IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP OVER THE PERSON AND ESTATE OF,

ADEN HAILU,

An Adult Ward.

FANUEL GEBREYES,

Appellant,

vs.

PRIME HEALTHCARE SERVICES, LLC dba ST. MARY'S REGIONAL MEDICAL CENTER,

Respondent.

Case No. 68531

District Court Case No. G-15-00125

RESPONDENT'S ANSWERING BRIEF

William E. Peterson, No. 1528
Janine C. Prupas, No. 9156
SNELL & WILMER L.L.P.
50 West Liberty Street, Suite 510
Reno, Nevada 89501
(775) 785-5440
Attorneys for Respondent

DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) who must be disclosed. These representations are made so that the justices may evaluate possible disqualification or recusal. No publicly held corporation owns 10% or more of any of Respondent. No other firms are expected to appear on behalf of Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Statutes

Regulations

Other authorities

I. Statement of Jurisdiction.

Prime Healthcare Services, LLC dba Saint Mary's Regional Medical Center ("Saint Mary's') concurs in Appellant's Statement of Jurisdiction. This Court has jurisdiction under NRAP 3A(b)(1) and NRAP 3A(b)(3).

II. Statement of Issues on Appeal.

Saint Mary's does not concur in Appellant's Statement of Issues. This is an appeal from a final judgment of the court that Appellant's Ward, Aden Hailu, is legally dead under provisions of the Uniform Determination of Death Act, NRS 451.007 (Uniform Act), and the only issue before the Court is whether that determination is supported by substantial evidence.

III. Standard of Review.

A trial court's findings of fact will not be set aside if they are supported by substantial evidence. Substantial evidence is evidence that a trier of fact might reasonably believe to be adequate to support a conclusion.

IV. Statement of Case.

This case was originally commenced on June 18, 2015 in Department 15 of the Second Judicial District Court, CV15-01172 on motion for temporary restraining order filed by Petitioner's former counsel, Calvin Dunlap. The motion was brought to restrain Saint Mary's from discontinuing ventilator and other life sustaining measures for Aden Hailu, who the hospital had determined was brain

dead under the Uniform Act. The Honorable Connie Steinheimer, sitting in for Judge Hardy deemed the motion a complaint without objection from Saint Mary's. Appx. 031.

The complaint/motion was precipitated by Saint Mary's refusal to grant Mr. Dunlap's written request, by letter dated June 2, 2015, for two weeks' notice prior to removal of the ventilator, and cessation of other life sustaining measures for Aden Hailu, a patient at Saint Mary's Regional Medical Center, whose physicians, responsible for her care, had determined to be brain dead under the Uniform Act. Mr. Dunlap stated he needed this time to arrange for the services of an independent physician to confirm brain death. Saint Mary's denied this open ended request, but did grant him until June 18, 2015 to obtain an independent opinion. Appx. 159-162.

After hearing argument on the motion, Judge Steinheimer approved a stipulation of the parties, entered in open court, that Mr. Dunlap would have until July 2, 2015 to obtain an independent opinion. If that opinion confirmed brain death, Saint Mary's could proceed to remove the ventilator. If it did not, further proceedings would be conducted in the guardianship court. Appx. 031. Unbeknownst to the Court and counsel, Petitioner's counsel had already retained the services of Dr. Gomez, an independent physician, who examined Hailu on that same day. After performing his examination, Dr. Gomez concluded: *"Anoxic*

brain injury with herniation and now brain death. Transcranial doppler (a confirmatory test of blood flow to the head), no flow, previous apnea test : no respiratory drive. No gag, corneals, pupils fixed and dilated. GCS is 3. Further care futile. ***In my opinion no further tests are required to prove brain death.*** *However additional confirmation could include a CTA brain or cerebral nuclear medicine blood flow test."* Appx. 565.

While Petitioner denied retaining Dr. Gomez, he was aware Mr. Dunlap had retained an independent physician to perform such an examination, but claims he did not authorize it. Appx. 181. Regardless, an independent examination was conducted at the request of Petitioner's counsel and that examination confirmed Aden Hailu was brain dead. All of this was explained to the Court in response to her request for information regarding proceedings in front of Judge Steinheimer. Appx. 165-166.

On July 2, 2015, Petitioner, through new counsel, filed a new action in the Guardianship Court (GR15-00125), together with a motion for temporary restraining order and request for permanent injunction. The motion sought the same relief as the original motion, and additional relief in the form of thyroid hormone treatment to promote brain healing. Appx. 11, 23-25. The motion was accompanied by a declaration from Dr. Paul Byrne, a neonatologist and

pediatrician from Missouri, and celebrity national advocate against the practice of organ transplantation.

The trial court heard testimony on July 2, 2015 from Petitioner Fanuel Gebreyes, Dr. Paul Byrne, Dr. Aaron Heide, Chief of Neurology at Saint Mary's Regional Medical Center, and Helen Lidholm, Chief Executive Officer of Saint Mary's Regional Medical Center. Although the evidence presented during the hearing unequivocally established brain death (as later determined by the Court), at the conclusion of the hearing, Ms. Lidholm testified that Saint Mary's would have no objection to providing Petitioner with additional time to secure the services of a licensed and credentialed neurologist in the State of Nevada, to examine Aden Hailu, and if such doctor determined that she was alive, to order and direct Saint Mary's to undertake whatever treatment such physician deemed appropriate to enable Hailu to be transferred to an appropriate facility for long term care and treatment. Ms. Lidholm also offered to pay for the services of any such physician. Appx. 304-307.[1]

Based on Lidholm's representations, the parties entered into a second stipulation, also approved and ordered by the Court that: "*Petitioner has until July*

[1] Ms. Lidholm explained that under state and federal law, hospitals do not, and may not, order or direct care for patients. Only licensed doctors can do that. Appx. 304-307; *see also* NAC 449.307 et seq. regarding licensing and responsibility for medical care, which is always with the physician. NAC 449.313. St. Mary's doctors had already determined Ms. Hailu was brain dead, and that continued life support was inappropriate, and in their view, unethical.

