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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD, *et al.* Plaintiffs, v. FREDERICK S. ROSEN, M.D.; UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND, *et al.* Defendant.	Case No. RG15760730 [Hon. Stephen Pulido, Dept. 517] OPPOSITION BY UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND AND FREDERICK S. ROSEN, M.D. TO PLAINTIFFS' MOTION TO BIFURCATE **DATE:** April 19, 2018 **TIME:** 2:30 p.m. **DEPT:** 517 Reservation No: R-1917827 Action filed: 3/3/15 First Amended Complaint Filed: 11/4/15

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I. INTRODUCTION

By their motion, plaintiffs ask the court to sever and try first the issue of whether the Guidelines for the Determination of Brain Death in Infants and Children constitute the accepted medical standards for evaluating whether a pediatric patient has sustained brain death under the Uniform Determination of Death Act (UDDA), codified at Health & Safety Code section 7180. At face value, this question looks like it may, and perhaps must, be answered simply. However, as with every question in this unprecedented case, the process of answering this question will be complex, carrying with it potentially significant and far-reaching consequences.

An order bifurcating this issue will not serve the interests of judicial economy. As discussed in detail below, a bench trial on the issue of whether the Guidelines satisfy the UDDA will require introduction of substantial evidence of Jahi McMath's ("McMath") past and current medical condition, expert testimony, and the foundational evidence upon which those experts' opinions are based. This same evidence must be presented and considered by subsequent factfinder(s) on the issues of whether McMath currently satisfies the legal criteria for death, whether she has standing to pursue a claim for personal injury damages, and whether plaintiffs are collaterally estopped from challenging the judgment confirming McMath's death entered by the Alameda County Superior Court in 2013. In short, the interests of judicial economy will not be served by granting the plaintiffs' motion. What is more, doing so may constitute an abuse of discretion.

At best, plaintiffs' motion is an ill-disguised motion *in limine* brought to preclude the defense from introducing expert opinion and foundational evidence to establish that McMath is, and has been, legally deceased since she was separately examined, and diagnosed as brain dead, by three different physicians under the Guidelines in December 2013. A decision to hold a bench trial on this issue is premature. In the interests of justice, plaintiffs' motion to bifurcate should be denied without prejudice to the parties bringing other motions to bifurcate after discovery has been completed on the issue of brain death.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Guidelines For The Determination Of Brain Death Are The Accepted Medical Standard For Confirming Brain Death In Pediatric Patients

Alan Shewmon, M.D., whose declaration plaintiffs have submitted in support of their motion to bifurcate, concedes the Guidelines for the Determination of Brain Death in Infants and Children (the "Guidelines") constitute the accepted medical standards for evaluating whether a pediatric patient has sustained brain death. (Shewmon Decl., ¶ 6.) He is not alone. All experts who have evaluated whether McMath is brain dead have applied the Guidelines. (Request for Judicial Notice, "RJN" Ex. A (1/2/14 Order by Judge Grillo), at 2:21-3:10, 6:4-7:22; and Ex. B (10/6/14 Order Appointing Dr. Fisher.)

B. Three Physicians Have Performed Brain Death Examinations In Accord With The Guidelines To Confirm McMath Is Brain Dead

McMath has undergone three brain death examinations since December 10, 2013. Plaintiffs concede that these three separate brain death examinations, performed by Robin Shanahan M.D., a board certified pediatric neurologist, Robert Heidersbach, M.D., a board certified pediatric critical care physician, and Paul Fisher, M.D., a board certified pediatric neurologist and Chief of Child Neurology at Stanford University's Lucile Packard Children's Hospital, were performed in accordance with the accepted medical standards set forth in the Guidelines. (RJN Ex. A (1/2/14 Order), at 2:21-3:10, 6:4-7:22; Ex. C. (10/8/14 CMO, at 1:22-2:7); Ex. B (10/6/14 Order). Each of these physicians independently concluded that McMath met the criteria for irreversible brain death under the Guidelines and was brain dead. (RJN Ex. D (12/23/13 Order by Judge Grillo), at 5:22-23.) A death certificate was issued by the County of Alameda on January 3, 2014. (RJN Ex. E (Fed. Complaint), at ¶ 73, and exhibit A attached thereto; First Amended Complaint (FAC) at ¶ 27.)

