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Attorneys for Defendant FREDERICK S. ROSEN, M.D.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor, Petitioners, vs. CHILDREN'S HOSPITAL OF OAKLAND, Dr. DAVID DURAN, M.D., and Does 1 through 100, inclusive, Respondent. _____/	**No. RP13-707598** [Assigned to Judge Evelio M. Grillo; Probate Code sections 3200 et seq, and 4600 et seq.] Date Action Filed: 12/20/13
LATASHA NAILAH SPEARS WINKFIELD, et. al, Plaintiffs, vs. FREDERICK S. ROSEN, M.D.; UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND (formerly Children's Hospital & Research Center at Oakland), et al, Defendants. _____/	**No. RG15760730** [Assigned for All Purposes To: Judge Robert B. Freedman, Department 20] Date Complaint Filed: 3/3/15 Amended Complaint Filed: 11/4/15

NOTICE OF RELATED CASE; AND

APPLICATION TO ORDER CASES RELATED

THE FOLLOWING PARTIES, THEIR ATTORNEYS OF RECORD, AND INTERESTED NON-PARTIES are hereby given notice that the above listed actions are related and no notice of related case has yet been filed as is required by California Rule of Court, Rule 3.300.

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Defendant FREDERICK S. ROSEN, M.D., requests relief pursuant to California Rule of Court, Rule 3.300(h)(1), Code Civ. Proc. § 1048(a), Code Civ. Proc. § 128(a), Code Civ. Proc. § 177(a) subsections (1), (2), (3), (4) (5) and (8), Local Rules of the Superior Court, County of Alameda, Rules 3.120 and 3.130(b), and the court's discretionary equitable and administrative powers, including but not limited to reassignment (in whole or in part) of the later filed medical malpractice case to the Honorable Evelio M. Grillo ("Judge Grillo"), since he is the judge who has jurisdiction of the first filed related case. Judge Grillo has made substantial rulings and entered judgement on issues that plaintiffs seek to vacate in their subsequently filed medical malpractice case that has been assigned to the Honorable Robert B. Freedman ("Judge Freedman").

When plaintiff LATASHA WINKFIELD and her attorneys filed their complaint for medical malpractice earlier this year, they failed to comply with their duty to file a notice of related case as required by Cal. Rule of Court, Rule 3.300(b), and further failed to comply with Judge Grillo's written order dated October 8, 2014.

When one compares the new allegations set forth in paragraphs 30-36 of the First Amended Complaint filed on November 4, 2015 in Case No. RG15760730, with the request for relief and evidence that Mrs. WINKFIELD presented to Judge Grillo back in October 2014 in Case No. RP13-707598, it is evident that Mrs. WINKFIELD is engaged in forum shopping. The First Amended Complaint seeks the same relief that Judge Grillo denied Mrs. WINKFIELD back in October 2014, to wit, a further evidentiary hearing on the issue of whether Jahi McMath continued to meet the criteria for brain death.

Concurrent with this Notice of Related Case, Dr. ROSEN has filed a Demurrer to plaintiffs' First Amended Complaint filed on November 4, 2015 in plaintiffs' medical malpractice case pursuant to Code Civ. Proc. § 430.10 subdivisions (a), (c) and (f). In his demurrer, Dr. ROSEN seeks the following orders:

(1) That the demurrer to the first cause of action be sustained without leave to amend on the ground that Jahi McMath does not have standing to state a first cause of action for personal injuries since she has been adjudicated to have suffered irreversible brain death. The doctrines of collateral estoppel and res judicata bar plaintiffs from re-litigating a claim that Jahi

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McMath now has brain function. The doctrine of judicial estoppel precludes Mrs. WINKFIELD from gaining a litigation advantage by espousing one position (i.e., that Judge Grillo has jurisdiction) and then seeking a second advantage by taking an incompatible position (i.e., that Judge Freedman has jurisdiction). Mrs. WINKFIELD's contrary positions run afoul of the law that prohibits parties from seeking the same relief in different courts. Two courts cannot have jurisdiction over the same claim for relief. Mrs. WINKFIELD should be judicially estopped from relying on the change of circumstances exception to collateral estoppel because she has taken incompatible positions in two courts.