21, 2015 in which to obtain the services of a physician licensed in the State of Nevada who is in good standing with the State medical board and can be credentialed by Respondent in order to examine Aden Hailu and willing to order whatever medications or procedures that licensed physician deems necessary and appropriate for Aden, to include a complete written medical plan and discharge plan. The proposed written medical plan and discharge plan for Aden Hailu will include details about how Aden Hailu will be discharged from the hospital and how she will be transported to another location." July 20, 2015 Order, p. 2, lns. 3-9, Supplemental Appendix 002. The Stipulation and Order further required Petitioner to *"submit to the Court and Respondent a plan of care supported by a licensed physician in the State of Nevada that details the substance of ongoing treatment and care plan for Aden Hailu...and care plan must also be in the best interests of Aden Hailu as determined by the Court...the care plan will include: (1) method of transportation; (2) location of the destination; (3) a care plan for when Aden Hailu arrives at the destination; and (4) the method of payment for the ongoing care plan."* *Id.* at lns. 10-16. In order to give Petitioner sufficient time to comply with the Stipulation and Order, the Court continued the hearing to July 21, 2015 at which time it would address any and all remaining issues, including any supplementation of evidence that the parties might wish to present at that time. *Id.* at lns. 23-26.

The Court reconvened the hearing on July 21, 2015. Although Petitioner did not comply with any of the requirements imposed by the Court under the approved Stipulation and Order, he stated he was prepared to present evidence contradicting the determination of brain death, and supporting the need for additional care. No arrangements had been made by any doctor or facility willing to take Aden Hailu as a patient, but pursuant to the Court's previous order, the Court stated it would nonetheless allow Petitioner to supplement its evidence *"Let me be clear ... What you (Mr. O'Mara) were to do was obtain, as offered, additional medical information that would help this Court and help the Guardian reach a conclusion different from what the overwhelming medical evidence had established at the last hearing (that the statutory definition of brain death had been satisfied). Dr. Byrne's evidence was not medically acceptable, was not compelling, was not credible, and was not sufficient for the Court to reach a conclusion consistent with ongoing continued and extended care, so the plan was, Mr. O'Mara, to allow you additional time to provide other credible evidence and a plan of care. I don't have that. I'll listen to your testimony from your witness, but I'm not redirecting this case because redirection inconsistent with medical evidence that will be in the record will then go to other issues, issues of best interest decision making, issues of whether or not you're asking for experimental medical care and treatment approval, so this is not just the issue of whether or not Saint Mary's remains*

involved in the life of your child or her circumstances. The Court will not facilitate an impractical course of treatment, so you've already not met the expectations of the Court and the order of the Court." Appx. 361-362.

Having failed to satisfy the requirements of the Court's Order and Stipulation, the Court nonetheless permitted Petitioner to present additional testimony regarding the determination of death. Petitioner provided testimony from (1) Dr. Brian Callister, an internist and hospitalist, (2) Dr. Scott Manthei, an Osteopath from Las Vegas, and (3) the Petitioner. Saint Mary's called Dr. Floreani, a pulmonologist whose office conducted the critical and definitive apnea test that unequivocally established brain death. The medical evidence presented by Saint Mary's, through its two physicians, Dr. Heide (on July 2, 2015), and Dr. Floreani (on July 21, 2015), satisfied all the elements and criteria for determining brain death under the Uniform Act.

At the July 2 and July 21 hearings, Petitioner presented the testimony of three physicians, Dr. Byrne, Dr. Manthei and Dr. Callister. Dr. Byrne is a neonatologist and pediatrician and fundamentalist catholic who testified at the July 2, 2015 hearing, that he does not believe in brain death and that it is a concept that was invented by a coterie of doctors and organ transplant capitalists conspiring together to vivisect the living, in order to harvest organs. Dr. Byrne conceded that he is not qualified to provide any opinion regarding the elements of brain death as

laid out by the American Academy of Neurology (the applicable standard of care in Nevada), and was not even familiar with the applicable criteria.

Dr. Manthei, who testified on July 21, 2015, is an osteopath who likewise conceded that he is not qualified to provide any opinions on brain death, and is not familiar with the standards of the American Academy of Neurology to determine brain death.

Dr. Callister was called last. He is an internist and hospitalist who testified that he is not a neurologist, but is familiar with the criteria and tests for brain death laid down by the American Academy of Neurology and testified that under those criteria, Aden Hailu is brain dead.

Based on this evidence, as well as the medical records establishing that all three elements to determine brain death under the standards of the American Academy of Neurology were satisfied ((1) Coma with a known cause of origin, (2) Clinical confirmation of lack of brain and brain stem function from established clinical tests, and (3) apnea test), the Court concluded that all the elements of brain death under the Uniform Act were satisfied, and that Aden Hailu was legally dead. As a result, the Court denied the request for injunctive relief permitting Saint Mary's to disconnect the ventilator and cease further life sustaining measures. The Court's order was stayed, and the injunction continued until this Court rules.

As set forth below, the trial court's decision is supported not only by substantial evidence, but by uncontroverted evidence.