C. Winkfield Initiated Actions In Alameda County Superior Court To Challenge The Brain Death Finding

On December 9, 2013, Winkfield invoked the Superior Court's jurisdiction to, among other things, challenge the brain death determination made at Children's Hospital pursuant to *Dority v. Superior Court* (1983) 145 Cal.App.3d 273. Judge Grillo's order explains that per *Dority*, the jurisdiction of the Court can be invoked to (1) establish a mistake was made in the brain death

determination, or (2) the diagnosis was not made in accord with accepted medical standards. (RJN Ex. A, (1/2/14 Order) at p. 9.) Judge Grillo appointed Dr. Fisher on December 23, 2013 to serve as the court's expert to provide an independent opinion as to whether McMath was brain dead. (RJN Ex. A, (Order) at 5:10-21.) Plaintiffs agreed Dr. Fisher was qualified to examine McMath under the Guidelines and provide an opinion in accordance with Health & Safety Code section 7181. (*Ibid.*)

Dr. Fisher performed an independent brain death examination of McMath on December 23, 2013. (*Ibid.*) Winkfield's attorney stipulated that Dr. Fisher's December 23, 2013 brain death examination and diagnosis was in accord with accepted medical standards in the Guidelines. (*Id.*, at pp. 6-7.) On December 24, 2013, Judge Grillo ruled there was clear and convincing evidence McMath had suffered brain death and was deceased as under sections 7180 and 7181. A death certificate was issued on January 3, 2014 and transferred to New Jersey, where she remains. (FAC, ¶ 27.)

On September 30, 2014, plaintiffs sought to invoke Judge Grillo's jurisdiction under *Dority* to determine whether McMath was still dead. (RJN Ex. M at 3:14-20.) On October 3, 2014 plaintiffs thereafter filed a petition for writ of error coram nobis contending they had "new evidence" that showed McMath was "no longer brain dead." (RJN Ex. C.) Judge Grillo re-appointed Dr. Fisher as the Court's independent expert under Evidence Code section 730. (RJN Ex. B.) As the court's re-appointed expert, Dr. Fisher opined on October 6, 2014 that: the Guidelines continue to be accepted medical standard for diagnosing brain death in children, that plaintiffs had not submitted evidence that McMath was not brain dead under the Guidelines, and that none of plaintiffs' materials refuted his December 2013 finding that McMath was brain dead. (*Ibid.*) Plaintiffs thereafter dismissed their petition. (RJN Ex. C.)

D. Plaintiffs Initiated The Personal Injury / Wrongful Death Action After Dismissing Challenges To The Probate Proceeding

Plaintiffs' first amended complaint alleges two inconsistent causes of action: for wrongful death by the alleged heirs of a *deceased* McMath, and a claim for personal injury by an *alive* McMath. In the first amended complaint, plaintiffs allege that, based upon the opinion of a pediatric neurologist, McMath's condition had changed since December 2013 and she "***no longer fulfills the standard brain death criteria*** on account of her ability to specifically respond to stimuli." (FAC, ¶ 35.)

1. Defendants Demurred To McMath's Personal Injury Claim

Defendants demurred to the claim for personal injuries on the grounds that McMath is legally deceased, and the doctrines of *res judicata* and collateral estoppel prevent plaintiffs from re-litigating the issue of McMath's death. (RJN Exs. G, H (Demurrers).) On March 14, 2016, the court overruled the demurrers, finding, among other things, that it could not determine at the pleading stage whether plaintiffs are collaterally estopped from relitigating whether McMath is brain dead because plaintiffs had alleged sufficient facts to show the changed circumstances exception to collateral estoppel may apply. (RJN Exs. I, J (3/14/16 Orders).) The court determined that although collateral estoppel may ultimately apply, a "more developed factual record" may be necessary to determine whether the changed circumstances exception precludes application of the doctrine of collateral estoppel. (*Ibid.*) The court certified questions seeking appellate clarification regarding the preclusive effect of the previous brain death determination. (RJN Ex. K (3/14/16 Order Re: CCP § 166.1).)

