposed to further brain testing, and he also stated that that if the Hospital pursued the tests then Judge Collyer of the Federal Court would request an appearance before her prior to the test. In the meantime the Judge requested, as a courtesy, that the Hospital maintain the ventilator and refrain from performing any further tests.
7. However, there has been no order issued by Judge Collyer, as of 12:30 PM on November 3, 2008.
8. That the parents are of the Orthodox Jewish faith and as part of their faith they believe that life ends when the heart stops beating as opposed to when the brain stops working. Further, Judge Collyer indicated at 9:30 AM, on November 3, 2008, that she was not exercising jurisdiction.
9. The issue in this case is whether the Hospital has the authority to follow the stated procedure when a patient is considered brain dead, or whether the parents wishes take precedent over hospital procedure in this case.
10. At this stage the parents are refusing to make any decisions regarding their child, except actions the Hospital does not wish to take.

11. A guardian ad litem should be appointed to make a decision regarding further tests for the child.

12. The following people have been contacted as possible Guardian Ad Litems regarding M.B.: Ira Zimmerman, George Teitlebaum, and Ethan Suskine.

13. We are seeking relief of the Court as an alternative to harsher, less tolerable rights of self-help we could invoke.

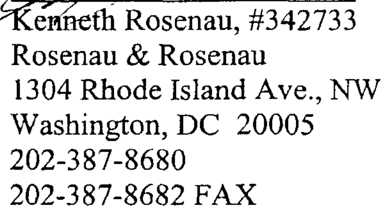
14. Nevertheless, the Parents' reaction seems outside the normal "grief reaction" regrettably seen all too often at a specialty hospital such as Children's. Unlike conventional hospitals we see far more fact patterns of this type.

WHEREFORE, Children's National Medical Center seeks:

a. That the court issue a declaratory judgment stating that the Hospital is permitted to take the required tests to confirm that M.B. is brain dead and stop all treatment.

b. Any further relief as this Court deems just and equitable and balances the best interests of the patient, and duties of all parties.

Respectfully submitted,

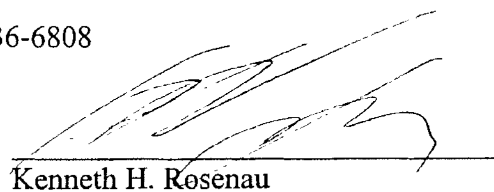


Kenneth Rosenau, #342733
Rosenau & Rosenau
1304 Rhode Island Ave., NW
Washington, DC 20005
202-387-8680
202-387-8682 FAX

CERTIFICATE OF SERVICE

I, KENNETH H. ROSENAU, hereby certify that a copy of the foregoing Complaint for Injunctive Relief and Declaratory Judgment were served by hand by the same process server. This service was effectuated by hand on 3 day of November to: At 2:00 pm

Mr. and Mrs. Brody c/o Mr. Jeffrey Ira Zuckerman
Curtis Mallet-Prevost Colt & Mosle LLP
1200 New Hampshire Avenue NW
Suite 430
Washington DC 20036-6808

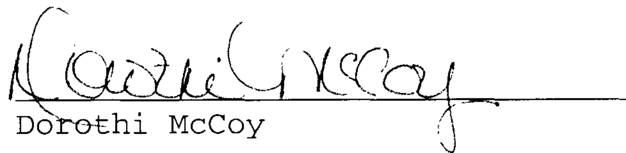


Kenneth H. Rosenau

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Notice of Removal to the United States District Court for the District of Columbia from the Superior Court of the District of Columbia" was served upon counsel for the Children's National Medical Center by hand delivery to:

Kenneth H. Rosenau, Esquire
Rosenau & Rosenau
1304 Rhode Island Avenue, N.W.
Washington, D.C. 20005



Dorothi McCoy

L
08-1898
HHK

CIVIL COVER SHEET

JS-44
(Rev.1/05 DC)

I (a) PLAINTIFFS

Children's National Medical Center

11001
D.C.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Eluzer Brody, Miriam Brody and Motl Brody

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)
NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Kenneth H. Rosenau (202) 452-7350
Rosenau & Rosenau
1304 Rhode Island Avenue, N.W.
Washington, D.C. 20005

AT

Case: 1:08-cv-01898
Assigned To : Kennedy, Henry H.
Assign. Date : 11/4/2008
Description: Civil Rights - Non. Employ.

II. BASIS OF JURISDICTION

(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U S Government Plaintiff
- ○ 3 Federal Question (U S Government Not a Party)
- ○ 2 U S Government Defendant
- ⦿ 4 Diversity (Indicate Citizenship of Parties in item III)

III CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	⦿ 4	○ 4
Citizen of Another State	○ 2	⦿ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

○ A. *Antitrust*

- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 368 Asbestos Product Liability

○ C. *Administrative Agency Review*

- ☐ 151 Medicare Act

Social Security:
- ☐ 861 HIA ((1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g)
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g)

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

⊘ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR **○ F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 610 Agriculture
- ☐ 620 Other Food &Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 RR & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

Other Statutes
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation

- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Satellite TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 900 Appeal of fee determination under equal access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act