(2) In the event Judge Freedman overrules the demurrer and determines that collateral estoppel/res judicata does not bar Jahi McMath's first cause action for personal injuries, and that plaintiffs are entitled to further judicial consideration of their contention that Jahi McMath has brain function, Dr. ROSEN further demurrers to the first cause of action on the grounds that Judge Freedman's consideration of plaintiffs' first cause of action is in excess of Department 20's jurisdiction. (C.C.P. § 430.10(a).) Another department in this Superior Court has exclusive jurisdiction of this claim, *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598, the Honorable Evelio M. Grillo presiding. Accordingly, the first cause of action should be transferred to Judge Grillo for resolution of whether Jahi McMath has standing to state a cause of action for personal injuries. (See C.C.P. §§ 396a and 399.)

(3) In the further event Judge Freedman overrules Dr. ROSEN's demurrer to the first cause of action, and further transfers first cause of action to Judge Grillo, that the instant medical malpractice action be stayed pending Judge Grillo's resolution of whether Jahi McMath has standing to state a cause of action for personal injuries.

A. The Parties, Interested Non-Parties and Their Counsel

Dr. ROSEN hereby serves this notice of related case on the following parties, interested non-parties and their attorneys:

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Christopher B. Dolan Aimee E. Kirby THE DOLAN LAW FIRM The Dolan Building 1438 Market Street San Francisco, CA 94102	Attorney for LATASHA WINKFIELD, the Mother of Jahi McMath, a minor, in Case No. RP13-707598
Douglas C. Straus Brian W. Franklin Noel M. Caughman ARCHER NORRIS A Professional Law Corporation North Main St., Suite 800 Walnut Creek CA 94596-3759	Attorney for UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND (formerly Children's Hospital & Research Center at Oakland) in Case No. RP13-707598
David Nefouse Andrea Weddle Alameda County Sheriff's Office Coroner's Bureau 480 4th Street Oakland, CA 94607	Alameda County Coroners Office
California Department of Public Health Office of Legal Services 1415 L Street Sacramento, CA 95814	California Department of Public Health
Bruce M. Brusavich Puneet K. Toor AGNEWBRUSAVICH 20355 Hawthorne Blvd., 2nd Floor Torrance, CA 90503	Attorneys for Plaintiffs LATASHA WINKFIELD, MARVIN WINKFIELD, SANDRA CHATMAN, and JAHI MCMATH, a minor, by and through her Guardian Ad Litem, Latasha Nailah Spears Winkfield in Case No. RG15760730
G. Patrick Galloway, Esq. Joseph E. Finkel, Esq. Karen Sparks, Esq. GALLOWAY, LUCCESE, EVERSON & PICCI 2300 Contra Costa Blvd., Suite 30 Pleasant Hill, CA 94523-2398	Attorneys for UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND in Case No RG15760730
Andrew N. Chang, Esq. ESNER, CHANG & BOYER 234 East Colorado Blvd., Suite 750 Pasadena, CA 91101	Attorneys for Plaintiffs LATASHA WINKFIELD, MARVIN WINKFIELD, SANDRA CHATMAN, AND JAHI MCMATH, a minor, by and through her Guardian Ad Litem, Latasha Nailah Spears Winkfield in Case No. RG15760730

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B. Plaintiff LATASHA WINKFIELD Has Two Actions Pending in the Alameda County Superior Court Wherein She Seeks Identical Relief

1. WINKFIELD I: *Winkfield v. Children's Hospital Oakland, et al,* Case No. RP13-707598, filed December 20, 2013

a. On December 24, 2013, Judge Grillo conducted an evidentiary hearing, after which he ruled that there was clear and convincing evidence that Jahi McMath had suffered brain death

The probate case, *Winkfield v. Children's Hospital Oakland, et al,* Alameda County Superior Court Case No. RP13-707598, Judge Grillo presiding, was filed on December 20, 2013, pursuant to Probate Code sections 3200 et seq, and 4600 et seq., by attorney Christopher M. Dolan, on behalf of LATASHA WINKFIELD, the mother of Jahi McMath, a minor. Mrs. WINKFIELD named CHILDREN's HOSPITAL OAKLAND ("CHO") as respondent.

Mrs. WINKFIELD's petition came on for hearing on December 24, 2013, at which time Judge Grillo heard testimony from two physicians who examined Jahi McMath: Robin Shanahan, M.D., (exam on 12/11/13) and Paul G. Fisher, M.D., (exam on 12/23/13). Judge Grillo found that "[b]oth doctors presented consistent testimony that established the accepted medical standards for determining brain death in minors. Both doctors conducted their examinations of Jahi McMath consistent with the accepted medical standards, and both doctors reached independent conclusions of brain death based on their application of the standards to Jahi's condition." (Amended Order, Ex. A, 16:10-16.) Dr. Shanahan reviewed an EEG taken on or about December 11, 2013. Dr. Fisher reviewed an EEG taken on or about December 23, 2013. These tests reinforced the physicians' conclusions. Dr. Fisher conducted an additional test, a cerebral perfusion test, which was consistent with brain death. Judge Grillo found "This clear and convincing evidence was the basis of the court's conclusion on December 24, 2013, that Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." (Amended Order, Ex. A, 16:16-22.)

