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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE 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.

Case No. RG15760730

ASSIGNED FOR ALL PURPOSES TO:
JUDGE STEPHEN PULIDO
DEPARTMENT 16

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF JAHI MCMATH'S FIRST CAUSE OF ACTION FOR PERSONAL INJURIES

Reservation #: R-1838158

Date: July 13, 2017
Time: 3:00 p.m.
Dept: 16

Complaint Filed: March 3, 2015
Date of Trial: None set

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I

INTRODUCTION

Plaintiffs have not met their heavy burden of showing that this court has jurisdiction to review the medical determination of Jahi McMath's death. (*Dority v. Superior* Court (1983) 145 Cal.App.3d 273, 278.) Accordingly, defendants' motion for summary adjudication of McMath's first cause of action for personal injuries should be granted on the grounds that McMath lacks standing because she was declared deceased in accord with California law in December 2013.

Plaintiffs' opposition, while long-winded and histrionic[1], fails to provide any legal basis upon which this court can reconsider the lawful declaration of McMath's death. There are no triable issues of material fact. Plaintiffs failed to provide reliable and competent medical evidence that demonstrates McMath no longer fulfills the accepted medical standards for brain death.

Plaintiffs admit, under penalty of perjury, that the applicable criteria for the determination of brain death in a child such as McMath are set forth in the Guidelines for the Determination of Brain Death in Infants in Children: An Update of the 1987 Task Force Recommendation, ("Guidelines") authored by defendants' expert herein, Thomas A. Nakagawa, M.D. (See Still Decl., ¶2 and Ex. A.)

McMath has been in Winkfield's sole and exclusive custody since August 2014 – nearly three years. Yet Winkfield, her attorneys and team of advocates have *not once* submitted McMath to the *only* recognized diagnostic criteria for assessing pediatric brain death: a brain death evaluation performed pursuant to the neurologic criteria in the Guidelines. Instead, they rely upon unauthenticated video recordings taken by her family and the declaration of Dr. Shewmon, a neurologist who has advocated for the past 25 years that brain death is a "legal fiction" and should not be a legal criteria for death. (See Still Decl., ¶¶ 13-15, and Ex. I, J, and K.) Despite numerous publications and oral presentations, Dr. Shewmon's theories on brain death have not been accepted by the mainstream. He has been wholly unsuccessful in his efforts to change the statutory criteria

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[1] Plaintiffs argue that the question before the court is literally a matter of "life versus death" and plaintiffs are entitled to a trial because life should be given the "benefit of the doubt." (Ptfs' Oppo.,1:2-6.) The issue before the court is not a "life versus death" decision. Summary adjudication of McMath's personal cause of action will not affect whether McMath continues to receive the extraordinary medical services that are being provided by the State of New Jersey.

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for death in the United States. As defendants' brain death expert, Sanford Schneider, M.D., stated in his declaration at Paragraph 20:

> I understand that plaintiffs' allegation that J. McMath is not dead is based on the opinion of Dr. Alan Shewmon, M.D. The dissenting theory proposed by Dr. Shewmon is that death is not a neurological phenomena and death only occurs after total cessation of the systemic circulation. This theory is contrary to the accepted medical and legal standards that brain death is a legal criterion for death. Dr. Shewmon's opinion is a philosophical minority opinion that denies and conflicts with the accepted medical standards in the Guidelines as well as California law.

Given Dr. Shewmon's long history of advocacy that the accepted brain death criteria are fallible and the extraordinary amount of publicity this matter has received, we should not be surprised that Dr. Shewmon reached out to plaintiffs in the spring of 2014 to be an unpaid consultant. He readily admits that he volunteered his time and for "humanitarian, ethical, academic and research interests." (Shewmon Decl., ¶2.) Stated bluntly, Dr. Shewmon is exploiting the tragic death of Jahi McMath to advance his agenda. This is not the only instance Dr. Shewmon inserted himself into a legal proceeding for the purpose of advancing his dissenting theories on brain death. (See Still Decl., ¶ 15 and Ex. K; and Defendants' Request for Judicial Notice at Ex. 20.)