6

○ G. *Habeas Corpus/ 2255*	○ H. *Employment Discrimination*	○ I. *FOIA/PRIVACY ACT*	○ J. *Student Loan*
☐ 530 Habeas Corpus-General ☐ 510 Motion/Vacate Sentence	☐ 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loans (excluding veterans)

○ K. *Labor/ERISA (non-employment)*	☒ L. *Other Civil Rights (non-employment)*	○ M. *Contract*	○ N. *Three-Judge Court*
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Labor Railway Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 444 Welfare ☒ 440 Other Civil Rights ☐ 445 American w/Disabilities-Employment ☐ 446 Americans w/Disabilities-Other	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights-Voting (if Voting Rights Act)

V. ORIGIN

○ 1 Original Proceeding ◉ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi district Litigation ○ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

to stop medical treatment 28 USC 1332

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** [ ] Check YES only if demanded in complaint **JURY DEMAND:** YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form.

DATE November 4, 2008 **SIGNATURE OF ATTORNEY OF RECORD** [signature]

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The **JS-44** civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the Cover Sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence Use 11001 to indicate plaintiff is resident of Washington, D C ; 88888 if plaintiff is resident of the United States but not of Washington, D C., and 99999 if plaintiff is outside the United States

III. CITIZENSHIP OF PRINCIPAL PARTIES. This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT. The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint You may select only one category. You must also select one corresponding nature of suit found under the category of case.

VI. CAUSE OF ACTION. Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause

VIII. RELATED CASES, IF ANY. If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form

KB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE M.B[1]
(D.D.C.)

DOCKET NO. Case 1:08-cv-01898 (HHK)

MOTION TO DISMISS AND FOR DECLARATORY JUDGMENT AND REQUEST FOR EMERGENCY HEARING/TRO

Comes now Children's Hospital and with deep respect for the pain the parents are feeling and sympathy at their loss, moves to dismiss this matter and for an emergency hearing for the following reasons:

Preliminarily, as expressed previously and more privately, the family has our profoundest sympathy. The death of any child is a traumatic unsettling and disquieting event to bystanders and medical personnel let alone family. The death was inevitably a direct result of the progression of this most aggressive tumor. He was only 12. We express our heartfelt sympathy and hope that the legal difficulties they have compelled us to by their position does not overwhelm our sincerest sympathies to them in what should be their time of bereavement. It is too easy to loose the human and

[1] The nomenclature and naming of the parties in the Notice of removal violates HIPAA without formal signed releases by the parents of the late child. Without such formal release, Children's National Medical Center, hereafter CNMC, prefers to adhere strictly to the law for the privacy of the late child and his family. And is filing a motion to seal portions of the record.

compassionate when extreme views require action in the Court. Displaced grief is still grief.

1. There is no jurisdiction for this Court on this matter. On the simplest level this matter was pending in the Superior Court and set for a TRO on the issues defined below in the Family Division of the Superior Court. The removal was a calculated attempt to circumvent that normal process. There is no infringement on the parents religious views as discussed below. There is no issue of money between the parties, let alone $75,000. With all due respect to the candor to the tribunal of opposing counsel, that rote recitation was motivated by a desire on the part of the parents to continue what they perceived as medical treatment and effectuation of religious laws over the spirit and letter of the law of the District and Untied States.

2. The usual pattern of CNMC is not advise their attorneys (and often even their physicians) if there is or is no insurance coverage in a case. This permits the counsel to take such action as is required without anyone throwing stones and saying it was motivated by money. That pattern is well known to the Courts and is being broken in this case due to the jurisdiction issue raised by the parents. There is 100% insurance coverage on this child and no bills or fees are known to be originating to the parents. There is not

even a TV rental. In issue. Bluntly, this is not a case about money on either side and we respect the parent's heartfelt desires to remove this case and therefore gain a few days or weeks of the illusion of life as a victory, but need to correct their misimpression. Jurisdiction is a pretext offered to permit more time to pass.

Children's has maintained for decades a policy of treating every child regardless of fiscal ability, coverage or no coverage.

3. It may at some point become a case about money in that the Child was pronounced dead overnight, last night (November 4 to 5).[2] As such the insurance company at some point in the future might decline to pay for coverage from the point of declaration. Right now there is no bill, let alone $75,000 or $7,500 in issue. The Court can issue a show cause order forthwith giving the counsel time to demonstrate such a bill or amount in controversy. This representation binds CNMC in future actions. CNMC would suggest 6 hours for the return of the show cause since we know what has issued, and not issued in this case. What is in dispute is the tragic death of a 12 year old child from a brain tumor, and the cynical attempts of the parent's attorneys to construe $75,000 in monetary damages is not worthy of the deep felt religious views of the parents and not worthy of the jurisdiction

[2] That process was started Sunday and the parent withdrew consent for further testing.

of this Court. Continuing this case strips the child of any dignity an dishonors his memory and CNMC regrets counsel opposite have adopted that tactic. It is not worthy of the memory of MB.

4. What is in issue in this case is not a federal questions and it is not normally the province of the Federal Courts. With all due respect to the rule 11 inquiry of opposing counsel, and we note here *the counsel* and not the parents, there is a simple clash of the definitions of death.