Judge Grillo issued a written order dated December 26, 2013, and an amended order dated January 2, 2014. (Amended Order, Ex. A.) In his order, Judge Grillo noted that at various times during the proceedings, Mr. Dolan requested that Paul A. Byrne, M.D., be allowed to examine Jahi and provide a second section 7181 opinion. Mr. Dolan, however, withdrew his request that Dr. Byrne be allowed to examine Jahi and provide an opinion based on his examination. (Amended Order, Ex.

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A, 14:3-8.) Judge Grillo further noted that at the hearing on December 24, 2013, Mr. Dolan "stipulated that Dr. Fisher conducted the brain death examination and made his brain death diagnosis in accord with accepted medical standards." (Amended Order, Ex. A, 6:22-7:1.)

On January 17, 2014, Judge Grillo entered a final judgment. (Final Judgment, Ex. B.) Mrs. WINKFIELD did not challenge Judge Grillo's findings or final judgment via an appeal, a motion for new trial, or a motion to vacate judgment. She did not seek relief from judgment on grounds of extrinsic fraud, mistake or duress.

b. In October 2014, Mrs. WINKFIELD petitioned Judge Grillo for an evidentiary hearing and reconsideration of his findings, ruling and judgment that Jahi McMath sustained brain death

In October 2014, eight months later after judgment was entered, Mrs. WINKFIELD's counsel filed a petitioner/motion with Judge Grillo seeking an evidentiary hearing and reconsideration of the prior determination of brain death. (Petition filed October 3, 2014, Ex. C.) Mrs. WINKFIELD contended that Judge Grillo made an "error" in his previous determination of brain death. She advised Judge Grillo that there was new evidence that shows Jahi McMath no longer meets the criteria for brain death. Mrs. WINKFIELD filed the declarations of five individuals, Calixto Machado, M.D., Ph.D., Elena B. Labkovsky, Ph.D., Philip De Fina, Ph.D., and Charles L. Pretigiacomo, M.D., and D. Alan Shewmon, M.D., as well as audiovisual recordings of Jahi McMath. Mrs. WINKFIELD argued that Judge Grillo had jurisdiction of the matter, and a grave injustice would be perpetrated if Judge Grillo did not agree to consider the new evidence:

> The question now becomes does the court still retain jurisdiction over this matter and, more specifically, to decide whether Jahi McMath, is currently, brain dead, as defined by those same code sections? Petitioner submits that the Court does, indeed, have jurisdiction and that the interests of justice, which are literally those of life or death, demand that this Court exercise that jurisdiction to prevent the perpetuation of a grave injustice: continuing to declare that Jahi McMath is dead when she is not. (Petition filed October 3, 2014, Ex. C, 7:14-20.)

Judge Grillo calendared Mrs. WINKFIELD's motion seeking reversal of his prior determination of brain death for October 9, 2014 at 9:00 a.m, and set a briefing schedule. Mrs. WINKFIELD's attorney requested an evidentiary hearing with expert testimony. Counsel argued:

> Petitioner's experts will testify that Jahi may have, at the time of Dr. Fisher's examination, demonstrated evidence of brain death due to

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> the swelling of her brain following traumatic events that led to her suffering a loss of oxygen to her brain but, now that the swelling has receded, and she has had time to receive post incident medical care, she has demonstrable brain function. (Petition, Ex. C, 9:13-21.)

Judge Grillo denied Mrs. WINKFIELD's request for an evidentiary hearing. He ruled that the court would consider the matter on the papers, including any audiovisual recordings. Judge Grillo ruled that he would not hear live testimony. (Order, Ex. D.) Judge Grillo suggested that Mrs. WINKFIELD seek relief from the Department of Public Health on an application to amend the death certificate and, if she was not satisfied with that result, she could file a petition for a writ under C.C.P. section 1095 and 1094.5. (Id.)

After receiving the declarations and other evidence from Mrs. WINKFIELD's attorney, on October 6, 2014, Judge Grillo appointed Paul Fisher, M.D., Chief of Child Neurology at Stanford University School of Medicine, as the court's expert to review the 'new evidence' offered by plaintiffs. (Order Appointing Dr. Paul Fisher, Ex. E.) (Judge Grillo's prior determination of brain death was based, in significant part, on Dr. Fisher's independent medical examination of Jahi McMath, performed pursuant to Health and Safety Code section 7181, on December 23, 2013. (Amended Order, Ex. A).)