V. Statement of Facts.

There are virtually no material facts in dispute in this case. Aden Hailu was admitted to Saint Mary's Medical Center on April 1, 2015 complaining of severe abdominal pain. Because the treating physician (Dr. Chu) could not determine the source or cause of the pain she performed an exploratory laparotomy from which Aden Hailu essentially did not recover. It was determined that Aden Hailu sustained severe anoxic (lack of oxygen) brain damage incident to or coincident with the surgery, and that her condition rapidly deteriorated thereafter. By April 14, 2015, Dr. Heide, the primary care physician overseeing Aden's neurological condition noted: *"Left pupil is fixed and dilated along with right. No corneal response. No oculocephalics. Not breathing over vent. No chewing on the tube as of yesterday. No response to peripheral stim. ... All indications are leading towards criteria for brain death."* Appx. 561. The next day (April 15, 2015), Dr. Heide noted no cortical or subcortical brain function, fixed dilated pupils, no limb response to pain, no reflexes, no Babinski (test for neurological response) no breathing and no chewing. *Id.* By the next day (April 16, 2015), Dr. Heide concluded: "Pt with neuro clinical exam consistent with brain death...TCD (Transcranial Doppler which is a test to measure blood flow to the brain) from

yesterday consistent with absent cerebral blood flow consistent with cerebral circulatory arrest. Pending apnea test for confirmation of brain death criteria...From neuro perspective there is no chance of functional recovery based on current exam and ancillary findings." Appx. 562.

Dr. Heide testified that when he first examined Aden Hailu on April 12, 2015 she was not clinically brain dead, but was rapidly declining. Appx. 259. "Her neurological findings and functions were disappearing." *Id.* Within 48 hours from that time (April 14, 2015), she exhibited no neurological functions whatsoever. Appx. 260. *"What I mean by that is based on the criteria for cerebral cortical, subcortical brainstem function were absent at that time." Id.* Dr. Heide stated that he followed the protocol for determining brain death established by the American Academy of Neurology, which he testified is the accepted medical standard for determining brain death nationwide, including Nevada Appx. 263-265. That test calls for the determination of brain death to be made by (1) clinical neurological examination, (2) determination of the existence of coma and the cause of the coma (here anorexic brain injury during or incident to surgery), and (3) an apnea test. The existence and cause of coma was already established. The clinical neurological examination measures brain response through various observations (pupillary response, ocular response, eye movement consistent with head movement, inner ear response to determine if there are

functioning neurons left in the brain stem, pain response, motor response, etc.). Appx. 264-265. The apnea test disconnects the patient from the ventilator for a period of ten minutes (after administering oxygen), to determine spontaneous breathing and gag response, and exhalation, to dispel the build-up of carbon dioxide. The apnea test was conducted on May 30, 2015, and unequivocally established brain death: *"There were no spontaneous movements or attempted respirations for the entire 10 minute test.* ***This test result confirms Brain Death unequivocally."*** Appx. 555. Dr. Heide concluded his testimony as follows:

"Q. Okay. Doctor, testimony in court has to be to a reasonable degree of scientific or medical certainty. I don't know if you've ever testified before, but that's the requirement. You're familiar with the, obviously, the criteria established by the American Academy for the determination of death.

A. Yes.

Q. You've applied the criteria?

A. Yes.

Q. And based upon your application of the criteria, the results from all the tests that you've employed, do you have, do you have an opinion, based upon, or a reasonable degree of medical

certainty that, that Aden Hailu is, based on, based on the legal definition, dead? Deceased.

A. Based on my application of AN guidelines, my experience, my training, she has zero percent change of functional neurological outcome, and thereby meets the criteria that I documented in my notes of brain death."

Appx. 276.

When trial resumed on July 21, 2015, Saint Mary's called Dr. Floreani, a pulmonologist, who was involved in the treatment and care of Aden Hailu for the entire duration of her admission at Saint Mary's. Appx. 426. Dr. Floreani testified he was familiar with the criteria and standards for determining brain death under the Uniform Act, and the American Academy of Neurology. Appx. 426. Dr. Floreani testified as follows:

"The coma, the exam that is consistent with brain death, and an apnea test that shows no voluntary ventilation or spontaneous breaths during the test with an appropriate increase in carbon dioxide indicating absolutely no ventilation during the period of the test. The test done by Dr. Bacon was done by the book exactly how you should do it and determined that she had no breathing for ten minutes and that her carbon dioxide increased from 40 to over 100. That is not compatible with

brainstem activity, and unfortunately and tragically it is not compatible with human life." Appx. 428.

Dr. Floreani concluded his testimony as follows:

"Q So then once again, thank you for that answer. I just want to make it clear for the record. Your opinion as to - - I understand we can all have opinions, you want to apply the clinical diagnosis. To a reasonable degree of medical certainty, does she satisfy the definition of brain dead?

A Yes, unfortunately she does."

Appx. 431.

Petitioner was unable to offer any testimony refuting or contradicting this testimony. Dr. Byrne, a pediatrician and neonatologist from Missouri called by Petitioner testified he did not even examine Aden Hailu. Appx 189, 204. He also testified brain death is not true death (Appx. 216; 219), and that a person does not become dead merely because a doctor declares one brain dead. Appx. 217. Dr. Byrne claims that the Uniform Declaration of Death Act came about as a result of a coterie of Harvard professors who first devised the concept, and that it was invented, conjured, and made up just to get organ transplants. Appx. 218-220, 222. According to Dr. Byrne: *"Brain death was invented for the sole purpose of organ transplantation, living human medical experimentation, and the means in which*

measures to sustain life could be legally withdrawn. It was the first legal form of euthanasia in the United States." Appx. 230. Dr. Byrne's definition of death is only when the soul leaves the body. Appx. 223.

