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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF ALAMEDA

14  
15 LATASHA NAILAH SPEARS WINKFIELD;  
16 MARVIN WINKFIELD; SANDRA CHATMAN;  
17 and JAHl McMATH, a minor, by and  
through her Guardian ad Litem, LATASHA  
18 NAILAH SPEARS WINKFIELD,

19 Plaintiffs,

20 vs.

21 FREDERICK S. ROSEN, M.D.; UCSF BENIOFF  
CHILDREN'S HOSPITAL OAKLAND  
(formerly Children's Hospital & Research  
22 Center at Oakland); MILTON McMATH, a  
nominal defendant, and DOES 1  
23 THROUGH 100,

24 Defendants.

CASE NO. RG 15760730

ASSIGNED FOR ALL PURPOSES TO:  
JUDGE STEPHEN PULIDO - DEPT. "517"

**PLAINTIFFS' REPLY IN SUPPORT OF  
THEIR MOTION TO BIFURCATE THE  
ISSUE OF WHETHER AAN AND AAP  
GUIDELINES MEET THE STATUTORY  
DEFINITION OF "DEAD" UNDER THE  
UNIFORM DETERMINATION OF DEATH  
ACT (HEALTH & SAFETY CODE, §7180)**

DATE: April 19, 2018  
TIME: 3:00 p.m.  
DEPT: "517"

**Reservation No: R-1917827**

Date Action Filed: 03/03/15

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Defendants' Opposition highlights why Plaintiffs' Motion to Bifurcate should be granted.

1. Defendants continue to misstate the issue of life or death posed by this case and the Motion to Bifurcate; Plaintiffs do not ask the Court to reject the Guidelines as a standard for evaluating the issue of brain death in a proceeding to determine whether a patient can be declared brain dead under the UDDA's mechanism for reconciling organ donation practices with the UDDA's strict definition of brain death; rather, Plaintiffs bring this personal injury action because Jahi is alive, and it is Defendants who challenge Jahi's standing to bring this action because they argue she is not alive, based solely on their claim she is brain dead under the Guidelines that were applied to her 4 ½ years ago.

In their opposition, Defendants continue to misstate Plaintiffs' theory of their case and their Motion to Bifurcate. Defendants' first sentence in their opposition erroneously states that Plaintiffs ask the court to sever the issue whether the AAN and AAP Guidelines constitute accepted medical standards for determining whether a patient has sustained brain death under the UDDA (H & S Code, sec; 7180.) This is just not and has never been true.

Defendants lately have been repeatedly misstating Plaintiffs' claim in order to distract the court from what Plaintiffs have consistently been advancing since the very beginning of Jahi and her family's nightmarish journey since her botched surgery: Whatever their medical acceptance in making the quick determination whether a patient can be declared dead and organ donation practices can proceed, the Guidelines do not adequately measure the extraordinarily broad standard of the UDDA (H & S Code, sec. 7180) that brain death requires the "irreversible cessation of all functions of the entire brain." Put simply, while the Guidelines allow for a finding of brain death despite the presence of some brain

1 functions, the statutory definition clearly does not. Moreover, Plaintiffs have always  
2 asserted that even if the Guidelines comported with the statutory definition, Jahi  
3 does not fulfill either the Guidelines or the statutory definition because she is  
4 intermittently responsive. The first of the requirements of the Guidelines for brain  
5 death – coma – does not exist because, among other facts, Jahi is intermittently  
6 responsive.

7 In December 2013, as part of the expedited proceeding before Judge Grillo  
8 to determine whether the hospital could disconnect Jahi's life support against the  
9 family's wishes, this could not be proven given the extremely brief time allotted for  
10 making the determination.

11 Over the past 4 ½ years, the facts which disprove Defendants' contention  
12 Jahi is not alive have existed unabated, and her family is entitled to and will prove  
13 at trial, through expert and other evidence, that Jahi is alive.

14 Thus, to reiterate, contrary to Defendants' argument, Plaintiffs are not asking  
15 the court or jury to "reject" accepted medical standards for determining brain  
16 death. For instance, from the beginning of this litigation and in successfully resisting  
17 demurrer, Plaintiffs did not, nor did they need to, argue anything more than that  
18 "Plaintiffs have alleged and will prove with expert evidence that Jahi's brain is  
19 clearly not 'dead' in a neuropathological sense (i.e., necrotic).