After reviewing the evidence provided by Mrs. WINKFIELD, Dr. Fisher submitted a letter to Judge Grillo, dated October 6, 2014, wherein he debunked the five expert declarations and other evidence. (Fisher Letter, Exhibit F.) Dr. Fisher found the evidence did not support the claim that "Jahi McMath is not brain dead." Dr. Fisher wrote: "[N]one of the current materials presented in the declarations refute my examination and consultation finding (attached), or those of several prior attending physicians who completed the same exams, that Jahi McMath met all criteria for brain death." (Id.) Dr. Fisher's conclusion was based on the following points:

- The guidelines for determining brain death referenced by Dr. Shewmon and Dr. Prestigiacomo "are not the relevant guidelines."
- Ms. Labkovsky's "EEG Neurofeedback Certification is not considered the appropriate certification" to conduct EEGs in the determination of brain death.
- "The diagnosis and determination of brain death requires serial neurological examinations performed in person by different attending physicians. No records of any on-site or in-person serial neurological examination of Jahi

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McMath, performed by a physician, have been presented to me via these declarations."

- "Videos of hand and foot movements, coincident with verbal commands heard on audio, cannot affirm or refute brain death, and are not substitutes for in-person serial neurological examinations by a physician.
- "No apnea test has been performed or reported in the declarations, as requried for a determination of brain death.
- "A 'flat' electroencephalogram (EEG), or electro-cerebral silence, is not required for the determination of brain death [Citation.] The EEG performed on 9/1/14 was not performed in standard conditions, but rather at an apartment and Dr. Machado does note artifacts, which he attributes to movement. Electrical artifacts cannot be excluded as the cause of reported electrical activity, but again, electro-cerebral silence is not requisite to the determination of brain death.
- "No cerebral blood flow radionuclide brain scan has been performed or reported in the declarations, and that is the test used to determine cerebral flow in order to assist in the determination of brain death, ..."
- Magnetic resonance angiography (MRA) "is not a technique used to determine cerebral blood flow."
- "Magnetic resonance imaging (MRI), as performed on 9/26/14, provides a structural picture of the brain and is not part of the determination of brain death. A picture of persistent brain tissue inside the skull does not negate the determination of brain death. Liquefaction of the brain is not requiste to the determination of brain death. There are no specific anatomic or pathologic changes noted in brain death."
- "Heart rate analysis, as presented from 9/1/14, is not part of and not relevant to the determination of brain death."
- "Menarche and menstrual cycles are not relevant to the determination of brain death."
- "A bispectal index monitor has no role in and is not relevant to the determination of brain death." (Fisher Letter, Ex. F.)

Mrs. WINKFIELD's attorney received a copy of Dr. Fisher's letter. What can only be construed as acknowledgment that Mrs. WINKFIELD was unlikely to get a favorable decision from Judge Grillo, on October 8, 2014, Mrs. WINKFIELD's attorney emailed Judge Grillo advising that Mrs. WINKIFIELD was dropping her pending motion from the court's calendar. Judge Grillo agreed to drop both the motion and case management conference that had been scheduled for October 9, 2014. Judge Grillo wrote in his order that, if in the future, Mrs. WINKFIELD "elects to seek relief in this case" then she may request a case management conference at a later date, at which time Judge

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Grillo would decide whether to set the matter for further hearing and set a briefing schedule. (Case Management Order, Ex. G.)

Judge Grillo further ordered that in the event Mrs. WINKFIELD elected to file a different case, then she "must file a notice of related case informing the court of the case," pursuant to California Rule of Court 3.300. (*Id.*)

Mrs. WINKFIELD did not file a writ with the appellate court as Judge Grillo suggested.

2. WINKFIELD II: *Winkfield v. Frederick Rosen, MD., et al,* Alameda County Superior Court Case No. RG15760730, filed March 3, 2015

On March 3, 2015, less than six months after Mrs. WINKFIELD withdrew her motion for an evidentiary hearing and reconsideration of Judge Grillo's determination of brain death, Mrs. WINKFIELD filed a medical malpractice complaint in Alameda County Superior Court, alleging that her daughter should be able to pursue a personal injury cause of action. Mrs. WINKFIELD named CHO and Dr. ROSEN as defendants. (*Winkfield v. Frederick Rosen, MD., et al,* Alameda County Superior Court, Case No. RG15760730.) The undersigned is informed and believes that Mrs. WINKFIELD failed to file the requisite notice of related case with this Superior Court as required by California Rule of Court, Rule 3.300. Nor did Mrs. WINKFIELD give Judge Grillo notice of the related case as he ordered on October 8, 2014. (Still Declaration.)

