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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
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15 LATASHA NAILAH SPEARS WINKFIELD;)
16 MARVIN WINKFIELD; SANDRA CHATMAN;)
17 and JAHI 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)
22 (formerly Children's Hospital & Research)
Center at Oakland); MILTON McMATH, a)
23 nominal defendant, and DOES 1)
THROUGH 100,)

24 Defendants.)

CASE NO. RG 15760730

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

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS TO
DECLARATION OF D. ALAN
SHEWMON, M.D. IN SUPPORT OF
OPPOSITION TO PLAINTIFFS' MOTION
TO BIFURCATE**

DATE: April 19, 2018

TIME: 2:30 p.m.

DEPT: 517

RESERVATION NO: R-1917827

Date Action Filed: 03/03/15

25 **COMES NOW** the Plaintiffs, by and through their attorneys of records, and
26 respond to Defendants' Objection to the entire Declaration of D. Alan Shewmon,
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**PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO DECLARATION OF D. ALAN
SHEWMON, M.D. IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO BIFURCATE**

1 M.D. as setting forth inadmissible opinions and their request that the Court exclude
2 the Declaration in its entirety. For the reasons stated here, Plaintiffs' contend that
3 Defendants' overall objection, their reasons for that objection and their request to
4 exclude Dr. Shewmon's Declaration lacks support in statutory and case law and
5 should be overruled. Importantly, this Court has already overruled these identical
6 objections to Dr. Shewmon's Declaration when it denied, by written Order dated
7 September 5, 2017, Defendants' Motion for Summary Adjudication. Defendants cite
8 no additional legal support for these objections here.

9 Defendants object to the Declaration on the basis that Dr. Shewmon "failed
10 to apply the appropriate medical standards for determining brain death under
11 California's UDDA." Plaintiffs contend he did not, as Section 7180(a) requires proof
12 of "irreversible cessation of all functions of the entire brain, including the brain stem"
13 and the American Association of Neurology guidelines do not adequately measure
14 all functions of the entire brain, including the brain stem. In the Matter of the
15 Guardianship of the Person and Estate of Aden Hailu, an Adult, 131 Nev. Advance
16 Opinion 89.

17 The Court's prior ruling on this identical Objection is instructive: "Defendants
18 have not cited any legal authority ...that the absence of such a formal re-
19 examination is dispositive of brain death when raised in a cause of action alleging
20 a change of circumstances since a prior determination, or requires exclusion of all
21 expert or other evidence as to brain function falling short of such a re-examination".
22 (Court's Written Order Denying MSA, pg. 2.)

23 Nothing in Evidence Code, §§801-803 preclude Dr. Shewmon from rendering
24 this opinion. Dr. Shewmon is a pediatric neurologist, board certified in Pediatrics,
25 Neurology (with special competence in Child Neurology) and Clinical
26 Neurophysiology, who served as the Chief of Neurology at Olive View-UCLA
27 Medical Center and Vice-Chair of the Neurology Department at UCLA. He is an
28

1 internationally recognized expert in brain death and, in fact, is speaking, on April
2 11 and 12, 2018 at the Harvard Medical School Annual Bioethics Conference 2018:
3 Defining Death: Organ Transplantation and the 50-year Legacy of the Harvard
4 Report on Brain Death, specifically about "a neurologist's view" of brain death and
5 "the controversial case of Jahi McMath" as well as brain death as a coherent and
6 justified concept for determining death".

7 Dr. Shewmon has stated, in his Declaration, to a reasonable degree of
8 medical certainty, his opinion and the bases of his opinion that Jahi McMath does
9 not currently satisfy the statutory definition of "dead" under the Uniform
10 Determination of Death Act ("UDDA") set forth in Health & Safety Code, §7180(a),
11 which requires the "irreversible cessation of all functions of the entire brain,
12 including the brain stem".