The First Appellate District denied defendants' petition for writ of mandate stating: "Because the trial court found the record at the pleading stage was inadequate for a collateral-estoppel determination and 'may require a more developed factual record,' we conclude, under the circumstances, that this matter should not be resolved at the pleading stage." (RJN Ex. L., 7/12/16 Order.)

2. Defendants Moved For Summary Adjudication Of The Personal Injury Claim

On March 23, 2017, defendants filed a motion for summary adjudication of the cause of action for personal injuries on the grounds that McMath lacks standing because she was declared deceased in accord with California law. (RJN Exs. N, O.) Defendants submitted the declarations of two brain death experts who attested that the only accepted neurological criteria for assessing McMath's brain function is an examination performed in accordance with the accepted medical standards that are set forth in the Guidelines. (RJN Exs. P, Q.) Although plaintiffs admitted, in a sworn response to a request for admission, that the Guidelines are the applicable criteria for the determination of brain death in a child such as McMath, McMath has not undergone a brain death examination under the Guidelines since

Judge Grillo ruled she was brain dead and deceased on January 2, 2014. (RJN Ex. P, Q, R; Declaration of Jennifer Still ("Still Decl."), ¶ 2, Ex. A.)

On September 5, 2017, the court issued its ruling denying the motion for summary adjudication. (RJN Ex. S.) The court agreed that defendants established that the determination of brain death was made in accord with accepted medical standards. (*Ibid.*) However, the court found that "there is a triable issue of fact as to whether McMath currently satisfies the statutory definition of "dead" under Health & Safety Code § 7180(a), or at least as to whether a subsequent examination in accordance with accepted medical standards is warranted under the circumstances." (*Ibid.*) "[A]t the very least a triable issue exists as to whether there are changed circumstances pertaining to McMath's condition so as to warrant a subsequent determination in accordance with accepted medical standards." (*Ibid.*)

3. Plaintiffs' Move To Bifurcate On Issues And Theories Not Previously Alleged

Since the court's ruling on the MSA, plaintiffs have changed tactics. They are no longer contending that McMath no longer fulfills the accepted medical standards. On December 22, 2017, plaintiffs filed the subject motion to bifurcate wherein they admitted that "it is more likely than not that" McMath would fail a brain death examination performed in accord with the Guidelines. In a letter to defense counsel dated March 20, 2018, plaintiffs concede that McMath "would most like fail a brain death examination." (Still Decl., ¶ 6, Ex. E.) Plaintiffs' new theory is that the neurologic criteria for brain death in the Guidelines are flawed.[1]

In addition, plaintiffs refuse to consent to a brain death re-examination. (Still Decl., ¶ 5.) In January 2018, plaintiffs' attorney represented to defense counsel that he is going to object to a brain death examination "given the grave risk that disconnecting [McMath] from the respirator will cause metabolic acidosis and cardiac arrhythmia or arrest. ... The test is, in my opinion, violative of CCP 2032.220(a)(1)." (*Id.*, at ¶ 6.) More recently, plaintiffs suggested McMath's current physician strongly opposes submitting McMath to a brain death examination under the Guidelines. (*Id.*, at ¶ 8, Ex. D.)

[1] In overruling the demurrer Judge Freedman noted in his Order: "The court is not persuaded by CHO's argument that Plaintiffs are 'improperly asking this court or a jury to reject the accepted medical standards used to determine irreversible brain death.'" (RJN Exh. I, (3/14/16 Order) at p. 3.) In fact, this is precisely what plaintiffs are now asking the court to do.

Defendants have yet to obtain verifiable, competent and objective evidence of McMath's *current* brain function. (*Id.*., ¶ 9.) The most recent medical testing of McMath was performed at University Hospital on September 26, 2014. (*Ibid.*) This testing demonstrated that she has no electrical brain activity, no blood flow to her brain, and no cerebral mechanism to hear sound. (*Ibid.*) The most recent materials relied on by plaintiffs are video recordings taken two years ago. (*Ibid.*) Indeed, Dr. Shewmon's declaration opining that McMath "no longer...fulfill[s] the widely accepted pediatric guidelines for determining brain death" relies on these outdated video files. (Shewmon Decl., ¶¶ 6, 10.)