The medical malpractice case was assigned for all purposes to Judge Freedman pursuant to the procedures reflected in the Local Rules of the Superior Court, County of Alameda, Rule 3.120.

Dr. ROSEN and CHO demurred to the complaint on the grounds that Jahi McMath did not have standing to state first cause of action for personal injuries because Jahi McMath was medically and legally determined to have sustained irreversible brain death by Judge Grillo and the physicians who examined her. Defendants argued that the doctrines of collateral estoppel and res judicata prevented plaintiffs from relitigating the determination of brain death. Furthermore, a death certificate had been issued.

At the hearing on the demurrer, held before Judge Freedman on July 30, 2015, plaintiffs' counsel admitted that the allegations in the complaint were "bare as to this issue of collateral estoppel and the death certificate." (Reporter's Transcript, Ex. H, 5:24-6:1.) Plaintiffs' counsel argued,

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however, that plaintiffs were prepared to amend their complaint to allege facts showing a change in circumstances, i.e., that there is new evidence Jahi is alive. Counsel informed Judge Freedman that Jahi has recently developed breasts, had her first menstrual period, and she is "responsive enough." (Transcript, Ex. H, 8:25-9:19.) Counsel further advised Judge Freedman:

> And, critically, we have teams of expert neurologists lined up to opine ... [t]hat, in fact, she does have hypothalmaic brain function, because you can't have puberty, you can't have the development of things that go along with puberty unless you have hypothalamic brain function. ...
>
> We have teams, several teams of experts that will opine that she has brain function, and that there are many parts of her brain that are intact. (Transcript, Ex. H, 9:20-10:1.)

Plaintiffs' counsel advised Judge Freedman that plaintiffs seek an evidentiary hearing on the issue of whether Jahi is brain dead, either by jury or the court. (*Id.*, 10:11-11:8.) Of course, this is the same relief Mrs. WINKFIELD requested of Judge Grillo back in October 2014. Plaintiffs' counsel omitted to inform Judge Freedman that this was Mrs. WINKFIELD's third bite at the apple.

Judge Freedman sustained the demurrer to the first cause of action for personal injuries. In his Order dated October 20, 2015, Judge Freedman gave Jahi McMath leave to amend to allege facts showing the circumstances have changed, thereby overcoming the defendants' challenge to the first cause of action on the grounds that Judge Grillo's prior rulings and judgment are binding on the parties pursuant to the doctrines of collateral estoppel and/or res judicata. (Order, Ex. I, p. 2.)

We learn from the First Amended Complaint, filed on November 4, 2015, that this is not 'new evidence' at all. (First Amended Complaint, Exhibit J.) In fact, it is the same evidence that Mrs. WINKFIELD asked Judge Grillo to consider in October 2014.[1/] Furthermore, Mrs. WINKFIELD neglected to mention that she presented this same evidence to Judge Grillo in October 2014, and that she abruptly withdrew her motion they day before the scheduled appearance before Judge Grillo. Was the motion withdrawn suddenly and without explanation because she feared

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1. Plaintiffs 'new evidence' consists of MRI and MRA scans performed on September 26, 2014, the onset breast development and menarche, audiovideo recordings, and the opinion of California physician, D. Alan Shewmon, M.D., the triple boarded California physician referred to in paragraphs 30 and 35 of the First Amended Complaint. (Ex. J.) Plaintiffs failed to identify Dr. Shewmon by name in their FAC. This is an intentional omission, rather than a careless oversight. On October 6, 2014, the court appointed expert, Dr. Paul Fisher, advised Judge Grillo that Dr. Shewmon's opinions are not reliable because he does not use the relevant criteria for brain death. (Ex. F.)

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another unfavorable decision by Judge Grillo given the conclusions reached by the court's expert, Dr. Paul Fisher, as reflected in his October 6, 2014 letter?

C. Authority

The court has inherent power "to amend and control its process so as to make them conform to law and justice." (Code Civ. Proc. § 128(8).)

1. The two *Winkfield* cases are related as defined by Rule 3.300(a)

California Rule of Court, Rule 3.300 provides in relevant part:

> (a) **Definition of "related case."** A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases:
>
> (1) Involve the same parties and are based on the same or similar claims;
>
> (2) Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;
>
> (3) Involve claims against, title to, possession of, or damages to the same property; or
>
> (4) Are likely for other reasons to require substantial duplication judicial resources if heard by different judges.