5. Children's notes in this regard the child had a progressive grade IV astrocytoma [aka Glioblastoma multiforme, which is the highest grade glioma and is the most malignant form of the astrocytomas]. Despite all therapies and surgical measures, this brain tumor carries a very poor survival rate. Citations as far back as 1940's Gunther's, *Death be not Proud*, or the late Glen Brenner could be mentioned. The regrettable diagnosis for approximately half a year has been terminal. The only issue in the treatment during the life time of the child was whether surgical intervention, radiation, chemo or such could have prolonged his life and if by which of those various choices.

6. The child has been pronounced dead. Under federal and District law the doctors should withdraw all efforts. To quote from the affidavit of the physician:

There is no activity in any portion of his brain, including the brain stem. The patient received a brain death exam on Sunday evening that revealed that the patient had no brain stem activity. He had no cough or gag response with the proper stimulation. The patient did not have any corneal responses with stimulation to corneal region. He has no spontaneous movement or any such movement with noxious stimulation to any extremities or truncal region. He did not have the proper response when cold water was placed into either ear canal. And his eyes remain fixed, dilated, and midpoint. He received an apnea test and did not breathe while off the ventilator despite the partial pressure of carbon dioxide in his blood reaching levels of 94 (normal 35-45) which would stimulate any normal and functional brain to breathe. He had an electroencephalogram which can be considered a confirmatory exam performed that measures the electrical activity of the brain. This patient's brain wave activity was flat in all of his leads. He therefore has no brain activity recorded. This patient therefore can be declared brain dead because of the above exam.

7. As the evidence will show in this case, the brainstem controls autonomic functions such as heart rate and breathing. The ventilator is all that keeps this "breathing" going. The cardiac activity is due to three drugs which the parents refuse to let us discontinue: Epinephrine (aka adrenaline) Dopamine and Vassopressine.

8. The situation will not await a deliberated approach over months. At the current time many of his normal bodily functions are decomposing in the physical sense. Like time and tides this will not wait for the hand of man.

Notably he is in diabetes insipidus due to the loss of the function of his brain stem to produce hormones to regulate his body water. This hormone is currently being replaced by drugs we wish to stop. He is also losing the function of his cardiovascular system requiring medications to keep his heart beating and his blood pressure within a reasonable range. This is all causing oscillation in the clinical picture of this patient and he is becoming remarkably unstable. It should be noted in this regard that the above statement was adopted by Dr. Smith in her affidavit. The decomposition of brain tissue means that instead of small regulated doses of hormone secreted by the body to the blood stream from a "bank" in the glands of the brain, those same cells are now breaking open and dying, releasing floods of the hormones instead. The situation is not stable and the hospital is incapable of stabilizing it. This is death at its simplest and the return of the human form to the "dust from man was are made."

9. As expressed previously, the family has our profoundest sympathy. The death of any child is a traumatic, unsettling and disquieting event to bystanders and medical personnel let alone family. The death was inevitably a direct result of the progression of this most aggressive of tumors. We express our sympathy and hope that the legal difficulties they have compelled us to by their position does not overwhelm our sincerest

sympathies to them in what should be their time of bereavement. But the decision of their counsel to remove compels a response by the hospital. There is no medical or scientific definition of life that supports the present position of the parents. If, as they hope and CNMC hopes, a miracle occurs and life is restored against all known medical and scientific evidence and experience, such divine intervention would happen whether the ventilator was on or off as well as the drugs were provided or not. We agree there is no jurisdiction over God.

10. However, the hospital is regulated by certificates of need, and governing bodies who do not adopt the religious definition of death the parents do. There are real world consequences to the reaction of the parents to the tragedy that befell them when their son took ill and then died. We are not authorized to hold the earthly remains. In the absence of instructions from the parents they would have to be turned over to the office of the Chief Medical Examiner for the District of Columbia which has procedures inconsistent with traditional Jewish Law. We do not desire such an outcome but must comply with the law. The Hospital has the profoundest respect for the faith of these parents, as it does for all parents.[3] The First Amendment and both the due process and the natural law right to rear children is not to

be taken lightly. However, this right ends when brain death occurs and when the parent seeks to command others to still do their bidding. That respect cannot let us "treat" this former patient in ways that violate our government issued certificate of need and exceed the authorization of the executive branch of the District of Columbia.

11 The Court has authority to act via Title 28 USC Section 2201. Regretfully, CNMC seeks a declaratory judgment recognizing the scientific truth the child has died, and ceases to have any brain stem function and that cessation of life support occur as death has rendered them moot, and to continue in any way is offensive to our license, offensive to good medical ethics, and a deprivation of scarce and highly demanded resources.

12. Counsel notes in this respect, Children's has cooperated fully in every effort the parents have requested to transfer the situation to another facility. Regretfully as of this writing, no other facility in the District of Columbia or New York is prepared to accept a child who has been declared brain dead. This decision seems unanimous. The opinion of the physicians is not divisible into minority or majority. It is unified and consistent. It should be noted in this regard that New York State has an exception for religious practices as defined by the parents, and the Hospital has offered

---

[3] The undersigned has family within the same community attending synagogue in Lakewood, New Jersey,

repeatedly to transfer the child, pre-pronouncement of death, to New York if the Parents counsel could locate a hospital to accept him. No hospital has come forward. That offer is repeated hereat. If the parents can find another hospital to accept what they term life, CNMC will assist any transfer that does not defraud the receiving hospital or insurance coverage.