III. BIFURCATION STANDARD

There are at least two provisions in the Code of Civil Procedure which grant the court authority to bifurcate issues for trial. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086 [bifurcation rests in the discretion of the trial court].) Section 598 authorizes a trial court, "when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby," to order that the trial of any issue or part of an issue shall precede the trial of any other issue or part of an issue. (Code Civ. Proc., § 598.) Section 1048 authorizes the court to "order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues," in order to further "convenience, or to avoid prejudice, or when separate trials will be conducive to expedition and economy." (Code Civ. Proc., § 1048.)

While the trial court has broad discretion to determine the order of proof at trial, it must only do so where bifurcation serves the interests of judicial economy. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504.) In short, where the primary objective of avoiding "waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff" is not met, bifurcation of a specific issue should not be ordered. (*Horton v. Jones* (1972) 26 Cal.App.3d 952, 955 [references omitted].)

IV. PLAINTIFFS' MOTION TO BIFURCATE DOES NOT SERVE THE INTERESTS OF JUDICIAL ECONOMY

Plaintiffs ask the court to bifurcate and hold a bench trial on the issue of whether the Guidelines "comport with the statutory requirements of the [UDDA]." (Plfs' Motion, at 2:9-13.) Plaintiffs argue

that bifurcation of this issue will serve the interests of judicial economy because it will establish the "proper standard by which to judge whether [McMath] is dead or alive." (*Id.*, at 6:7-11.) While, on its face, resolution of the "correct" medical/legal standard for evaluating brain death in a child seems to be a simple, and indeed a necessary foundational question, that must be addressed. It is not.

As discussed below, the question of whether the Guidelines constitute the accepted medical standard for evaluating brain death in a child is complex. The historical facts of the case, McMath's current condition, the experts' opinions regarding McMath's historical and current condition, and the foundational evidence upon which those opinions are based must all be considered. After the medical standards issue has been decided in a bench trial, the same evidence must then be presented to a factfinder to resolve subsequent issues concerning whether McMath satisfies the statutory criteria for brain death, serving neither the interests of justice or judicial economy.

A. The Guidelines Set Forth The Accepted Medical Standard For Determining Brain Death In A Child Under The UDDA

Health and Safety Code section 7180, which codifies the UDDA in California, provides, in relevant part, that "[a]n individual who has sustained ... irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards." (*See also, Dority, supra,* 145 Cal.App.3d at p. 278.) Though plaintiffs' expert, Dr. Shewmon, recognizes the Guidelines constitute the accepted medical standards for evaluating brain death in pediatric patients, plaintiffs nevertheless seek a bifurcated trial on the issue of whether the Guidelines satisfy the statutory requirements set forth in the UDDA, including whether the Guidelines accurately measure whether there has been "irreversible cessation of all functions of the entire brain, including the brain stem." (Shewmon Decl., ¶¶ 6, 42.)

The Guidelines have been accepted, and are used by, medical societies and hospitals nationwide. (RJN Ex. AA (Declaration of Thomas A. Nakagawa, M.D., FAAP, FCCP In Support of Defendants' MSA ("Nakagawa Decl.,")) at ¶ 9; and Ex. R (Declaration of Sanford Schneider, M.D., FAAN, FAAP, In Support Of Defendants MSA ("Schneider Decl.")), at ¶ 7.) Dr. Fisher, Dr. Heidersbach, and Dr. Shanahan followed the Guidelines when they each performed their own independent brain death

examinations on McMath in 2013 to conclude she met the accepted criteria for death under the Guidelines and the UDDA. (RJN Ex. U (Declaration of Robin Shanahan, M.D.); Ex. V (Declaration of Robert Heidersbach, M.D.); Ex. A, (1/2/14 Order), 2:21-3:12; and Ex. B (10/6/14 Order and Letter).)