The two *Winkfield* cases involve the same parties, Mrs. WINKFIELD, Jahi McMath, and CHO. The addition of Dr. ROSEN as a defendant, and SANDRA CHATHAM as a plaintiff, does not alter the claims or defenses. These parties are in privity with the parties in *Winkfield I,* and would be bound by any decisions made in Judge Grillo's court. Both *Winkfield* cases involve the issue of whether Jahi McMath is brain dead, whether Judge Grillo's rulings and final judgment is subject to reconsideration, and, if so, the format of the reconsideration and applicable law and medical criteria.

Both *Winkfield* cases arise from the same incident, i.e., alleged negligent medical treatment provided to Jahi McMath at CHO on December 9, 2013.

Both *Winkfield* cases seek the same relief, i.e., an reconsideration of whether Jahi McMath meets the criteria for brain death and reversal of Judge Grillo's prior determination and judgment of brain death.

Judge Grillo invested substantial time and considerable resources during his initial

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consideration of whether the brain death criteria were met, as well as his subsequent, thoughtful reconsideration of whether Jahi McMath continued to meet the criteria for brain death. He twice appointed Paul G. Fisher, M.D., who completed the tasks he was assigned by Judge Grillo.

It would be a substantial duplication of this court's judicial resources to have a different judge consider and rule upon the same issues, law, medical guidelines and evidence that were before Judge Grillo in December 2013 and October 2014. Judge Grillo has intimate knowledge of Jahi's condition, the applicable law, the factors and evidence that went into his determination, the parameters of the hearing process, and the applicable criteria/guidelines for diagnosing brain death. Assignment of this issue to Judge Grillo will promote the uniformity of decisions, prevent forum shopping, and avoid the uncertainty that will necessarily result if this matter is reconsidered by a second judge.

2. Plaintiffs and their counsel failed to comply with their duty to file the a notice of related case

Rule 3.300(b) provides that Mrs. WINKFIELD and her counsel had a duty to file the notice of related case at the time they filed their medical malpractice complaint:

> (b) **Duty to provide notice.** Whenever a party in a civil action knows or learns that the action or proceeding is related to another action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California, the party must serve and file a Notice of Related Case.

In addition, Judge Grillo separately ordered Mrs. WINKFIELD to file the notice and, further, to give him a copy of the notice. Plaintiffs' failure to file the requisite notice deprived the clerk of court, Judge Grillo and the presiding judge from having the requisite information prior to judicial assignment of the second *Winkfield* case.

3. Rule 3.300(h)(1) authorizes assignment of related cases to a single judge

If all the related cases have been filed in one superior court, the court, on notice to all parties, may order that the cases, including probate and family law cases, be related and may assign them to a single judge or department. In a superior court where there is a master calendar, the presiding judge may order the cases related. Cal. Rules of Ct., Rule 3.300(h)(1).

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4. Judge Grillo has exclusive jurisdiction of Mrs. WINKFIELD's claim that Jahi McMath is no longer brain dead

When a proceeding has been assigned to one department of the superior court, it is beyond the jurisdictional authority of another department of the same court. (*Williams v. Superior Court of Los Angeles County* (1939) 14 Cal. 2d 656, 662.) Exclusive jurisdiction is acquired by the first department to assume and exercise control over the matter. (*Silverman v. Superior Court* (1988) 203 Cal.App.3d 145, 150-151.) "One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court." (*Ford v. Superior Court* (1986) 188 Cal. App. 3d 737, 742.) "A judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned." (*Id.*) The Supreme Court in *Williams v. Superior Court of Los Angeles County* (1939) 14 Cal. 2d 656 held:

> [Where] a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. [Citation.] If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anomalous situation and doubtless lead to much confusion." (*Id.*, at p. 662.)

In *People v. Madigral* (1995) 37 Cal.App.4th 791, the court further explained:

> " ' " ' "A superior court is but one tribunal, even if it be composed of numerous departments . . . . An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department. . . ." ' [Citations.] This is because the state Constitution, article IV, section 4 vests jurisdiction in the court, '. . . and not in any particular judge or department. . . .; and . . . whether sitting separately or together, the judges hold but one and the same court.' " ' " (*Silverman v. Superior Court* (1988) 203 Cal.App.3d 145, 150-151.)

In summary, Judge Grillo has exclusive jurisdiction of the issue of whether Jahi McMath is brain dead. Judge Grillo's determinations and judgment of brain death is binding on all other departments in the Alameda County Superior Court.