20 Importantly, Judge Freedman in overruling Defendants' demurrer, cogently  
21 ruled two years ago:

22 "The court is not persuaded by CHO's argument that Plaintiffs are  
23 'improperly asking this court or a jury to reject the accepted medical  
24 standards used to determine irreversible brain death.' Plaintiffs are not,  
25 by way of this action, expressly seeking any redetermination or reversal  
26 of the matters in the prior probate proceeding or seeking to apply  
27 standards other than those set forth in the UDDA. Instead, they have  
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1 brought a civil action independent of the prior proceeding, which  
2 includes a cause of action asserted on Jahi's behalf. CHO, as the party  
3 moving for dismissal of that cause of action, bears the burden of  
4 showing that it is insufficient or barred as a matter of law, and the court  
5 determines that CHO has not met this burden at the pleading stage,  
6 based solely on the allegations and matters of which the court takes  
7 judicial notice."

8 Defendants' Motion for Summary Adjudication last year also raised the argument  
9 that Jahi lacked standing to bring a personal injury action based solely on the  
10 December 2013 determination. This Court first noted that at the outset of its order  
11 denying the motion, and then proceeded to rule similarly to Judge Freedman:

12 "As the court previously ruled, while Health & Safety Code sections  
13 7180 and 7181 and Dority, supra, support the appropriateness of the  
14 proceedings and examination made in the context of McMath's  
15 guardian's petition to require Children's Hospital Oakland (CHO) to  
16 keep McMath on life support, such authority does not establish that a  
17 determination of death in such a proceeding is final for any and all  
18 subsequent purposes, even where (as here) there is evidence of  
19 changed circumstances arguably warranting a new determination."

20 Thus, this Court and Plaintiffs have in mind the proper focus on this issue of standing  
21 raised from the beginning by Defendants. Plaintiffs' Motion to Bifurcate follows this  
22 proper focus by asking that the issue of Jahi's standing to bring her action for  
23 personal injury be resolved preliminarily, NOT by challenging the Guidelines that are  
24 used by hospitals to declare patients dead for purposes of organ donation, but  
25 rather by determining the merits of Defendants' claim that Jahi is dead because  
26 she suffers the "irreversible cessation of all functions of the entire brain."

27 Contrary to Defendants' claim, this issue does not threaten public policy and  
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1 the benefit of the UDDA mechanism which attempts to reconcile organ donation  
2 practices with the law and individuals' right, within reason, to decide whether to  
3 live. Plaintiffs in no way are attempting to change or eliminate the UDDA's  
4 acknowledgment that brain death is not the same as biological death, but can be  
5 treated as such for purposes of permitting - if the individual or proxy consents -  
6 organ donation. However, if the individual or proxy does not consent, as is the case  
7 here with Jahi and her family, then it should be the individual's right - within reason -  
8 to not consent.

9 **2. Defendants also mischaracterize the persuasive effect of the *Hailu* opinion**  
10 **and its reasoning.**

11 Defendants also misstate the persuasive effect of the Nevada Supreme  
12 Court's opinion and reasoning in In the Matter of The Guardianship of the Person  
13 and Estate of Aden Hailu (2015), 361 P.3d 524 ("Hailu"). The Hailu Court expressly  
14 noted there are two separate and independent questions in the context of the  
15 UDDA: (a) whether the Guidelines are considered accepted medical standards  
16 among UDDA states, and (b) whether the Guidelines adequately measure the  
17 "extraordinarily broad standard" for brain death set forth in the UDDA.

18 It is this second question that the parties dispute, and which Plaintiffs request  
19 this court to adjudicate in an initial phase of the trial of this case.

20 Further, the fact that the Nevada legislature amended its UDDA to expressly  
21 state that AAN and AAP Guidelines are accepted medical standards in  
22 determining brain death begs the question. Critically, the Nevada Legislature did  
23 NOT amend the definition of brain death under the UDDA. It did not change the  
24 definition in any way, that brain death is the "irreversible cessation of all functions  
25 of the entire brain." It certainly could have if it wanted to, and it certainly knew how  
26 to do so. But it did not. And here in California, Plaintiffs concede the Guidelines are  
27 accepted medical standards for purposes of disconnecting life support and  
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1 proceeding with organ donation. Since this is conceded, section 7180 could be  
2 interpreted to read the Guidelines into the statute as accepted medical standards,  
3 creating the same effect as the recent amendment in Nevada. Thus, the Nevada  
4 amendment is immaterial to the issues in this case.