13. CNMC cannot continue the status quo. First, it is a violation of our license and certificate of need. We cannot jeopardize the right of the facility to exist. Second, it arguably defrauds such insurance as might exist, something CNMC will not assist in.[4] Third, it uses a scare resource absolutely needed for other critically ill children. See affidavit. Fourth, it is cruel to the parents and family to perpetuate this. That is why under Mosaic law interment is generally supposed to take place before the next sunset; (Sabbath aside) to avoid long drawn mournful events such as this. And last of all, continuing any support to this child eliminates any dignity this child has left.

The hospital could label him a trespasser since there is no right to occupy a hospital bed as a tenancy. For the moment we have chosen not to intrude on the parent's grief in so callous a fashion. However the law is clear

---

(believed to be with the patient's uncle synagogue) and has consulted three separate counsel all of orthodox faith to ensure no stone has been left unturned.

[4] To be clear, we do not accuse the parents of fraud or fraudulent intent, but the current definitions in civil and criminal law give the insurances company the right to say state false billing. Caulfield V. Stark.

on point. A private hospital has a right to accept or decline a patient. *Lucy Web Hayes National Training School v. Geoghegan*, 281 F. Supp. 116 (D.D.C. 1967). As the Court states in that case at page 117:

A private hospital; has a right to accept or decline any patient. It has a moral duty to reserve its accommodations for persons who actually need medical and hospital care and it would be a deviation from its purposes to act as a nursing home for aged persons who do not need constant medical care but who need nursing care. There are homes for the aged; there are nursing homes and similar institutions. Hospitals have a duty not to permit their facilities to be diverted to the uses for which hospitals are not intended.

See also *Jersey City Medical Center v. Halstead*, 404 A.2d 44 (NJ 1979).

The undersigned is authorized to declare him trespasser at will, and the Court regularly enforces trespass injunctions and issues both criminal and civil orders on point.

14. There is no clash of religious principle in issue in this case, but a clash on the definition of death. The orthodox Jewish Law defined that, by some scholars, as cessation of cardiac activity. The parents have chosen a specific commentary and "branch" of that multifaceted law. There are equally respected religious authorities who would hold the opposite. But that is not the issue. The parents have an absolute right to their religion and their sub-sect or minority view. CNMC honors that and there is no infringement on it. If, arguably, they claim an infringement, transfer to New York is their remedy.

15. If the Court wants to appoint either a special administrator of the estate under DC Code, or a special master, our files and records are open without reservation or hesitation upon appropriately phrased order. We cannot waive HIPAA but the Court may issue appropriate orders. We ask only reasonable speed and that the desire to give the parents their day in court and their full measure of speech, religion, belief and due process does not deviate from the path of humanity while the Hospital is performing these actions. Time is not a luxury other families and other ill children have. We are sure the parents have no desire to risk inflicting their pain and grief on other parents by utilization of this scare resource and that both sides ask the swiftest and fairest resolution of the remnant of a tragic death.

We acknowledge that if the parents can effectuate a transfer that moots this matter and suggest either show cause, or once again implore them to use the peculiar New York law to their advantage.

16. The parents are not the only ones suffering here. Right now nurses are tending to the earthly remains when they should be aiding the living, and parents of other children are in the same ICU. The strain on the nurses and related personnel is difficult. By issuing a declaratory judgment that death has occurred the mourning process can begin for all concerned. We do not know if this will bring solace to the parents, but we can hope. As

discussed in the attached affidavit, CNMC maintains only a small ICU as it is a specialty hospital and not "general admission" such as the Washington Hospital Center or DC General had been. The decision of these parents puts other children at risk. We know they would not intentionally harm other children, but they have not considered, as this Court must, that the allocation of scarce resources to this Family's desires, means that other children are being deprived or that the resources will not be there that may be needed for them. Children come into our ICU every hour and to deprive them the time and attention of the nurses has ripples.

17. The attached affidavit is incorporated by reference. It was written and mentions the supplemental memorandum of points and authorities intended for the Superior Court, and that document is being attached under the rule of completeness.

18. The Hospital has bent over backwards during the lifetime of the child to accommodate the views of the family. The undersigned personally consulted three prominent orthodox counsel to either sere as Guardian ad litem and to review the actions of the hospitals. Two rabbis were consulted to ensure no diminution of the first amendment rights of the parents occurred in September or early October.

19. This issue if not controlled by the Religious Freedom Respect Act. That legislation mandates at worst a balancing test, and the parents position fails on that test for the reasons given above.

Wherefore, CNMC seeks the following remedy:

First and simplest the Court can issue a show cause order that the counsel for the parents appear via counsel on Wed, November 5 at 4:00 and show cause why the matter should not be dismissed for lack of either a case or controversy or an amount in excess of $75,000.00 and then dismiss and permit the TRO to go forward in the Superior Court.