It is unfortunate that Dr. Shewmon is using this public venue to discredit and cast into question the accepted neurologic criteria for determining whether a child has suffered brain death and is deceased under California law. As a medical professional, he should be aware that it would be a violation of the standard of care, a breach of professional ethics, and contrary to California law for a neurologist or critical care physician to make determination of brain death based on the sort of unauthenticated, sham 'evidence' presented by plaintiffs herein. It is likely that if a pediatric neurologist working in a critical care setting made a brain death determination of patient solely based on the video recordings and other ad hoc medical evidence that Dr. Shewmon is relying on in this case, the physician's medical license would be subject to disciplinary action. As the lead author of the Guidelines, Thomas A. Nakagawa stated in declaration, at paragraph 12:

> The only accepted criteria for diagnosing pediatric brain death are those set forth in the Guidelines. Brain death is a clinical assessment made by qualified physicians in a standardized approach. The diagnostic criteria in the Guidelines were established to provide uniformity in the determination of brain death. The methodology allows physicians to pronounce brain death in a precise and orderly manner. It ensures that all components of the

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> examination are performed and appropriately documented. Adherence to the uniform criteria in the Guidelines protects the health and safety of pediatric patients and provides family members and society at large with the assurance that determination of brain death is reliable and lawful. There is no substitute for a brain death evaluation. Ad hoc testing of brain function is not a substitute to a brain death evaluation performed in accordance with the accepted medical standards. Indeed, a physician's assessment of brain death made pursuant to ad hoc testing would be a violation of the standard of care, a breach of professional responsibility as well as a violation of California's Uniform Determination of Death Act.

This court should reject plaintiffs' attempt to delegitimize the standardized brain death criteria that have been used for decades in critical care units nationwide. A ruling from this court that permits plaintiffs to proceed forward to some sort of hearing to revisit the question of McMath's death–*without any evidence that a brain death evaluation under the accepted medical standards in the Guidelines was applied to McMath and she no longer meets the criteria for brain death*–will cause chaos and uncertainty for hospitals and the medical professionals who are charged with applying the statutory criteria for brain death. Dr. Shewmon's advocacy of his minority views should be directed to the California legislature and/or the medical and ethical bodies charged with formulating the diagnostic tests and medical criteria for determining death.

In summary, given the complete absence of recognized, reliable and competent evidence that establishes to a degree of medical certainty that a mistake or error was made in the diagnosis of death in December 2013, this court lacks jurisdiction to revisit the question of McMath's death.

II

ARGUMENT

A. The Court Lacks Jurisdiction to Review the Medical Determination of Brain Death

In its adoption of the Uniform Determination of Death Act in 1982, the California legislature decided that the determination of whether a person has suffered a lack of neurologic function (i.e., brain death) should be left to the province of the medical professionals. There is no statutory provision that permits judicial review of a determination of brain death. However, in case of *Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 278, the appellate court ruled that a superior court has jurisdiction to review a medical determination of brain death where a "sufficient

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showing" that [1] it is reasonably probable that a mistake has been made in the diagnosis of brain death, or [2] where the diagnosis was not made in accord with accepted medical standards." (*Dority, supra,* 145 Cal.App.3d. 273, 278.)

Plaintiffs have not met their jurisdictional burden under *Dority*. It is undisputed that:

- Under California statutory law, a determination of neurologic death (i.e., brain death) "must be made in accordance with **accepted medical standards**." (Health and Safety Code section 7180.)

- The Guidelines for the Determination of Brain Death in Infants in Children: An Update of the 1987 Task Force Recommendation ("Guidelines"), co-authored by defendants' brain death expert, Thomas A. Nakagawa, M.D., represent the **accepted medical standards** for determining pediatric brain death. (Plaintiffs' Response to Defendants' Separate Statement of Undisputed Material Facts, No. 2.)

- During the three brain death evaluations performed on McMath in December 2013, the **accepted medical standards** for pediatric brain death set forth in the Guidelines were correctly applied. (Plaintiffs' Response to Defendants' Separate Statement of Undisputed Material Facts, Nos. 8, 12, 26, 35.)

- In December 2013, McMath fulfilled the **accepted medical standards** for pediatric brain death set forth in the Guidelines. (Plaintiffs' Response to Defendants' Separate Statement of Undisputed Material Facts, Nos. 12, 13, 14, 26, 28, 29, 36, and 66.)

- The Alameda County Coroner's office issued a Death Certificate for McMath on January 3, 2014; plaintiffs have not invalidated McMath's death certificate. (Plaintiffs' Response to Defendants' Separate Statement of Undisputed Material Facts, Nos. 43-44.)