Dr. Byrne testified the Uniform Act requires the determination of death to be made by accepted medical standards, but that such standards are not sufficiently stringent for a matter as important as the determination of death. Appx. 236. He was unable to dispute, however, the determination of death made by Saint Mary's complied with accepted medical standards under the Act:

Q. Do you - -

A. - - the question is simpler.

Q. Do you, do you say "yes" or "no" to my statement to this Court, that Saint Mary's Hospital applied accepted medical standards to determine death?

A. I - -

Q. You can agree or disagree.

A. I don't know.

Q. Okay. Fine.

A. I don't know.

Appx. 238.

Dr. Manthei, an osteopath from Las Vegas, was called to testify that he would be willing to perform a tracheostomy on Aden Hailu if arrangements could be made to transport her to Las Vegas, and other arrangements made to have her admitted to a qualified facility. Appx. 403- 404. No such arrangements, however, had been made. Appx. 407. Dr. Manthei did not examine Aden Hailu, nor did he even review her medical records. Appx. 405. Dr. Manthei conceded he was not qualified to make a determination of brain death: "I am not qualified to declare her brain dead." *Id.*

The last doctor called by Petitioner, Dr. Callister, an internist and hospitalist conceded that the requirements for determining brain death under the Uniform Act, and the criteria laid out by the American Academy of Neurology were fully satisfied. Dr. Callister testified he is not a neurologist and not qualified to testify as to the medical standards for neurology. Appx. 376. He did state, however, he was familiar with the standards for determining death laid out by the American Academy of Neurology in the State of Nevada, Appx. 377, and that he actually performed some of those procedures on Hailu, and obtained zero neurological response from her, all of which "can be consistent with brain death." Appx. 377-380. Dr. Callister also conceded that all three elements for determining brain death under the standards promulgated by the American Academy of Neurology were satisfied (coma, clinical examination and apnea):

"Q. All right. Are you familiar with the three cardinal signs of brain death under the standards promulgated by the American Association of Neurology?

A. I can't repeat them off the top of my head, no.

Q. Let's talk about coma. Is she in a coma?

A. Yes.

Q. Do you recognize a coma as one of the three signs?

A. Yes.

Q. Is the coma irreversible?

A. I don't know.

Q. To a medical degree of certainty, would you agree that it looks like it's irreversible?

A. It look like it's irreversible, but I am not certain of that.

Q. Thank you. After coma, brainstem reflexes, a number of tests to determine brainstem reflexes. You performed some of those, correct?

A. Yes, I did.

Q. The brainstem reflex test that you undertook which is part two of the American Association of Neurology test indicates no response, no reflexes from the brainstem, correct?

A. Correct.

Q. Consistent with brain death, right?

A. It can be, yes.

Q. The last one, apnea test. You only saw the record on one apnea test, right?

A. From May 28th, correct.

Q. And the apnea test that was conducted confirmed, if you looked at the record, unequivocally brain death, did it not?

A. It was consistent with brain death based on those applications."

Appx. 388-385.

In conclusion, Dr. Callister unequivocally conceded that the standards and criteria for determining brain death laid out by the American Academy of Neurology were fully satisfied:

"Q. Let me start over again.

The Uniform - - I know you're not a lawyer and I'm not going to pretend that you are, but the Uniform Declaration of Death Act promulgated for cases just like this one, people come to court to determine whether or not a person is brain dead or not, can you accept that?

A. Sure.

Q. Under the Uniform Act, it applies standard medical practices in a community. We apply here in Nevada the standards that are promulgated by the American Academy of Neurology. Can you accept that?

A. I understand that.

Q. Do you understand that the American Academy of Neurology for purposes of determining brain death have promulgated a series of procedures and tests that - -

A. No, I understand.

Q. You understand that?

A. Yeah. I don't read them as bedtime reading, but I'm quite familiar with them.

Q. Then if you understand all of that, I'm asking you to tell the Court to identify just one of those that would be indicative of anything other than brain death, just one.

A. By a strict definition, she would meet their category.

Q. Okay. Then I'm going to restate it my way if you disagree with me, I want you to tell me why.

A. Okay.

Q. The proposition is all of the criteria and standards promulgated by the American Academy of Neurology for determining death have been satisfied in this case, and if that is an untrue statement, I want you to tell me why.

A. I'm not going to say it's - - I would say from a check the box criteria statement, it is true."

Appx. 397-399.

VI. The Trial Court's Findings of Fact Are Supported By Substantial Evidence.

NRCP 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This principle has been articulated in hundreds of court cases, including those granting or denying a request for permanent injunction. *See, e.g., Sanson Investment Co. v. C.R. Cleland*, 97 Nev. 141, 625 P.2d 566 (Nev. 1981)(findings of fact by trial judge in denying permanent injunction will not be set aside where supported by substantial evidence.); *Chateau Vegas Wine, Inc. v. Southern Wine and Spirits of America, Inc.,* 127 Nev. Adv. Op. 73, 265 P.3d 680 (2012)(A district court's findings of fact are accorded deference, however, unless they are clearly erroneous and not based on substantial evidence). Substantial evidence is that which a reasonable mind might accept as adequate to

support a conclusion. *Day v. Washoe County School District*, 121 Nev. 387, 116 P.3d 68 (2005).