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D. Plaintiffs are Forum Shopping

Plaintiffs appear to be engaged in forum shopping in the hopes of getting a more favorable ruling from another judge sitting in the same Superior Court. This is demonstrated by the following:

(1) On October 8, 2014, having received Dr. Fisher's letter invalidating their 'new evidence' and having been advised that Judge Grillo that he would not conduct an evidentiary hearing, Mrs. WINKFIELD's attorney abruptly withdrew their motion to have Judge Grillo reconsider his prior determination of brain death. It is no coincidence that she withdrew her motion the day before Judge Grillo was expected to rule.

(2) Judge Grillo maintained jurisdiction over the issue of brain death. In his Order dated October 8, 2014, Judge Grillo advised Mrs. WINKFIELD and her attorney that he would entertain further requests for relief (re the issue of Jahi's brain death), including scheduling CMCs, briefing schedules and hearing dates, upon their request. Mrs. WINKFIELD and her attorneys were aware that her request for relief was still pending in Judge Grillo's court should she again seek reconsideration of Jahi's brain death.

(3) On March 3, 2015, Mrs. WINKFIELD filed a medical malpractice complaint that, even her own attorney admits, is "bare" of allegations that address the preclusive effect of collateral estoppel given that there is a final judgment of brain death. Was this a careless oversight, or a plan to attempt to have Jahi's brain death reconsidered by a judge other than Judge Grillo? Plaintiffs have had this 'new evidence' since September 2014. Why did they not allege the requisite facts in their initial complaint? Was the intent to have a judge other than Judge Grillo accept jurisdiction and make initial rulings on the case, thereby, effectively causing the disqualification of Judge Grillo?

(4) Mrs. WINKFIELD and her counsel failed to comply with their mandatory duty to file the requisite Notice of Related Case required by Cal. Rule of Court, Rule 3.300, when they filed the medical malpractice complaint on March 3, 2015.

(5) Mrs. WINKFIELD and her attorneys disregarded Judge Grillo's order that he be given notice if they filed a related case.

(6) Mrs. WINKFIELD and her attorneys did not disclose to Judge Freedman that

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they sought the exact relief (i.e., an evidentiary hearing and reconsideration of the determination of brain death) based on the same evidence (a September 26, 2014 MRI and MRA, the onset of breasts and menarche, recordings of Jahi, and expert opinions) that was presented to Judge Grillo in October 2014.

(6) Mrs. WINKFIELD and her attorneys did not disclose to Judge Freedman that in October 2014, the court's expert, Paul G. Fisher, M.D., carefully reviewed plaintiffs' 'new evidence' and concluded that it did not change the conclusion that Jahi McMath was anything but irreversibly brain dead.

(7) Mrs. WINKFIELD and her attorneys did not disclose to Judge Freedman that Mrs. WINKFIELD dropped her motion on the eve of Judge Grillo's ruling on the 'new evidence.'

(8) Mrs. WINKFIELD could not challenge Judge Grillo in a motion to disqualify pursuant to C.C.P. section 170.6. Nor could she prevail on an objection to Dr. Fisher since her attorney had previously stipulated that Dr. Fisher conducted a proper brain death examination and made his diagnosis in accord with accepted medical standards. Her counsel circumvented Rule 3.300's notice of related case requirement and defied Judge Grillo's order. Her attorney then drafted a complaint that obscures the fact that they want a hearing that Judge Grillo previously ruled they were not entitled to.

(9) Plaintiffs' First Amended Complaint involves essentially the same parties and the same issues considered by Judge Grillo in December 2013 and October 2014. The new evidence alleged by plaintiffs is not new.

(10) Plaintiffs' contention that Jahi has miraculously reversed her irreversible brain death borders on being a cruel hoax. This is demonstrated by analyzing plaintiffs' often cited claim that Jahi did not begin breast development until long after her brain death diagnosis. (See First Amended Complaint, Ex. I, Paragraph 33; Reporter's Transcript, Exhibit H, 9:16.) During oral argument on the Demurrer, plaintiffs' attorney argued that Jahi's puberty proves she has hypothalmic brain function: "[Y]ou can't have puberty, you can't have development of these things that go along with puberty unless you have hypothalmic brain function." (Reporter's Transcript, Ex. H, 9:20-10:1.) Not only did Dr. Fisher discredit this proposition, but Jahi McMath had breast development

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long before her brain death. Photographs of Jahi posted on the internet depict her with breast development before brain death. (Exhibit I.)