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- During McMath's hospitalization at Saint Peter's University Hospital from January 6, 2014 to August 25, 2014, the daily neurological assessments performed by the PICU team were at all times consistent with brain death and the discharge diagnosis was that McMath was brain dead. (Plaintiffs' Response to Defendants' Separate Statement of Undisputed Material Facts, Nos. 46-50.)

- McMath has not undergone a brain death evaluation pursuant to the **accepted medical standards** in the Guidelines since December 2013. (Latasha Winkfield's verified response to Dr. Rosen's Request for Admission Nos. 15, 18, and 22, at Still Decl., ¶ 3 and Ex. B.)

B. Plaintiffs' Verified Responses to Requests for Admission Establish That McMath Has Not Been Evaluated by a Qualified Physician Pursuant to Accepted Medical Standards for Determining Brain Death Since She Was Pronounced Deceased in 2013

Plaintiffs' admissions, made under penalty of perjury in response to written discovery propounded by defendant Frederick Rosen, M.D., are dispositive of this motion in that they establish the accepted medical standards for determining brain death have not been applied to McMath since she was lawfully pronounced deceased in December 2013:

Dr. Rosen's Request for Admission No. 32, propounded to McMath:

> Admit that the Guidelines for the Determination of Brain Death in Infants in Children: An Update of the 1987 Task Force Recommendations, are the applicable criteria for the determination of brain death in a child such as JAHI McMATH. (Exhibit A to Declaration of Jennifer Still, Esq.)

McMath's Response to RFA No. 32:

> **ADMIT.** (Still Decl., ¶ 2 and Ex. A.)

Dr. Rosen's Request for Admission No. 15 propounded to Winkfield:

> Admit that a neurological examination in accord with the accepted medical standards set forth the in the Guidelines for the Determination of Brain Death in Infants in Children: An Update of the 1987 Task Force Recommendations, appended hereto at Exhibit A, has not been performed on JAHI McMATH since December 23, 2013. (Still Decl., ¶ 3 and Ex. B.)

Winkfield's Response to RFA No. 15:

> **ADMIT**, in accordance with the Guidelines for the Determination of Brain Death in Infants in Children: An Update of the 1987 Task Force Recommendations. … (Still Decl., ¶ 3 and Ex. B.)

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Dr. Rosen's Request for Admission No. 18 to Winkfield:

> Admit that no physician specializing in pediatric neurology or pediatric critical care medicine with expertise in the accepted medical standards for determining pediatric brain death set forth in the Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations, appended hereto at Exhibit A, and who has performed a neurologic examination on JAHI McMATH in accord with the accepted medical standards, has found that JAHI McMATH does not fulfill the accepted neurological criteria for brain death. (Still Decl., ¶ 3 and Ex. B.)

Winkfield's response to RFA No. 18:

> **ADMIT**. ... (Still Decl., ¶ 3 and Ex. B.)

Dr. Rosen's Request for Admission No. 22 to Winkfield:

> Admit that you have no documentary evidence, prepared by a treating physician of JAHI McMATH in the specialty of pediatric neurology or pediatric critical care medicine, that demonstrates JAHI McMATH does not fulfill the accepted neurologic criteria to assess for pediatric brain death set forth in the "Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations", appended hereto at Exhibit A. (Still Decl., ¶ 3 and Ex. B.)

Winkfield's response to RFA No. 22:

> **ADMIT**. ... (Still Decl., ¶ 3 and Ex. B.)

C. Plaintiffs' Contention that McMath No Longer Fulfills the Accepted Medical Standards in the Guidelines is Not Based on Reliable or Competent Evidence, is Speculative, Lacks Foundation and is in Violation of California Law

1. The superior court must act as a "gatekeeper" and exclude plaintiffs' clearly invalid, unreliable and speculative 'expert' opinion

California law **requires** that a determination of death be made "in accordance with accepted medical standards." (Health and Safety Code § 7180(a).) Defendants have established, through the declarations of Dr. Nakagawa and Dr. Schneider, and plaintiffs' verified admissions, that the **only** lawful and recognized methodology for determining the brain death of an individual is a clinical evaluation pursuant to the accepted medical standards in the Guidelines by two qualified physicians in a controlled (i.e., hospital) setting.