The district court found that *"the testimony from St. Mary's physicians Dr. Aaron Heide and Dr. Anthony Floreani, at the July 2, and July 21, hearings, was credible and established Ms. Hailu meets the definition of death pursuant to the Uniform Determination of Death Act (NRS 451.007(1)(b)), based on standards outlined by the American Academy of Neurology and that St. Mary's and its physicians followed mandated medical protocols and procedures in reaching their determination."* Appx. 139-140 (finding no. 2). The Court also found in finding no. 3: *"None of the evidence presented by Petitioner, including the testimony of Dr. Paul Byrne, Dr. Brian Callister and Dr. Scott Manthei negated the substantial, compelling and credible evidence presented by St. Mary's."* Appx. 140. The trial testimony supporting these two findings is reproduced in part above, and it cannot be seriously disputed that it is more than adequate to support these two findings of fact by the trial court. Indeed, the standards and criteria laid out in the Act and the protocols for establishing brain death by the American Academy of Neurology were "uncontested," with three physicians all testifying they were fully satisfied, and two admitting their lack of qualifications to make such determination, and/or lack of knowledge or information as to whether they were satisfied or not.

VII. The Standards And Protocols Established By The American Academy of Neurology For Determining Brain Death Are "Accepted Medical Standards" In Nevada, And Elsewhere For Determining Death Under The Uniform Act.

Petitioner argues: "For what appears to be the first time, a District Court has concluded that the medical standards and protocols to determine 'brain death' are set by the American Academy of Neurology." Appellant's Opening Brief, p. 4. While this may be a true statement for the reason that there is no reported case in Nevada dealing with the Uniform Act, the standards of the Academy are widely recognized as an accepted medical standard for making such determinations, including Nevada. Dr. Heide (Director of Neurology and Stroke for Saint Mary's, and a board certified neurologist who obtained his medical degree from the University of Washington, did his neurology training at the New England Medical Center at Tufts University, his stroke fellowship at Lahey Medical Center in Burlington, Massachusetts, and former director of the stroke center at Valley Medical Center in Washington Appx. 255-256), testified that the standards established by the Academy are standards that are applicable throughout the United States, and in Nevada. Appx. 264-265.

Petitioner's own expert, Dr. Callister conceded that the standards of the American Academy are accepted medical standards in Nevada. Appx. 397-398.

Dr. Floreani also testified that the standards of the American Academy are the applicable standards in Nevada. Appx. 427, 429-430. Petitioner proffered no evidence whatsoever supporting the existence of any other standard, nor did he produce any evidence refuting the testimony of Dr. Heide, Dr. Floreani, and Dr. Callister that the standards of the American Academy of Neurology for determining brain death are accepted medical standards in Nevada.

The Uniform Act was changed in 1980, to revise the language that formerly stated the determination of brain death shall be made by "reasonable medical standards," to "accepted medical standards." The latter is more objective in nature (avoiding debate about what may be reasonable, as opposed to what is actually accepted practice), yet flexible enough to avoid obsolescence as technology advances: *"Specifying criteria would inhibit advancement in technology, and also would inhibit the courts in determining the facts in each individual case and in recognizing acceptable standards as dynamic, rather than a static concept."* Comments, National Conference of Commissioners on Uniform State Laws, Summary of Determination of Death Act.

The State of New Jersey recently debated whether it should amend its Uniform Act to specifically incorporate the American Academy guidelines (AAN). Although New Jersey declined to do so, believing that the Act should allow greater flexibility than just one standard, the state's law commission did observe that many

states do adhere to AAN guidelines in practice, that hospital guidelines usually adopt or follow the AAN guidelines, and as a practical matter, the AAN guidelines are the only institutional standards that are currently available. *See* State of New Jersey, New Jersey Law Revision Commission Final Report on New Jersey Declaration of Death Act, January 18, 2013, http:www.njlrc.org (New Jersey has been a leader in the legal aspects of the determination of brain death ever since the famous Karen Ann Quinlan case, *In re Quinlan*, 70 N.J. 10, den. sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976)).

Based on the testimony and the literature, it cannot be denied that the standards and protocols for determining brain death by the American Academy of Neurology are "accepted medical standards" under the Uniform Act.

VIII. The Determination Of Death Under The Uniform Act Does Not Require Or Depend On The Absence Of Recordable Brain Waves On An Electroencephalogram.

Petitioner pointed out in his brief that after Aden Hailu's admission to the hospital, and for a short time thereafter, an EEG exhibited significant deterioration, but still showed "diffuse brain waves." Appellant's Opening Brief, p. 14. Petitioner argues that "Nevada will be the first state to make a determination of death when the person was first determined to be alive, as confirmed by an EEG, without subsequent confirmatory evidence of a subsequent flat EEG." Appellant's

Opening Brief, p. 4. Although this statement may sound somewhat startling, it is a banality. Patients with well-functioning brains and other bodily parts and systems admitted to a hospital sometimes die while in the hospital, after which they have non-functioning brains, bodily parts and systems. Such was the case with Aden Hailu. The fact that Aden Hailu exhibited weak and diffuse brain activity for a short period of time after her admission to the hospital, and prior to, or for some period of time during her rapid deterioration, but prior to application of the requisite tests, procedures and protocols to determine brain death (up to and including the definitive apnea test on May 30, 2015), has no bearing whatsoever on the determination of brain death under the Uniform Act after that time. At bottom, what Petitioner is suggesting is that a determination of brain death cannot be made unless and until an EEG discloses no brain wave activity whatsoever. Petitioner cites no authority whatsoever for this proposition, because there is none.