B. Plaintiffs' Challenge To The Guidelines Is Premised Upon Reasoning Found In A Nevada State Court Opinion

Plaintiffs derive their challenge to the Guidelines' sufficiency to satisfy the UDDA's statutory requirements for establishing brain death from the Nevada Supreme Court's opinion set forth in *In re Hailu* (2015) 131 Nev.Adv.Opn. 89 ("*Hailu*"). (RJN Ex. W (*Hailu* Decision).) The trial court confirmed the hospital had accurately applied the American Association of Neurology's guidelines for determining brain death (the "AAN Guidelines") when it concluded Hailu, an adult, was brain dead. (*Hailu*, at pp. 9-10.) On appeal, the Nevada Supreme Court focused primarily upon the question of whether sufficient evidence had been presented to show that the AAN Guidelines (as opposed to the pediatric Guidelines, which are at issue in this case) constituted the "'accepted medical standards' that are applied uniformly throughout the states that have enacted the UDDA as sufficient to meet the UDDA definition of brain death." (*Id.*, at p. 13.) The court concluded insufficient evidence had been presented to establish that the AAN Guidelines were the accepted medical standards under Nevada's UDDA for diagnosing brain death and queried whether the so-called "Harvard criteria" might still be the accepted medical standard in adult patients and remanded the case for further proceedings on this issue. (*Id.*, at p. 14.) The *Hailu* court made no finding on the issue of whether the AAN Guidelines met the statutory criteria for brain death set forth in Nevada's version of the UDDA.

Unlike in *Hailu*, McMath was a pediatric patient, not an adult. The physicians who diagnosed McMath brain dead in 2013 followed the pediatric Guidelines, not the AAN Guidelines. Furthermore, there is a universal consensus among both parties' experts that the Guidelines are the undisputed medical standard for evaluating brain death in a child and that the Guidelines were followed by physicians who pronounced McMath brain dead. To summarize:

- Dr. Heidersbach performed a brain death examination on McMath in accordance with the Guidelines at Children's Hospital and concluded McMath was brain dead on December

12, 2013 (RJN Ex. A (1/2/14 Order); Ex. C (10/6/14 Order); Ex. V (Heidersbach Decl.); Ex. AA (Nakagawa Decl.) ¶ 15(H)(1));

- Dr. Shanahan performed a brain death examination on McMath in accordance with the Guidelines at Children's Hospital and concluded McMath was brain dead on December 12, 2013 (RJN Ex. A (1/2/14 Order); Ex. C (10/6/14 Order); Ex. U (Shanahan Decl.); Ex. AA (Nakagawa Decl.) ¶ 15(D)(1));
- Dr. Fisher performed a brain death examination on McMath at Children's Hospital in accordance with the Guidelines, which he explicitly confirmed to be the accepted medical standard, and concluded McMath was brain dead on December 23, 2013; he also examined "new" evidence submitted by plaintiffs in October 2014 and confirmed she was still dead at that time (RJN Ex. A (1/2/14), Ex. B (10/6/14 Order); Ex. AA (Nakagawa Decl.) ¶ 16(N));
- Dr. Nakagawa, the lead author of the Guidelines, has submitted a declaration stating that the Guidelines remain the accepted medical standard used nationwide for evaluating brain death in a child and that McMath continues to fulfill the accepted criteria for brain death (RJN Ex. AA (Nakagawa Decl.) ¶¶ 9, 19);
- Dr. Schneider has submitted a declaration stating that the Guidelines are the only accepted medical standard for evaluating brain death in a child and that she continues to satisfy the medical and legal definition of death (RJN Q (Schneider Decl.) ¶¶ 7, 19; Ex. R (Supp. Schneider Decl.) ¶ 2;
- Dr. Shewmon, plaintiffs' own expert, also agrees the Guidelines are the accepted medical standard for evaluating brain death in a child and that McMath fulfilled the criteria for brain death under the Guidelines in December 2013 (Shewmon Decl., ¶¶ 6, 29; RJN Ex. R (Supp. Schneider Decl.) ¶ 3).