Yet, even though plaintiffs admit that "there is no question" that McMath fulfilled the accepted medical standards for pediatric brain death set forth in the Guidelines in December 2013, and that the accepted medical standards have not been applied to McMath since December 2013, they bizarrely contend that McMath is not dead and that plaintiffs should be afforded a hearing to

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'test' their theory that McMath has miraculously reversed her irreversible death. Plaintiffs' contention is speculative, illogical and fails to meet the evidentiary threshold for admissibility.

In support of their contention that McMath is not dead, plaintiffs submitted the declarations three individuals: (1) A pediatric neurologist who rejects all brain-based formulations of death and refuses to undertake a brain death evaluation of McMath pursuant to the accepted medical standards in the Guidelines; (2) an internist who lacks qualifications to assess brain function; and (3) a registered nurse who lacks qualifications to assess brain function. The 'evidence' upon which these three individuals rely upon are unauthenticated video recordings allegedly taken by her family members, the unproven, purported onset of puberty, observations from unqualified individuals, and select medical studies performed at University Hospital in September 2014, that are not a substitute for the accepted medical standard to determine brain death under California law. The declarations submitted by plaintiffs in support of their allegation that McMath is no longer brain dead are inadmissible for a host of reasons. Indeed, the declarations violate nearly every evidentiary requirement for admissibility.

The Supreme Court and legislature require that the superior court act as a "gatekeeper" to exclude expert opinion testimony that is (1) based on a matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772, citing Evid. Code §§ 801-803.) Importantly,

> The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion. [Citation.] In short, the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' [Citation.] (*Ibid.*)

Plaintiffs' declarations fail to meet the *Sargon* test for admissibility. Concurrently herewith, defendants have filed evidentiary objections to the declarations of the three individuals who represent that they believe that McMath is not dead. In support of the evidentiary objections, defendants submit the Supplemental Declaration of Sanford Schneider, M.D., in Support of

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Defendants' Evidentiary Objections. Dr. Schneider has reviewed the three declarations submitted by plaintiffs. Dr. Schneider observes that (1) McMath has not undergone a brain death evaluation under the accepted medical standards since December 2013, (2) Dr. Shewmon continues to base his opinion on matters that no reputable expert in brain death would rely upon in forming an opinion as to whether a child has suffered brain death under California law, and (3) Alieta Eck, M.D., and Sharlene Bangura, R.N., failed to demonstrate any education, knowledge or experience in the accepted medical standards for evaluating brain death.

In addition, the opinion that McMath is not dead, is an improper legal conclusion since plaintiffs' declarants are relying on matters that are contrary to, and in direct conflict, with California law. Under Evidence Code section 801 and 802, plaintiffs' declarations are inadmissible since the CUDDA dictates that a brain death determination be made solely pursuant to the accepted medical standards, i.e., the Guidelines. Plaintiffs admit that McMath has not undergone a brain death evaluation pursuant to California law since she was lawfully declared deceased in December 2013. Thus, any conclusion or opinion offered by plaintiffs that McMath no longer fulfills the accepted medical standards is clearly invalid and tantamount to a fraud on this court.

2. Objections to the declaration of Dr. Shewmon

Dr. Shewmon readily concedes that McMath fulfilled the accepted medical standards for brain death in December 2013, and that no mistakes were made in the three brain death evaluations. (Shewmon Decl., ¶ 6.) Dr. Shewmon further implicitly acknowledges that McMath has not undergone the standardized brain death evaluation pursuant to the accepted medical standards in the Guidelines since December 2013. Dr. Shewmon admits in his December 10, 2014, declaration that no effort was made to hospitalize McMath to undertake the standardized brain death evaluation. (Still Decl., Ex. F, p. 7.)

Yet he opines that she no longer fulfills the accepted medical standards because he has interpreted that, certain video recordings that were allegedly taken by McMath's family advocates, suggest to him that McMath is in a "minimally conscious state with intermittent responsiveness." (Shewmon Decl., ¶¶ 6.) Dr. Shewmon reaches this conclusion despite the fact that during his sole observation of McMath on December 2, 2014, he was unable to replicate the movements seen on

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the video recordings, and that "neither did she exhibit any cranial nerve reflexes or breath spontaneously over the ventilator – all consistent at that moment with continued fulfillment of the brain death Guidelines." (Shewmon Decl., ¶ 9.)