The determination of death is a clinical determination made by a physician employing accepted medical protocols and procedures. There are three parts to that determination. First, there must be a determination of coma and the cause or etiology for the coma (i.e., not a temporary drug or alcohol induced phenomena that might clear up). Second, there must be a clinical neurological evaluation of brain and brain stem functions and responses as discussed above. Third, there should be a final and definitive apnea test. Appx. 266, 277, 282, 427-428. An

EEG is not part of the accepted medical criteria for determining brain death. According to Dr. Floreani: "The prior EEG, the prior MRI really do not, are not considered primary determinants of brain death by the established consensus and evidence based criteria." Appx. 428. The AAN Guidelines do not call for an EEG. *Id.* This fact can be readily ascertained and confirmed by consulting literature published by the American Academy of Neurology itself, such as http://www.braindeath.org/clinical.htm, which discusses the three basic criteria for determining brain death discussed above and outlined in the cited testimony (coma, brain and brain stem clinical exam, and apnea test). One of the reasons for this, as outlined in the literature, is that after death, various cells or tissues in the body may continue to survive for some period of time, as manifested by the fact that after death various organs of the body can be preserved and transplanted. *See, e.g..* Wijdicks, Eelco, M.D., Ph.D., The Case Against Confirmatory Tests For Determining Brain Death in Adults, Division of Critical Care Neurology, Mayo Clinic, www.neurology.org: "The Determination of Death is based on a comprehensive clinical assessment....Pathologic studies have shown that considerable areas of viable brain tissue may remain in patients who meet the clinical criteria of brain death, a fact that makes these tests less diagnostic. Confirmatory tests are residua from earlier days of refining comatose states. A comprehensive clinical examination, when performed by skilled examiners, should

have perfect diagnostic accuracy." This fact is recognized in the case law as well. *See, e.g., People v. Bonilla*, 95 A.D.2d 396 (N.Y. 1983)(A serious dispute exists in the medical community concerning the effectiveness of the EEG in diagnosing brain death). Regardless of the merits of conducting another EEG, it was undisputed at trial, including by Petitioner's own expert, that the criteria laid out by the American Academy of Neurology to determine brain death were fully satisfied. Thus, there was no reason to conduct any further "confirmatory tests," as was conceded by Dr. Gomez himself, who was retained on behalf of Petitioner: "Anoxic brain injury with herniation and now brain death. Transcranial Doppler, no flow (this is a confirmatory test as well) previous apnea test, no respiratory drive. No gag, corneals, pupils fixed and dilated. GCS Is 3. Further care futile. ***In my opinion no further tests are required to prove brain death.*** However additional confirmation could include a CTA brain or cerebral blood nuclear blood flow test." Appx. 565.

Dr. Callister confirmed that all the criteria for brain death were fully satisfied under the standards of the American Academy (Appx. 383-385). As to the EEG, he conceded the readings were weak and diffuse, and were registered before the definitive apnea test was conducted more than one and one half months later. Appx. 386. He also acknowledged that even the diffuse readings he

observed in early April should not give anyone hope that that Aden Hailu would suddenly wake up and recover. Appx. 368.

In sum, the evidence of a weak and diffuse EEG reading in the first or second week of Aden Hailu's admission is not sufficient to overcome, or even undermine the trial court's finding of fact that the requirements for determining brain death pursuant to the Uniform Determination of Death Act (NRS 451.007) based on standards outlined by the American Academy of Neurology were satisfied. Appx. 139-140.

IX. The Cases Cited By Petitioner Are Right To Life Cases Dealing With Withdrawal Of Life Support From Patients In A Vegetative State, Not Patients Who Have Been Clinically Determined To Be Brain Dead.

Petitioner liberally draws from case law dealing with terminally ill patients' (or his or her guardian's) right to refuse medically necessary treatment to maintain or prolong life. Those cases are not apposite for the reason that in all of them, there was no dispute that the patient was alive. Issue was joined on the patient's right to die. This is are fundamentally different issue, as was expressed by the Supreme Court of Washington in *In re Bowman*, 617 P.2d 731 (Wash. 1980): *"The specific issue in this case is whether or not Matthew was legally dead on October 17, 1979, when the physicians declared that he had suffered brain death. We are not presented with the much more difficult question of whether life support*

mechanisms may be terminated while a person is still alive but in that condition known as a 'persistent vegetative state,' in which some brain functioning continues to exist. We are concerned here only with whether brain death, identified as the irreversible destruction of the entire brain from which cardiorespiratory death inevitably follows, is a recognized standard of death in this state." Id. at 735.

In *Conservatorship of Drabick*, 245 Cal.Rptr. 3d 185 (Cal.App. 1988), the patient was in a deep coma but breathing on his own, when his brothers petitioned the court to remove his feeding tube. The court granted permission, laying down a rule for the future that any such decision must include the prognosis that there is no reasonable possibility of return to cognitive sapient life. *Id.* at 216. The case has no relevance here.

In *Matter of Aida Jones*, 433 N.Y. 2d 984 (N.Y. Supreme Court [a trial court] 1980), a negative EEG precipitated the hospital's decision to perform the neurological tests to determine brain death. The EEG was not the operative diagnostic tool or test. "In this case, the treating physician, after observing that there was no brain activity shown on the EEG, *carried out a series of recommended neurological tests to determine whether or not there was no brain action." Id.* at 292. After performing the neurological tests the doctor concluded the patient was brain dead. *Id.* If the EEG were the operative tool or test, then the AAN standards would call for them. It does not. Petitioner also cites *Jones* for the

proposition that different procedures may be administered to determine brain death, as was employed by the doctor in the *Jones* case, because New York apparently had not adopted the Uniform Act at that time. The protocol instead employed standards established by the hospital itself. The court concluded *that "the medical profession has had occasion to adopt acceptable procedures in determining brain death. So long as the profession acts within guidelines of acceptable medical standards, it will be meeting legal requirements. No additional procedures are required, and court authorization is not necessary. In this case, all the prescribed procedures were followed." Id.* at 292. The same principle and same conclusion applies here. All the prescribed procedures under "accepted medical standards" in Nevada were followed.