Second, the Court can issue a declaratory judgment that brain death has occurred, and that per DC and federal law, the Hospital may remove (indeed must) the ventilator, cease all drugs and establish a time frame for the parents or their designees to claim the earthly remains of the late child.

Third, the Court could at 9:00 Wed November 5 appoint an agent guardian or special master to examine the child and report forthwith the court, not later than 4:00 on Wed. November 5, 2008.[5]

Fourth, the Court can simply dismiss this matter on the representations and affidavits attached or via show cause order returnable today. We reserve Rule 11 fees and legal fees *Pravic v. US Indusiires*, 109

[5] If a physician not currently licensed at CNMC we will have to specially credential him or her.

FRD 620, (1986) and progeny. It should be noted this is only against the counsel and that CNMC intends to donate such funds to a the normal fund for uncovered children at CNMC.

Respectfully submitted,

/s/Kenneth Rosenau

Kenneth H. Rosenau
Rosenau and Rosenau
1304 Rhode Island Ave, NW
Washington, DC. 2005

Points and authorities

1. The declaratory judgment statute which does not require the four part test for TROs.

2. The standards a moving party must meet in order to obtain a temporary restraining order are well settled. These are (1) has the party made a strong showing on the merits? (2) has the moving party shown that without such relief, it will be irreparably injured? (3) would the issuance of a temporary restraining order substantially harm the Defendant? (4) where lies the public interest? *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 A.2d 921 (D.C. Cir 1958); *Washington Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (DC 1977). As demonstrated below, Plaintiff has met the 4 standards.

3. The attached affidavit and CV and the filing it had been intended for which is included.

4. The definition of death in DC, noting In re A.C. 597 A2d (Dc 1991) and in re K.I.735 A2d 448 (DC 1999)

5. **Caulfield v. Stark,** 893 A.2d 970, 981 (D.C. 2006) for the proposition that any billing of any sort for medical treatment from this point forward would be a violation of consumer protection law and fraud, be it on the parents or on the insurance company CNMC does not commit fraud.

6. Consent was sought for this motion and denied at approximately 5:28 am and denied.

___________/s/Kenneth Rosenau__________________

Kenneth H. Rosenau

Certificate of Service

I, Kenneth H. Rosenau hereby certify that a true copy of the foregoing was emailed this 5th day of November contemporaneous to the electronic filing of this matter to Mr. Zuckerman. And mailed to him at 1200 New Hampshire Ave, NW Washington DC 20032

_______/s/Kenneth Rosenau___________________________

Kenneth H. Rosenau

SOPHIA RENYA SMITH, M.D.
3201 Coquelin Terrace
Chevy Chase, MD 20815
(202)884-2130 (office)
(301)654-2304 (home)
ssmith@cnmcresearch.org
11/10/65
United States

EDUCATION

Undergraduate	University of Florida, Gainesville, Florida B.S. in Microbiology and Cell Science August 1983 - May 1988
Medical Education	University of Florida College of Medicine Gainesville, Florida; M.D. August 1988 - May 1992
Internship/ Residency	Baylor College of Medicine Department of Pediatrics Houston, Texas June 1992 - June 1995
Clinical Fellowship	Baylor College of Medicine Department of Pediatrics Section of Critical Care Medicine Houston, Texas July 1995 - June 1998
Research Fellowship	National Institutes of Health National Institute of Child Health and Human Development Cell Biology and Metabolism Branch Bethesda, Maryland July 1998 - December 2002
Employment	Children's National Medical Center Department of Critical Care Medicine Pediatric Intensivist Washington, D.C. 1/2003 - present
	Shady Grove Adventist Hospital Pediatric Intensivist/Moonlighter Rockville, MD 12/1999 - 12/2002

Monmouth Pediatrics & Associates
Pediatrician
Houston, TX 06/1993 - 05/1998

Honors and Awards

Attending	Honors Graduate – Spirit of Faith Bible Institute (June 2006)
Fellowship	National Minority Training Research Forum Award- 2003
	National Minority Training Research Forum Award- 2002
	Recipient of the Fellowship Award for Research Excellence –2000
	Research project on iron misregulation and neurodegeneration chosen by the National Institutes of Health (NIH) Scientific Director for the National Institute of Child Health and Development (NICHD) as the scientific advancement for the year 2000 for presentation to Congress
	NIH Loan Repayment and Scholarship Program- 1999-2002
Residency	Baylor College of Medicine, Pediatric Chief Resident, (1994-1995)
Medical School	Auzenne Fellow (1994)

Professional Activities

Society of Critical Care Medicine (1995- present)
American Thoracic Society (1997-2000)
Mary Susan Moore Medical Society (1996-1998)
Greater Houston Society of Critical Care Medicine (1995-1998)
American Academy of Pediatrics (1992- 1998)

Administrative Duties & University Activities

Associate Director
Pediatric Critical Care Service
Walter Reed Army Medical Center