Hailu is completely inapplicable here.

Notably, following the *Hailu* decision, the Nevada legislature took swift action to amend the state's UDDA statute, which now explicitly requires brain death determinations be made in adults and

children in accord with the AAN and pediatric Guidelines, respectively. (RJN Ex. S (2017 Nev. AB 424), amending Chapter 451 of NRS.) *Hailu* is therefore virtually meaningless in Nevada.

Furthermore, while plaintiffs suggest the Guidelines do not accurately measure brain death as contemplated by the UDDA (even though they are the accepted medical standard), they do not offer an alternative *accepted medical standard for determining brain death* under the UDDA. Thus, by implication, plaintiffs are attempting to set the stage for two arguments: (1) that there can be no brain death determination under the UDDA because the accepted medical standards allegedly do not meet the statutory criteria for death, and (2) that McMath's brain death determination in 2013 is invalid because the criteria used to evaluate her condition was a medical standard plaintiffs now contend to be legally inadequate.

Either way, it is clear the parties would be required to present the same evidence twice: first in a bifurcated bench trial to resolve the question of the applicable medical standards, and then again in proceedings to decide whether McMath is currently brain dead. The interests of judicial economy will not be served in such a scenario.

V. AN ORDER GRANTING THE MOTION TO BIFURCATE WOULD CONSTITUTE AN ABUSE OF DISCRETION

A. Plaintiffs Seek To Prevent Defendants From Introducing Evidence Related To McMath's Brain Death Determination

In effect, plaintiffs' motion is not one to bifurcate, but a motion *in limine* to prevent defendants from introducing evidence necessary to establish its defenses to plaintiffs' claims in this case: that McMath was correctly determined to be brain dead under the Guidelines in 2013, that such medical finding was upheld by the Alameda County Superior Court through a proceeding that resulted in a final judgment, and that the court's judgment on the issue cannot be relitigated in this case under the doctrine of collateral estoppel.

A trial on the issue of whether the Guidelines qualify as the accepted medical standards for determining brain death, the court must engage in the role of a factfinder, weighing the testimony of the defense experts with plaintiffs' experts, while considering the foundational evidence upon which their opinions are based. At the end of the process, the court will then be in a position of weighing the

opinions and deciding whether the Guidelines meet the statutory criteria for brain death. In effect, the court will be choosing which set of experts' opinion has more merit, and issuing an order *in limine* to preclude the other set of experts from opining at subsequent trial(s) on the question of whether McMath is brain dead. There is a possibility then, that the defense will be precluded from introducing evidence or opinion that McMath's diagnosis in 2013 was correct and that the diagnosis cannot be revisited. Such a result would be unfairly prejudicial and may constitute an abuse of discretion.

B. The Court Does Not Have Jurisdiction To Decide Whether The Guidelines Are Sufficient Under The UDDA Under *Dority*

Bifurcation of the issue, and holding a bench trial, on the issue of whether the Guidelines constitute the "accepted medical standard" for determining brain death is potentially outside the scope of the court's jurisdictional authority under *Dority*. Under *Dority*, in cases where an individual has been diagnosed as brain dead in a hospital setting, the court's jurisdiction may be invoked in two limited instances: (1) "upon a sufficient showing that 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 v. Sup. Ct.* (1983) 145 Cal.App.3d 273, 280.) Plaintiffs' requested trial on the issue of whether the Guidelines meet the statutory criteria for brain death set forth in the UDDA does not fall into either category identified in *Dority*.

VI. A DECISION TO BIFURCATE THE ISSUE OF WHAT MEDICAL STANDARDS APPLY TO DETERMINE BRAIN DEATH IS PREMATURE AT THIS STAGE OF THE LITIGATION

The parties have recently commenced comprehensive discovery directed toward evaluating the brain death issues presented by this case. The defendants prepared and presented to the court a comprehensive case management plan on March 1, 2018, which enumerates the minimum anticipated discovery that must take place before any issues related to brain death can be accurately identified and prepared for resolution. Some of these steps include, but are not limited to, the completion of written discovery and document collection, depositions of Drs. Fisher, Heidersbach, and Shanahan, depositions of brain death experts and evaluation of the evidence relied upon by those experts, including depositions of physicians and individuals who have observed, made video recordings of, and provided care to McMath in New Jersey. (RJN Ex. X, (Joint CMC Statement) at p. 4.)