In his previous declaration dated December 10, 2014, Dr. Shewmon admitted that he considered whether "whether the videos represent wholesale fraud" but rejected this notion having met the family and their attorney. (Still Decl., Ex. F, p. 8.) However, he now maintains that the video recordings as "crude and unsystematic as they are, **represent the only way at present** to decide whether Jahi is permanently comatose or in a minimally conscious state with intermittent responsiveness." (Shewmon Decl., ¶10.) This statement is worth pausing on. The very notion that someone in the medical community, much less a board-certified pediatric neurologist, would rely on a series of unauthenticated video recordings taken by family members to conclude that someone is not brain dead, and then represent under penalty of perjury that there is no other means to determine her brain function, is not only wrong, it is unprofessional, dishonest and unethical.

At best, it is disingenuous that Dr. Shewmon and plaintiffs continue to peddle the fiction that McMath does not meet the criteria for brain death, even though they have known since her initial determination of brain death in December 2013, that there is only one accepted standard for assessing brain death. They conceded this during the hearing before Judge Grillo on December 24, 2013. In October 2014, Dr. Paul Fisher informed the plaintiffs in so many words that absent a brain death evaluation in accordance with the accepted medical standards in the Guidelines there was no legal or medical basis to revisit McMath's death. The question remains: If plaintiffs and Dr. Shewmon are so convinced that McMath does not meet the accepted medical standards for brain death, shouldn't they have undertaken such an examination years ago?

As demonstrated in defendants' moving papers, Dr. Shewmon has published extensively on his rejection of brain death as a criteria for death. He is a vocal proponent of revising the criteria for death and enacting new legislation. (Still Decl., ¶¶ 13-15, and Exhibits I and J.) Dr. Shewmon wrote that he has "come to reject all brain-based formulations of death." (See Still Decl., 7:16-20.) Dr. Shewmon has testified: "So since 1992 I've been an advocate that death is not neurological" and that "the ideal sequence of events is that there's a new concept that's introduced. It's studied.

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It's agreed upon. Then you have the medical community establish diagnostic standards for it. Then you revise the statutory laws accordingly, and then you put it into practice. (Still Decl., 7:2-8.)

Although Dr. Shewmon rejects the label as an 'outlier', there is no doubt that Dr. Shewmon's alternative views on brain death, and opinion that the Guidelines are fallible, have not been embraced by the vast majority of experts in his field. Virtually every pediatric critical care until in the United States is determining pediatric brain death pursuant to the criteria in the Guidelines. (Nakagawa Decl., ¶9.) More to the point, however, the evidentiary basis for Dr. Shewmon's opinion in this case (e.g., reliance on video recordings, etc.) is so far afield from the norm that it is akin to intentional malpractice. Until the California legislature revokes or amends the laws pertaining to brain death, the determination of brain death must be made in accord with the standardized and established criteria for brain death in the Guidelines.

3. The video recordings are inadmissible

As documented in the Supplemental Declaration of Jennifer Still, Esq., filed herewith, plaintiffs and their attorneys, Bruce Brusavich and Christopher Dolan, have refused to produce or authenticate the video recordings that were allegedly provided to Dr. Shewmon for his review, despite numerous attempts by the undersigned. Opposing counsel refuses to authenticate and lay the appropriate foundation on the grounds that the information is protected by the attorney client privilege and work product doctrine. (See Supp. Decl. of Jennifer Still, Esq.) Mr. Dolan has admitted in response to a business records subpoena for production of the video recordings provided to Dr. Shewmon, that his office is unable to locate the requested information. Mr. Dolan admitted that he is unable to provide the requested information because the computer where the information was stored is no longer accessible. Dr. Shewmon's statement in his declaration that "Every video file has been subjected to expert forensic video analysis and certified to contain no evidence of post-recording alteration." (Shewmon Decl., ¶10.) There is no support for this statement. No such certified expert forensic video analysis exists.

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4. Objections to the declarations of Alieta Eck, M.D., and Sharleen Bagura, R.N.

Alieta Eck and Sharleen Bagura declare that they have observed McMath to respond to commands and other stimuli. Dr. Eck concludes that McMath's movements are indicative of brain function. The testimony offered by Dr. Eck and Ms. Bagura does not come close to meeting the evidentiary requirement for admissibility of expert opinion. The two declarations lack any showing that they have the requisite specialized knowledge, skill, experience, training, or education sufficient to render an opinion as to whether J. McMath has brain function.