Medical Director
Respiratory Care Services
Children's National Medical Center

Assistant Professor of Pediatrics
George Washington University Medical Center

Educational Achievements

Courses taught

National Institutes of Health,
Respiratory Care and Attending Lecture Series

PICU Fellow Lecture Series

Respiratory Care Core Lecture Series
Children's National Medical Center

Guest lecturer for the University of Houston, College of Optometry

New Courses or Programs Developed

Physician Champion for Organ Donation at Children's National Medical Center

Airway Championship Team
Children's National Medical Center

Co-Chairman of Prince George's Community Health Fair for Parents and Children at Spirit of Faith Community Health Fair

Students or Post doctoral fellows for whom you served primary advisor

Ashley Lakin (high school student), Summer Internship Program in Biomedical Research at NIH

Faven Tesfaye (high school student), Young Scientists High School Research Program

Publications

"Complete loss of iron regulatory proteins 1 and 2 prevents viability of murine zygotes beyond the blastocyst stage of embryonic development." *(Blood Cells Mol Dis. 2006 Mar-Apr;36(2):283-7. Epub 2006 Feb 15.)*

Peijun Zhang[1], William Land[2], Stanton Lee[1], Jemma Juliani[1], Jonathan Lefman[1], Sophia R. Smith[2], David Germain[1], Martin Kessel[1], Richard Leapman[3], Tracey A. Rouault[2], Sriram Subramaniam[1]. Electron tomography of degenerating neurons in mice with abnormal regulation of iron metabolism. *J Structural Biology*. 2005 May;150(2):144-53.

Laura Jui-chen, Wu, A. G. Miriam Leenders, Sharon Cooperman, Esther Meyron-Holtz, Sophia Smith. William Land, Robert Y. L. Tsai, Urs V. Berger, Zu-Hang Sheng,, Tracey A. Rouault « Expression of the iron transporter ferroportin in synaptic vessicles and the blood-brain barrier » *Brain Research* 1001 :108-117 (2004).

Smith, Sophia R., Cooperman, S., LaVaute, T., Tresser, N., Ghosh, M., Meyron-Holtz, E., Land, W., Ollivierre, H., Jortner, B., Switzer III, B., Messing, A., Rouault, T. « Severity of neurodegeneration correlates with compromise of post-transcriptional iron metabolism regulation in genetically engineered mouse models » *Annals of the New York Academy Science*. 1012:65-83 (2004).

Grabill, C., Silva, Alfonso C., Smith, Sophia R., Koretsky, Alan P., Rouault, Tracey A. « MRI detection of ferritin iron overload and associated neuronal pathology in iron regulatory protein-2 knockout mice. » *Brain Research* 971: 95-106 (2003).

LaVaute, T., Smith, S., Iwai, K., land, W., Cooperman, S., Miller G., Abu-Asab, M., Tsokos, M., Mezey, E., Switzer III, R., Grinburg, A., Love, P., Tresser, Rouault, T. « Targeted deletion of the gene encoding iron regulatory protein-2 causes misregulation of iron metabolism and neurodegenerative disease in mice . » *Nature Genetics* 27: 209-214 (2001).

Smith, S., Davis, S., Mariscalco, M., Smith, C.W., Kaplan, S. « The Role of ICAM-1 in host response to Group A Streptococcus. » *Pediatric Research* 43: 158A (1998).

Smith, S., Davis, S., Mariscalco, M., Smith, C.W., Kaplan, S. «The role of ICAM-1 in Group A Streptococcus septic shock. » (In review)

Abstracts

Roberta Hales, Nishisaki A, Jarrah R, Biagas K, Cheifetz I, Corriveau C, Garber N, Hunt B, McCloskey J, Morrison W, Nelson R, Niles D, Smith S, Thomas S, Tuttle S, Helfaer M, and Nadkarni V Multi-institutional high fidelity simulation and task training "Boot Camp" orientation program: a report from a pediatric critical care simulation consortium Simulation in Healthcare 2007;1 supple:55

Nishisaki A, Jarrah R, Biagas K, Cheifetz I, Corriveau C, Garber N, Hales R, Hunt B, McCloskey J, Morrison W, Nelson R, Niles D, Smith S, Thomas S, Tuttle S, Helfaer M, and Nadkarni V A Multi-institutional high-fidelity simulation "Bootcamp" orientation and training program for pediatric critical care (PCC) fellows. Critical Care Medicine. 2006; 34(12) suppl: A121

Books

Smith S. (Editor and Author) In: Slonim AD Avoiding Common Pediatric Errors. Lippincott, Williams, and Wilkins: Philadelphia. PA 2008

Pediatric HIV/AIDS in the PICU. Pediatric Critical Care Medicine. Slonim and Pollack. Lippincott Williams and Wilkins. Philadelphia, PA 2005

Presentations

Partners in Respiratory Care Conference – Salisbury University "Pediatric Septic Shock". 2008

Conference by the Sea – Maryland/District of Columbia Respiratory Care Conference "Bronchial Casts". 2007

VSRC 2007 Neonatal/Pediatric Day Conference "Pulmonary and Extrapulmonary ARDS". 2007

"A multi-institutional high fidelity simulation "Boot Camp" orientation and training program for pediatric critical care (PCC) fellows" Poster presentation for SCCM 36th critical care congress. 2006

Research presentation for Noon Conference at Children's Hospital of Wisconsin – "Metals in our minds: therapeutic implications for neurodegenerative disorders". 2006