13 He has based his expert opinion on Jahi's current medical condition, his
14 examination of her, his review of 58 video clips of Jahi taken by her family members
15 and provided to the defense, along with Douglas Carner's report and declaration
16 concerning the authenticity of these video clips, and reports by attending physician
17 Alicia Eck, M.D. and nurses providing 24/7 care to Jahi. He has noted that Jahi's
18 brain showed "a surprising extent of relatively preserved brain tissue (albeit with
19 abnormal signal properties) which tells us in retrospect that when she was
20 diagnosed brain dead in December 2013, the lack of brain function was due more
21 to low rather than absent brain function..." Dr. Shewmon further opined that her
22 "recovery from impending multi-system failure... is not possible for a ventilated
23 corpse." (Shewmon dec., para 54)

24 Defendants argue that Dr. Shewmon's opinion that Jahi is not dead is
25 contrary to California law. It is not. Dr. Shewmon's opinion is that, according to
26 Section 7180(a), Jahi does not exhibit "irreversible cessation of all functions of the
27 entire brain, including the brain stem."
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1 Defendants object to Dr. Shewmon's opinion that Jahi is not dead based on
2 Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal. 4th 747, 771-
3 772 which held that an expert opinion is inadmissible when it is (1) not based on a
4 matter of a type on which an expert may reasonable rely, (2) is based on reasons
5 unsupported by the material on which the expert relies, and (3) is speculative." The
6 Sargon opinion is inopposite; Dr. Shewmon's expert opinions are, in fact, proper
7 expert opinions, supported by the evidence and not speculative. This court, when
8 ruling on this identical objection made in the context of the MSA, "[found] that Dr.
9 Shewmon has set forth a sufficient foundation that his opinions are based on
10 matters of a type on which an expert may reasonably rely, are based on reasons
11 supported by such material, and are not unduly speculative as to be entirely
12 inadmissible", citing Sargon and Evidence Code, §§720, 800-803.

13 Defendants' objections that Dr. Shewmon's opinions are based on
14 "unreliable and unaccepted methodology and " fail to comport with the generally
15 accepted professional standards" go to the heart of Plaintiffs' Motion for
16 Bifurcation. Plaintiffs contend that the UDDA is not consistent with the Guidelines
17 and Jahi is not brain dead pursuant to the UDDA because she has not had a
18 "cessation of all functions of the entire brain, including the brain stem." Defendants
19 disagree. These objections do not negate the admissibility of Dr. Shewmon's
20 opinions and conclusions.

21 The 58 video clips upon which Dr. Shewmon relies have been produced to
22 Defendants along with the Declaration of Authenticity by Douglas Carner. Although
23 family members are unable to state specifically who of them took specific video
24 on a specific date and time, Nailah Winkfield has provided verified responses to
25 special interrogatories stating that she, her husband Marvin, Sandra Chatman or
26 Nailah's sister took the video clips on their cell phones or Marvin's ipad, and that at
27 least one of these four family members was present with the on-duty 24/7 nurse.
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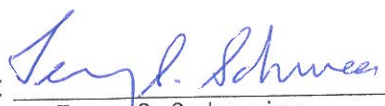
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Thus, Plaintiffs have properly authenticated these video clips and Dr. Shewmon has properly relied on them.

Defendants' remaining objections based upon hearsay, relevance and lack of personal knowledge are likewise ill-founded. Plaintiffs respectfully request that the Court overrule the objection and request to strike Dr. Shewmon's declaration.

Dated: April 12, 2018

**AGNEWBrusavich
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By: 
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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., 2nd Floor, Torrance, California. On April 12, 2018, I served the within document **PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO DECLARATION OF D. ALAN SHEWMON, M.D. IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO BIFURCATE**

- 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
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.

- 24 (State) I declare under penalty of perjury under the laws of the State of
25 California that the above is true and correct.
- 26 (Federal) I declare that I am employed in the office of a member of the
bar of this court at which direction the service was made.

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

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JAN DUNN