In *Matter of Welfare of Colyer*, 660 P.2d 114 (1983)(cited by Petitioner), a husband sought to discontinue life support for his admittedly alive wife, who was in a persistent vegetative state. The parties agreed the patient did not satisfy the criteria for brain death under the Uniform Act because she exhibited reflex (motor) in the lower portion of her brain, and brain stem. In a monumental case of first impression in Washington, the court, which did not have the benefit of a statute, outlined a procedure and protocol governing future applications for withholding life support from persons existing in a vegetative state, but not brain dead under the Uniform Act. The case has no relevance whatsoever to the issue subjudice.

In *In Matter of Storar*, 52 N.Y.2d 363 (N.Y. 1981), the court also dealt with requests of guardians of persons in persistent vegetative states to discontinue life support, but who were not brain dead. In one case, the court permitted the guardian to discontinue the use of a ventilator on a patient who had expressed his desire not to be kept alive under such circumstances, and in the second, denied the petition of a hospital to withhold necessary blood transfusions to a severely retarded patient that was necessary to maintain life. Neither decision has any applicability to this case.

In *Brophy v. New England Sinai Hospital, Inc.,* 497 N.E.2d 626 (Mass. 1986), the wife of a man in a persistent vegetative state was granted permission to discontinue a feeding tube. The court noted that the patient did not satisfy the criteria of brain death under the Uniform Act because the patient was responsive to pain stimuli, was able to breathe, and maintained certain motor reflexes. *Id.* at n. 7. The case has no application to the facts before this court.

In *Estate of Stewart*, 602 N.E.2d 1277 (1991), the court denied summary judgment in an estate case where the critical issue was the time of death of the testator who died of cardiac arrest, but may have been brain dead on an earlier date, which would have dictated a different disposition of the estate. In reversing summary judgment, the court stated there were material issues of fact remaining based on the testimony of one expert, who applied a standard for determining death

promulgated by Harvard Medical School. The Uniform Act as adopted in Nevada, and elsewhere, requires that the determination of death be made *"in accordance with accepted medical standards."* Saint Mary's does not dispute that standards promulgated by the Harvard Medical School may be accepted elsewhere, and perhaps even in Nevada. But there was no testimony to that effect. The undisputed testimony is that the standards promulgated by the American Academy of Neurology are accepted standards in Nevada and were appropriately applied in this case.

The same principle applies to Petitioner's reliance on *State v. Clark*, 20 Ohio App.3d 266 (Ohio App. 1984), a criminal case cited by Petitioner involving time of death, where one of the physicians testified that Ohio doctors generally employed the Harvard Medical School Test. (The AAN standards did not exist in 1984.)

Petitioner severely misstates the holding of *Hawkins v. Dekalb Medical Center, Inc.,* 721 S.E.2d 131 (Ga. App. 2011) and recites a quote that does not appear in that case at all. Petitioner states that brain death could not be declared in that case until two EEGs were performed, which is a protocol Petitioner requests that this Court adopt as the law in Nevada under the Uniform Act. While it is true that EEGs were performed in that case, they played no part at all in the determination of death.

Hawkins involved the death of a pregnant woman who was kept alive on a ventilator until she gave birth. She was subjected to "extensive neurological testing by numerous physicians to evaluate whether there was any brain function or brain stem function. According to her treating physician (who was later sued) the last part of a brain death evaluation was the performance of an apnea test, which ...could not be performed (to confirm or dispel brain death) because of its potential harm to the fetus. *According to Dr. Cook, patients who fail the final apnea test are declared dead." Id.* at 135.

After the child was born, the hospital conducted the same neurological protocols (not EEGs), to determine she was dead, and then performed the definitive apnea test, which the patient failed, after which the breathing apparatus was disconnected, and the patient stopped breathing. The woman's mother sued for wrongful death claiming the "apnea test" caused her death. The hospital claimed the apnea test merely confirmed the fact of death. The court granted summary judgment for the hospital and the doctors. The determination of death, affirmed by the court, was ***exclusively based*** on the neurological tests, and the apnea test, as it was here: *"Based on the results of the neurologic assessments and the apnea tests on March 16 and March 18, Dr. Cook determined that Tara Hawkins did not have any brain function or brain stem function and pronounced her dead on March 18. Drs. Snyder and Jackson agreed and decided not to*

reimplement ventilator support." *Id.* at 136. Summary judgment in favor of the doctors and hospitals was affirmed.

Petitioner argues that this Court ought to "follow the reasoning of Jones, Hawkins and Estate of Stewart, and hold that the language of the Uniform Act requires that all tests, including the EEG, demonstrate electocerebral silence, and the absence of brain wave activity in order to declare a person dead." Appellant's Opening Brief, p. 10. Apart from the fact that none of the foregoing cases cited by Petitioner stand for such a proposition, the commentators to the Uniform Act have specifically and categorically refused to adopt specific standards and protocols in favor of "accepted medical standards." The court in *Hawkins* specifically recognized this principle: "Whether Tara Hawkins was brain dead prior to apnea testing on March 18, 2004 constituted a specialized medical question to be answered by medical experts." *Id.* at 139. In adopting this principle, the court cited and quoted from the Supreme Court of Washington in *In Re Bowman*, 617 P.2d 731 (Wash. 1980)(holding that it is for the medical profession to determine the applicable criteria for deciding whether brain death is present, and to define the acceptable practices taking into account new knowledge of brain function and new diagnostic procedures). *Id.* at n. 19.