Learning Session #2 Organ Donation Breakthrough Collaborative, Washington, DC - 2006

Learning Session #1 Organ Donation Breakthrough Collaborative, Philadelphia, PA 2005

Lecturer for International Bioron Meeting, Cairns, Australia- 2001

Lecturer for Cold Springs Harbor Laboratories, Cold Spring Harbor, New York-2001

Gordon Research Conference, Plymouth, New Hampshire- 2001

Service to the Community

Spirit of Faith Christian Center
Audio Engineer
Communication Lab Director

Spirit of Faith Bible Institute Governing Board
Secretary

Mentor/Mentee High School and College Bound Seniors Program

AFFIDAVIT OF DR. SOPHIA SMITH

Comes now Dr. Sophia Smith, under penalty of perjury and sears as follows:

1. I am duly licensed as a physician in the District of Columbia. My CV is attached

2. I am one of the treating physicians as well as the attending of record of the child known as MB for legal purposes.

3. The view presented herein is the unanimous views of the entire Critical Care staff at CNMC and there is no known deviation or minority view.

4. The child was pronounced dead during the night of November 4, 2008. See attached chart note.

5. His death resulted from the progression of his glioblastoma multiformae tumor. This type of tumor carries with it a very high mortality rate. The only treatment options are surgery, radiation, and chemotherapy as only palliative measures of therapy for this highly malignant tumor.

7. This child has ceased to exist by every medical definition. At the current time many of his normal bodily functions are decomposing. Notably he is in diabetes insipidus due to the loss of the function of his brain stem to produce hormones to regulate his body water. This hormone is currently being replaced. He is also losing the function of his cardiovascular system requiring medications to keep his heart beating and his blood pressure within a reasonable range. This is all causing oscillation in the clinical picture of this patient and he is becoming remarkably unstable.

8. There is no activity in any portion of his brain, including the brain stem. The patient received a brain death exam on Sunday evening that revealed that the patient had no brain stem activity. He had no cough or gag response with the proper stimulation. The patient did not have any corneal responses with stimulation to corneal region. He has no spontaneous movement or any such movement with noxious stimulation to any extremities or truncal region. He did not have the proper response when cold water was placed into either ear canal. And his eyes remain fixed, dilated, and midpoint. He received an apnea test and did not breathe while off the ventilator despite the partial pressure of carbon dioxide in his blood reaching levels of 94 (normal 35-45) which would stimulate any normal and functional brain to breathe. He had an electroencephalogram which can be considered a confirmatory exam performed that measures the electrical activity of the brain. This patient's brain wave activity was flat in all of his leads. He therefore has no brain activity recorded. This patient therefore can be declared brain dead because of the above exam.

9. This child has no ability to breathe on his own and requires a ventilator to oxygenate and ventilate and he also requires the administration of vasopressor support to induce and sustain cardiac activity.

10. Ethically there is no appropriate treatment except removal of the ventilator and the drugs.

11. There is no known treatment being withheld at this time.

12. The staff (physicians, bed side nurses, social workers, dietician, respiratory therapists, and physical therapists) are distraught at what is providing futile care to the earthly remains of a former life.

13. The staff has sympathy for the parents and family. That is expressed by our counsel in his points and authorities and I concur with it.

14. However, there is no medical necessity for the "treatment" and the parent's have refused permission to cease it.

15. At the current time we have 32 beds in the ICU and all but 12 are in use. We have ICU admissions every shift of everyday.

16. This bed is needed for other patients and it is inevitable we will reach 100% capacity, including MB today or tomorrow. To save a bed for MB under these circumstances is to reduce the chances of an incoming child.

17. While our thoughts and prayers are with the family in this hour, we cannot continue to provide the resources they are demanding.

_____/s/___________________________

Sophia R. Smith, MD

Subscribed and sworn to under penalty of perjury. November 4, 2008

IN THE DISTRICT OF COLUMBIA
FAMILY COURT

IN RE M.B. 08-FSP-310

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

Comes now the Petitioner by and through the undersigned, and supplements the earlier motion and complaint with the following:

1. In the opinion of the medical community the child is currently brain dead. See attached chart entry on the pronouncement of death. He was pronounced dead on November 4, 2008. Under federal law and the standard of care of the medical community, we are to cease any measures of life support. This is not optional.

2. As the Court knows the legal definition of death in the District of Columbia derives from brain death and not from cardiac death.[In re A.C., in re K.I.]

3. The attached affidavit of Dr. Sophia Smith is incorporated by reference.

4. The position of Children's National Medical Center (CNMC) is that the child is regrettably deceased. That any burden of showing "non-death" is on the parents. It should be noted in this regard that at approximately 4:09 on Monday November 3, 2008 the parents withdrew any consent for further testing. No further testing is needed, and to the extent the parents refuse permission a "missing evidence" rebuttal spring into being against their position. [cite Red Book and case law].

5. Under the District of Columbia case law and the definition of death and the state of the chart as shown by the attached affidavit, it is the intention of the Children's National Medical Center Pediatric Intensive Care Team to withdraw support, over the objections of the parents. Specifically, to disconnect this patient from the ventilator and

discontinue his intravenous medications (Epinephrine, Dopamine and Vasopressin) which are maintaining his current cardiac function and perfusion to all of his organs.