Only after discovery described in the defendants' case management plan will the parties be properly equipped to make meaningful presentations of evidence and argument to the court. Indeed, defendants anticipate that after discovery has been completed, they will be bringing their own motion(s) to bifurcate and/or sever issues for resolution at trial. However, until the full scope of evidence on the issue of brain death has been disclosed and opinions of experts tested, it is impossible to know how, what, or even whether, bifurcation of specific issues, claims, or defenses should be sought, and whether resolution of some issues must take precedence over others.

As illustrated above, the issues concomitant to resolving the ultimate issue of whether McMath is legally deceased in California are complex, involving issues of law, equity, medicine, and public policy. It would be improper, and a potential miscarriage of justice, to make any decision at this stage in the process to bifurcate any singular issue without allowing fully developed discovery.

VII. PLAINTIFFS' MOTION SEEKS TO BIFURCATE ISSUES NOT BEFORE THE COURT

It is well-settled that "[t]he complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible." (*Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1182.) Through the motion to bifurcate, plaintiffs are attempting to hold a trial on a legal theory that is outside the scope of issues raised by the operative complaint in this case.

A. Plaintiffs' First Amended Complaint Alleges "Changed Circumstances"

In their FAC and prior filings within this and other courts, plaintiffs have conceded McMath met the criteria for brain death in 2013. (FAC, ¶ 35 "[McMath] *no longer* fulfills the standard brain death criteria..." [emphasis added].) In fact, plaintiffs have conceded the brain death examinations performed on McMath in December 2013 were done correctly in accordance with the Guidelines, and that Judge Grillo's finding that she was brain dead was appropriate. (Shewmon Decl., ¶ 6; RJN Ex. Y (Transcript of Proceedings on 5/12/16 in *McMath v. State of California, et al.*) at 7:20-23 ["we're not challenging whether or not the decision made at the time was made by Judge Grillo inappropriately. We're not seeking to overturn that decision in any way"].) Plaintiffs' focus, until now, has been upon alleged

"new" or "changed" facts which they contend show McMath is "no longer" brain dead under accepted medical standards (i.e., the Guidelines). (RJN Ex. F (FAC) at ¶ 35; RJN Ex. E (Fed. Compl.) at ¶ 50.)

B. Plaintiffs Now Seek A Trial Regarding The Medical Standards Applied To Diagnose Brain Death

Plaintiffs now take the position that the Guidelines are faulty because they do not accurately evaluate whether all brain function has irreversibly ceased, thereby suggesting McMath was never brain dead under the UDDA. In essence, plaintiffs seek declaratory relief, which is not alleged in the FAC.

No brain death examination has been conducted since 2013 in accordance with accepted medical standards, i.e., the Guidelines. Yet, plaintiffs have taken the position that, since at least 2014, McMath "is intermittently responsive and has some brain function" and therefore no longer meets the statutory criteria for brain death while simultaneously arguing that submitting McMath to another brain death examination under the Guidelines would cause irreparable harm. In taking this position, plaintiffs have selectively focused on establishing facts to satisfy the first half of the UDDA (irreversible cessation of all brain function, including the brain stem) while ignoring that second half, which requires that such a finding "must be made in accordance with accepted medical standards." (Health & Saf. Code, § 7180.)

Plaintiffs' entire bifurcation argument is premised upon the opinions set forth in the declaration of Dr. Shewmon, whose views on brain death are inconsistent with accepted medical standards. (*See,* D. Alan Shewmon, *"Brainstem Death," "Brain Death" and Death: A Critical Re-Evaluation of the Purported Evidence* (1998) 14 Issues in Law & Med. 125, 126 ("I have come to reject all brain-based formulations of death" after "convert[ing] from atheism to theism" and developing "a particular interest in the relationships among brain, mind, body, and soul") *cf., Fonseca v. Kaiser Permanente Medical Center Roseville* (E.D. Cal. 2016) 222 F.Supp.3d 850, 872 ("[o]n balance, a professional doubt surrounding brain death as death, legally or medically, represents a minority position"]; *and* Schneider Decl., ¶ 20 ["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."]).