The National Conference of Commissioners on Uniform State Laws also rejected this notion, specifically noting in connection with the Uniform

Determination of Death Act: *"This Act is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for determining death, but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, tests, and equipment."* As noted above, all other states that have adopted the Uniform Act have followed this admonition, and have declined to establish specific standards and criteria, leaving that to the medical profession. This Court should likewise decline Petitioner's invitation to legislate such criteria by judicial fiat.

X. Saint Mary's Cannot Be Compelled To Continue To Administer Life-Sustaining Treatment To Aden Hailu.

The CEO of Saint Mary's Hospital explained to the court that a hospital does not have the right or the authority to direct medical treatment and care for patients because those decisions must be made by licensed treating physicians independent of any direction and control by the hospital. The purpose of this rule is to maintain the independence and integrity of the medical profession. It is for this reason Ms. Lidholm extended to Petitioner the opportunity, at the hospital's expense, to retain a physician, duly credentialed and licensed, to undertake responsibility for the care and treatment of Aden Hailu and to direct whatever procedures such physician deemed medically necessary and appropriate, and to arrange to transport Aden

Hailu to a long term care facility ready that is willing and able to undertake her long term care. (Saint Mary's is an acute care hospital not a long term care facility.)

Petitioner was unable to make any such arrangements for the obvious reason that Aden Hailu is dead, and no facility is willing to undertake the care and treatment of a dead body. Petitioner's expert specifically declined to undertake such responsibility, and Petitioner's osteopath was also unwilling and unable to do so. Appx. 370, 407. Petitioner seeks to impose that duty and responsibility on Saint Mary's, instead, whose doctors have determined Hailu is dead, and that no further treatment is necessary, appropriate or warranted, and indeed, that current treatment and further treatment is unethical. The Court cannot compel Saint Mary's to continue to undertake the care of a dead body and administer life sustaining treatment, simply because the Petitioner cannot find a licensed and credentialed practitioner to perform them. The Court cannot compel Saint Mary's to perform an act that it is legally incapable of performing. *See Hall v. Wood*, 443 So. 2d 834, 841 (Miss. 1983)(a mandatory injunction requiring a practical impossibility should never issue); *Fernwood Mobile Home Park v. Almeyda*, 202 WL 3186280 (Cal. 2002) (injunction cannot issue to require action that defendant cannot legally perform).

Petitioner's citation to *In Re Guardianship of L.S. & H.S.*, 120 Nev. 157, 87 P.3d 521 (2005) is inapposite. In that case, the hospital in a medical emergency affirmatively sought to be appointed a temporary guardian for two infants to administer lifesaving transfusions to children of Jehovah Witnesses, who refused to consent to them. In that case, the hospital affirmatively undertook responsibility, but certainly was not required to do so. In retrospect, a physician at the hospital probably should have presented the petition (as is customary when treating mentally incompetent patients in need of medical care), rather than the hospital, but there was no time for that. The case does not stand for the proposition that a court of law may direct a hospital to perform medical procedures that it is legally incapable of performing, and legally incapable of directing any physician to perform.

In this respect the petition is futile, because courts of law cannot and should not be in the business of directing medical care. Those decisions are left to the medical profession. Courts do not and should not give advisory opinions to hospitals. The issue arises in this case only because the Petitioner has sought judicial intervention, and Saint Mary's has been fully respectful of and cooperative in the process. But that does not mean judicial intervention is actually available in this case, let alone appropriate.

As set forth in the discussion above, courts of law are not equipped to make decisions regarding medical care and treatment, nor is it reasonable or practical to subject such decisions to the adversary process. As stated by the courts in *Bowman* and *Hawkins* and other cases, and under the Uniform Act itself, such decisions are and should be left to the medical professionals, and so long as they act within "accepted standards" of medical care, they satisfy all legal standards as well, and should be free from judicial intervention.

XI. Conclusion.

For the reasons set forth above, the trial courts finding of fact that Aden Hailu is legally dead is supported by substantial evidence. The Uniform Act requires that the determination of death be determined in accordance with accepted medical standards. The criteria and standards promulgated by the American Academy of Neurology to determine brain death are accepted medical standards in Nevada. The evidence at trial was undisputed that those standards were applied and that based on those standards, Aden Hailu is brain dead. Because Aden Hailu is brain dead, she cannot be irreparably harmed by withholding further life sustaining support or treatments, such as a ventilator. So long as it is demonstrated that acceptable medical standards were employed to determine death under the Uniform Act, courts of law should not further interfere with the process. Such is the case here.

Dated: September 8, 2015

SNELL & WILMER L.L.P.

By: _____

William E. Peterson, No. 1528
Janine C. Prupas, No. 9156
50 West Liberty Street, Suite 510
Reno, Nevada 89501

Attorneys for Prime Healthcare Services, LLC, dba St., Mary's Regional Medical Center

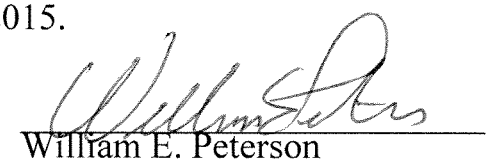
CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 font.

2. I further certify that this brief complies with the limitations of NRAP 32 (a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8,325 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of September, 2015.



William E. Peterson
Nevada State Bar No. 1528

CERTIFICATE OF SERVICE

This document was filed electronically with the Nevada Supreme Court on September 8, 2015. Electronic service of this document shall be made in accordance with the Service List as follows:

William M. O'Mara, Esq.
David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.
311 East Liberty Street
Reno, Nevada 89501