6. Children's notes in this regard the child has a progressive grade IV astrocytoma [aka Glioblastoma multiforme, which is the highest grade glioma and is the most malignant form of the astrocytomas]. Despite all therapies and surgical measures, this brain tumor carries a very poor survival rate. Citations as far back as 1940's Gunther's, *Death be not Proud*, or the late Glen Brenner could be mentions.

7. The Federal law also decides the definition of death by reference to brain death. Unlike New York State, the federal and District of Columbia definitions do not have an exception for religious views centered on only cardiac activity. There is nothing in this case that is an impingement on the parent's freedom to exercise their religion.

8. As expressed previously, the family has our profoundest sympathy. The death of any child is a traumatic unsettling and disquieting event to bystanders and medical personnel let alone family. The death was inevitably a direct result of the progression of this most aggressive tumor. We express our sympathy and hope that the legal difficulties they have compelled us to by their position does not overwhelm our sincerest sympathies to them in what should be their time of bereavement.

9. A specific fact of life is that scarce resources are being used for the preservation of a deceased body. CNMC cannot in good conscience assist in the billing of an insurance company and will not.[1]

10. There is no non-religious definition of life that supports the present position of the parents. If, as they hope and CNMC hopes, a miracle occurs and life is restored against

[1] As standard arrangement dating back many years CNMC does not tell the undersigned if a patient has insurance or not, and if the bill is being paid. This prevents any rational charge the actions are motivated by money.

all known medical and scientific evidence and experience, such divine intervention would happen whether the ventilator was on or off as well as the drugs were provided or not.

11. The Hospital has the profoundest respect for the faith of these parents, as it does for all parents.[2] The First Amendment and both the due process and the natural law right to rear children is not to be taken lightly. However, this right ends when brain death occurs and when the parents seek to command others to do their bidding. That respect cannot let us "treat" this former patient in ways that violate our state issued certificate of need and exceed the authorization of the executive branch of the District of Columbia.

12. Regretfully, CNMC seeks a declaratory judgment recognizing the scientific truth the child has died, and ceases to have any brain stem function and that cessation of life support occur as death has rendered them moot, and to continue in any way is offensive to our license, offensive to good medical ethics, and a deprivation of scarce and highly demanded resources.

13. Counsel notes in this respect, Children's has cooperated fully in every effort the parents have requested to transfer the situation to another facility. Regretfully as of this writing, no other facility in the District of Columbia or New York is prepared to accept a child who has been declared brain dead. This decision seems unanimous. The opinion of the physicians is not divisible into minority or majority. It is unified and consistent.

15. CNMC cannot continue the status quo. First, it is a violation of our license and certificate of need. Second, it arguably defrauds such insurance as might exist. Third, it

---

[2] The undersigned has family within the same community attending synagogue in Lakewood, New Jersey, (believed to be with the patient's uncle synagogue) and has consulted three separate counsel all of orthodox faith to ensure no stone has been left unturned.

uses a scare resource absolutely needed for other critically ill children. Fourth, it is cruel to the parents and siblings (if any) to perpetuate this. And last of all, continuing any support to this child eliminates any dignity this child has left.

The hospital could label him a trespasser since there is no right to occupy a hospital bed as a tenancy. For the moment we have chosen not to intrude on the parent's grief in so callous a fashion. However the law is clear on point. A private hospital has a right to accept or decline a patient. *Lucy Web Hayes National Training School v. Geoghegan*, 281 F. Supp. 116 (D.D.C. 1967). As the Court states in that case at page 117:

A private hospital; has a right to accept or decline any patient. It has a moral duty to reserve its accommodations for persons who actually need medical and hospital care and it would be a deviation from its purposes to act as a nursing home for aged persons who do not need constant medical care but who need nursing care. There are homes for the aged; there are nursing homes and similar institutions. Hospitals have a duty not to permit their facilities to be diverted to the uses for which hospitals are not intended.

See also *Jersey City Medical Center v. Halstead*, 404 A.2d 44 (NJ 1979).

The undersigned is authorized to declare him trespasser at will, and the Court regularly enforces trespass injunctions and issues both criminal and civil orders on point.

16. If the Court wants to appoint either a guardian (in the sense of DC code 21-2046) or a special master, our files and records are open without reservation or hesitation upon appropriately phrased order. We ask only reasonable speed and that the desire to give the parents their day in court and their full measure of speech, religion, belief and due process does not deviate from the path of humanity while the Hospital is performing these actions. Time is not a luxury other families and other ill children have. We are sure the parents have no desire to risk inflicting their pain and grief on other parents by

utilization of this scare resource and that both sides ask the swiftest and fairest resolution of the remnant of a tragic death.

[counsel's note:

The above proof reading form had been sent to Dr. Smith and Dalton for their correction and as part of Rule 11. It is as corrected by Dr. Smith and with her edits of medical data and terms. Because her affidavit referenced it, it is included, but it obviously was not in final form and is not filed in any court as such. KHR]