Defendants have established that a determination of brain death can only be made by physicians with special education, training, knowledge and expertise in the legal and medical requirements for determining brain death in the State of California. Brain death is a clinical assessment made by a qualified physician in a standardized approach that relies on a clinical examination and apnea testing with a known cause of coma. Dr. Eck, an internist, and Ms. Bangura (who is not a physician) failed to demonstrate that they have any education, training or expertise in assessing brain death, much less knowledge as to how brain death is declared in California, e.g., the CUDDA, the accepted medical standards, the Guidelines, etc., much less McMath's medical history. Furthermore, neither declarant demonstrated the knowledge, training, or experience that is required to provide an opinion as to whether McMath's movements are purposeless spinal reflexive movements that are consistent with brain death versus volitional responses to commands indicative of brain activity. As stated in Dr. Schneider's declaration and reiterated in his Supplemental Declaration at Paragraph 9, McMath has exhibited purposeless spinal reflexive movements, with and without tactile stimulation, since she was pronounced deceased in December 2013. McMath's physicians at Children's Hospital Oakland and St. Peter's University Hospital have consistently deemed her movements to be purposeless spinal reflexive movements. The Guidelines state that the clinical differentiation of spinal responses from retained motor responses associated with brain activity requires expertise. (Nakagawa Decl., ¶11(D).) The two declarants have not demonstrated that they have the expertise to distinguish purposeless spinal reflexive movements from activity associated with brain function. Finally, observation of a patient is not a substitute to a brain death evaluation performed in accordance with the accepted medical

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standards in the Guidelines. No reputable and qualified physician would reasonably rely on the matters that Dr. Eck relied upon in opining that McMath is not dead.

D. Collateral Estoppel Bars Plaintiffs From Relitigating The Issue Of McMath's Death As A Matter Of Law

Collateral estoppel operates to prevent relitigation of issues "necessarily decided in a prior proceeding whether the issue is brought on the same or a different cause of action." (*Evans v. Celotex* (1987) 194 Cal.App.3d 741, 744.) "New evidence, however compelling, is generally insufficient to avoid application of collateral estoppel" so long as the criteria for its application have been met. (*Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1561, *citing Evans*, *supra*, 194 Cal.App.3d 741, 744 (criteria for applying collateral estoppel include: (1) judgment was entered on the merits in first action, (2) same issue raised in second action that was necessarily litigated and decided in first action, and (3) parties are in privity in both actions.) Presentation of more compelling evidence in support of the same issue that was decided in the first action "is precisely the 'second bite of the apple' that collateral estoppel is designed to bar." (*Direct Shopping Network*, at p. 1562.)

Plaintiffs' alleged "new" evidence presented here does not change the fact that the central issue presented in this case is identical to that which was decided by Judge Grillo on December 24, 2013: that McMath met the criteria for brain death under California law and therefore was, and forever more will be, legally and medically deceased.

III

CONCLUSION

For foregoing reasons, defendants request the court grant defendants' motion for summary adjudication of the first cause of action for personal injuries.

DATED: July 6, 2017 HINSHAW, MARSH, STILL AND HINSHAW, LLP

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.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF JAHI MCMATH'S FIRST CAUSE OF ACTION FOR PERSONAL INJURIES

____ 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.

XX 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.

____ 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.

RECIPIENTS:

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(408) 861-6500

Andrew N. Chang, Esq.
ESNER, CHANG & BOYER
234 East Colorado Blvd., Suite 975
Pasadena, CA 91101

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 10, 2017.

Jessica Picone

Jessica Picone

Court: Alameda County Superior Court
Action No: RG15760730
Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*

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A Partnership
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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. My electronic service address is: jpicone@hinshaw-law.com.

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, electronic 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 BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF JAHI MCMATH'S FIRST CAUSE OF ACTION FOR PERSONAL INJURIES

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XX If ELECTRONIC SERVICE, I electronically served the documents listed above as follows:

RECIPIENTS:

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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 20, 2017.

Jessica Picone
Jessica Picone

Court: Alameda County Superior Court
Action No: RG15760730
Case Name: *Spears/Winkfield, et al. v. Rosen, M.D., et al.*

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