5 What remains true in this case and this state, same as in the *Hailu* case and  
6 in Nevada, is that section 7180 expressly defines brain death in the most  
7 "extraordinarily broad" terms, as the *Hailu* Court so accurately characterized it. And  
8 thus the question remains here, as in every one of those states. . . do the accepted  
9 medical standards – whether they are the AAN, the AAP, or the Harvard Guidelines,  
10 or any other accepted standard – comport with the UDDA definition?

11 **3. Defendants also continue to ignore what three judges of this court have**  
12 **acknowledged - namely, the expedited proceeding in December 2013 to**  
13 **disconnect life support is a different matter than whether Jahi can maintain**  
14 **an action for injury.**

15 Defendants also continue to misstate Plaintiffs' arguments, the rulings of this  
16 court (including Judge Grillo, Judge Freedman and now Judge Pulido) which have  
17 made clear that the court correctly views the issue of brain death in this medical  
18 negligence action as a very different issue of brain death for purposes of the  
19 proceeding before Judge Grillo. The expedited proceeding presided over by  
20 Judge Grillo was conducted solely for the purpose of allowing CHO to disconnect  
21 life support from Jahi. As the court has noted time and again, Defendants have not,  
22 do not, and cannot cite any authority that prevents Plaintiffs from proving that Jahi  
23 is alive and able to maintain her action for personal injury despite the fact that over  
24 four years ago, CHO was able to secure a determination of brain death in an  
25 expedited proceeding, in accordance with accepted medical standards, so that  
26 life support could be discontinued here in California.

27 Defendants' continued efforts to mischaracterize Plaintiffs as re-examining the  
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1 December 2013 determination appears to be their foothold for arguing that  
2 Plaintiffs are trying to preclude Defendants from repeating the tests they  
3 administered to Jahi in December 2013. This ignores (a) Plaintiffs have conceded  
4 that the results of those tests will likely be the same as they were in December 2013,  
5 as Dr. Shewmon has explained in his declaration, and (b) if Jahi is administered  
6 those tests, she will in all certainty not survive them.

7 Further, Defendants' argument (pages 12-13) that Plaintiffs once argued  
8 "changed circumstances" and now changes course and argues the Guidelines are  
9 "faulty," is disingenuous. Plaintiffs argued "changed circumstances" in resisting  
10 demurrer, and continue to argue "changed circumstances" in opposition to any  
11 further attempt by Defendants to assert collateral estoppel. That has not and will  
12 not change until that defense is finally put to rest. But that resistance to collateral  
13 estoppel is not inconsistent whatsoever with Plaintiffs' position – grounded primarily  
14 on the opinions of Dr. Shewmon and other experts who opine that Jahi continues  
15 to have brain function and exhibits intermittent responsiveness which together  
16 demonstrates she meets neither the statutory definition of brain death (irreversible  
17 cessation of all functions of the entire brain) nor the Guidelines (coma,  
18 non-responsiveness). (See also Plaintiffs' Response to Defendants' Objections to Dr.  
19 Shewmon's Declaration, filed contemporaneously herewith).

20 **4. Judicial economy favors Plaintiffs' motion.**

21 As Plaintiffs set forth in their moving papers, judicial economy supports  
22 Plaintiffs' Motion to Bifurcate. The issue whether the Guidelines comport with or  
23 adequately measure the UDDA's extraordinarily broad brain death standard would  
24 be limited to determining whether Jahi currently suffers the irreversible cessation of  
25 all functions of the entire brain. If it can be determined that any part of Jahi's brain  
26 has some function, then she does not meet the statutory definition of brain death.  
27 Bifurcating trial on this issue will save judicial and parties' time and resources, first  
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1 by reducing the complexity of the discovery on the "death" issue by determining  
2 at the outset whether Jahi has any brain function (as opposed to the quantity or  
3 degree of brain function), and second, reducing discovery and motions after that  
4 preliminary determination is made. In particular, Defendants are adamant they will  
5 seek a brain death examination in New Jersey pursuant to the guidelines which  
6 Plaintiffs vigorously refuse because it would in all certainty be fatal to Jahi.  
7 Bifurcation could obviate the need to decide whether Jahi should be forced to  
8 submit to such a test. Defendants' claim that they will be precluded from  
9 introducing the tests, results and testimony in connection with the proceeding  
10 conducted by Judge Grillo is not well-taken. The only issue raised so far as to that  
11 proceeding and Judge Grillo's findings is whether they must be given preclusive  
12 effect, not whether they are admissible.