Dr. Shewmon opines that, while McMath "fulfilled the widely accepted pediatric guidelines for determining brain death" in December 2013, "she no longer does" based upon Dr. Shewmon's belief that McMath "is intermittently responsive." (Shewmon Decl., ¶ 6.) Dr. Shewmon's belief is derived

from "49 distinct digital video files" that were "entrusted" to him by McMath's family. (Shewmon Decl., ¶ 10.) While Dr. Shewmon has not conducted a brain death examination in accordance with the Guidelines – the only accepted medical standard for evaluating pediatric brain death – nor has he himself observed any "intermittent responsiveness" first-hand while visiting her in December 2014, he nevertheless believes that McMath is "currently not brain dead." (Shewmon Decl., ¶ 30.)

Dr. Shewmon's minority opinion on brain death is in accord with that of Paul Byrne, M.D., whose opinion the *Fonesca* court found to reflect the minority viewpoint on brain death, and who Judge Grillo has previously determined would be unlikely to survive an Evidence Code section 402 hearing under Evidence Code section 720 and *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747. (*Sargon*, at p. 772 [a trial court must act as a gatekeeper, with the goal of excluding "'clearly invalid and unreliable' expert opinion"]; *Fonesca*, *supra*, 222 F.Supp.3d at p. 872; RJN Ex. A (1/2/14 Order) at p. 14.)

Plainly, it would be premature for this court to order a bifurcated trial on the issues cited by plaintiffs at this juncture based solely upon an untested opinion of an expert, whose views on brain death are within the minority, and a Nevada state court decision that has been rendered moot by legislative action in that state. Significant amounts of discovery must be conducted to test plaintiffs' theories and the standards for determining brain death in pediatric patients before decisions are made that may potentially preclude or limit defendants' abilities to fairly defend this case.

VIII. A BENCH TRIAL ON THE ISSUE OF WHETHER THE GUIDELINES SATISFY THE STATUTORY CRITERIA FOR DEATH MAY HAVE SIGNIFICANT CONSEQUENCES

There will be significant consequences if this court decides the Guidelines do not meet the statutory criteria for brain death under the UDDA. The Guidelines, relied upon by physicians at Children's Hospital and by the court's appointed expert, to diagnose McMath as brain dead, are the only accepted medical standards to evaluate brain death in a child in this country. Thus, if this court were to ultimately find the Guidelines cannot constitute the accepted medical standards under the UDDA, it will not only be compelling a change in this case's trajectory and scope, but causing incalculable disruption and uncertainty to the practice of medicine in pediatric intensive care units in hospitals across the country. (*See, e.g.*, RJN Ex. Z (Letter of *Amici Curiae*), at pp. 5, 7.)

Before this court makes any decision to hold a trial with such far-reaching potential consequences, it should permit the parties to complete comprehensive discovery on the full scope of issues pertaining to brain death, including whether the Guidelines are the accepted medical standard and whether McMath satisfies the accepted criteria. Plaintiffs themselves have argued against making decisions on the question of brain death in an "expedited and abbreviated proceeding," which they contend was the scenario in which Judge Grillo confirmed McMath's brain death diagnosis. (*See, e.g.*, RJN Ex. P (Plaintiffs' Opp. to Demurrer) 10:20-21.) Deferring a ruling on the plaintiffs' motion (and other anticipated bifurcation motions) until after the parties have completed regular and expert discovery, will serve the interests of all parties, including Plaintiffs, by creating a situation in which the court is able to make evidence-based decisions on this novel, and important, issue.

IX. CONCLUSION

For the reasons set forth above, the court should deny the plaintiffs' motion to bifurcate without prejudice to the parties filing future motions to bifurcate issues related to brain death after the parties have completed brain death discovery.

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