13 **5. Other than vigorously resisting Defendants' efforts to conduct an apnea test**  
14 **which will certainly be fatal to Jahi, Plaintiffs agree discovery should continue**  
15 **in all respects for both sides to present their views on Jahi's current condition;**  
16 **granting bifurcation will not change that.**

17 Plaintiffs will forcefully resist any effort to put Jahi through an apnea test – or  
18 any other test – which will in all certainty be fatal to Jahi. Other than such a test, or  
19 a test or other procedure that is life-threatening, Plaintiffs agree that the parties will  
20 conduct full discovery to prepare their respective positions as to Jahi's current  
21 condition, including her intermittent responsiveness (or, as Defendants assert, her  
22 lack thereof).

23 **6. Conclusion.**

24 Contrary to Defendants' core contention, Plaintiffs are not asking this court  
25 to hold a preliminary proceeding to reject the Guidelines as accepted medical  
26 standards. (Defendants' mischaracterization of Plaintiffs' Motion to Bifurcate is very  
27 similar to their misplaced claim earlier in this litigation that Plaintiffs are asking this  
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1 Court to reject Judge Grillo's determination in December 2013.) Rather, Plaintiffs are  
2 asking the court to conduct a preliminary proceeding to explore and determine  
3 whether the Guidelines comport with the UDDA definition of brain death for the  
4 purpose of deciding whether, in her current condition, Jahi can continue to  
5 maintain her action for personal injury. Plaintiffs have consistently asserted that Jahi  
6 currently does not suffer from the irreversible cessation of all functions of her entire  
7 brain and that her intermittent responsiveness proves she also does not fulfill the  
8 Guidelines because the first cardinal rule of the Guidelines is  
9 coma/unresponsiveness.

10 Plaintiffs respectfully request the court grant their Motion to bifurcate. If the  
11 court is inclined at this time to deny the motion, Plaintiffs ask that the denial be  
12 without prejudice.

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Dated: April 12, 2018

AGNEW Brusavich  
A Professional Corporation

By:   
Terry S. Schneier  
Attorneys for Plaintiffs

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **AGNEWBRUSAVICH**, 20355 Hawthorne Blvd., 2<sup>nd</sup> Floor, Torrance, California. On April 12, 2018, I served the within document **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO BIFURCATE THE ISSUE OF WHETHER AAN AND AAP GUIDELINES MEET THE STATUTORY DEFINITION OF "DEAD" UNDER THE UNIFORM DETERMINATION OF DEATH ACT (HEALTH & SAFETY CODE, §7180**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Torrance, California, addressed as set forth below:
- by placing a true copy thereof enclosed in a sealed envelope(s), and caused such envelope(s) to be delivered by OVERNIGHT addressed pursuant to the document(s) listed above to the person(s) at the address(es) set forth below.
- by electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission. I caused the documents to be sent to the persons at the electronic notification addresses as set forth below:

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21 I am readily familiar with the firm's practices of collection and processing  
22 correspondence for mailing. Under that practice, it would be deposited with the  
23 U.S. Postal Service on that same day with postage thereon fully prepaid in the  
24 ordinary course of business. I am aware that on motion of the party served,  
service is presumed invalid if post cancellation date or postage meter date is  
more than one day after date of deposit for mailing in affidavit.

25  (State) I declare under penalty of perjury under the laws of the State of  
California that the above is true and correct.

26  (Federal) I declare that I am employed in the office of a member of the  
27 bar of this court at which direction the service was made.

28 Executed this 12th day of April, 2018 at Torrance, California.

  
JAN DUNN