RELIEF REQUESTED

In the event Judge Freedman overrules Dr. ROSEN's demurrer to Jahi McMath's first cause of action for personal injuries alleged in the First Amended Complaint filed in the second *Winkfield* case (having determined that Jahi McMath has standing to allege a cause of action for personal injuries and plaintiffs are entitled to third hearing on their claim that Jahi McMath has brain function), the presiding judge is authorized to order the cases related and has discretion to reassign the second *Winkfield* case, in whole or in part, to Judge Grillo. Dr. ROSEN further requests the medical malpractice action be stayed pending Judge Grillo's determination of whether Jahi McMath has standing to allege a cause of action for personal injuries.

Dated: November 23, 2015 HINSHAW, MARSH, STILL & HINSHAW

By: _____
THOMAS E. STILL
JENNIFER STILL
Attorneys for Defendant FREDERICK S. ROSEN, M.D.

DECLARATION OF JENNIFER STILL

I, Jennifer Still, hereby declare:

1. I am an attorney at law duly licensed to practice before the courts of the State of California. I am an associate with the law offices of Hinshaw, Marsh, Still & Hinshaw, LLP attorneys for defendant FREDERICK S. ROSEN, M.D.

2. I am informed and believe that plaintiff LATASHA WINKFIELD did not file a notice of related case in either of her cases filed in the Alameda Superior Court. Dr. ROSEN has never received a notice of related case. I have personally reviewed court's dockets in both cases and neither docket reflects that a notice of related case has been filed.

3. Appended hereto as Exhibit A is a true and correct certified copy of Judge Grillo's "Amended Order (1) Denying Petition for Medical Treatment and (2) Granting in Part Application to

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Seal Portions of Record" filed on January 2, 2014, in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

4. Appended hereto as Exhibit B is a true and correct certified copy of Judge Grillo's "Final Judgment Denying Petition for Medical Treatment" filed on January 17, 2014, in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

5. Appended hereto as Exhibit C is a true and correct copy of the "Writ of Error Corum Nobis and Memorandum Regarding Court's Jurisdiction to Hear Petition For Determination that Jahi McMath is Not Brain Dead" filed on October 3, 2014 by Christopher Dolan, Esq., on behalf of plaintiff Latasha Winkfield in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

6. Appended hereto as Exhibit D is a true and correct copy of Judge Grillo's Judge Grillo's "Order Following Management Conference" filed on October 1, 2014, in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

7. Appended hereto as Exhibit E is a true and correct copy of the pertinent pages of Judge Grillo's "Order Appointing Dr. Paul Fisher as Court Expert Witness" filed on October 6, 2014, in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

8. Appended hereto as Exhibit F is a true and correct copy of Paul G. Fisher, M.D.'s, letter to Judge Grillo, filed on October 6, 2014, in the matter of *Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al,* Alameda County Superior Court, Case No. RP13-707598.

9. Appended hereto as Exhibit G is a true and correct copy of Judge Grillo's "Case Management Order (1) Confirming Petitioner's Withdrawal of Petition for Writ of Error Corim Nobis and (2) Stating There Will Be No CMC on 10/9/14" filed on October 8, 2014, in the matter of

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Latasha Winkfield, the Mother of Jahi McMath, a minor v. Children's Hospital of Oakland, et al, Alameda County Superior Court, Case No. RP13-707598.

10. Appended hereto as Exhibit H is a true and correct copy of the Reporter's Transcript of Proceedings of hearing on defendants' demurrer, held on July 30, 2015, in Department 20, Judge Freedman, presiding, in the matter of *Winkfield v. Frederick Rosen, MD.*, Alameda County Superior Court, Case No. RG15760730.

11. Appended hereto as Exhibit I is a true and correct copy of Judge Freedman's Order sustaining defendants' demurrer in the matter of *Winkfield v. Frederick Rosen, MD.*, Alameda County Superior Court, Case No. RG15760730, dated October 20, 2015.

12. Appended hereto as Exhibit J is a true and correct copy of plaintiffs' First Amended Complaint for Damages for Medical Malpractice" filed on or about November 4, 2015, in the matter of *Winkfield v. Frederick Rosen, MD.*, Alameda County Superior Court, Case No. RG15760730.

13. Appended hereto as Exhibit K are true and correct copies of photographs of Jahi McMath that are posted on the Internet. The images reflect that Jahi McMath had developed breasts prior to the diagnosis of brain death.

I declare under penalty of perjury under the laws of the State of California that all of the foregoing is true and correct, and as to those matters stated on my information and belief, I believe them to be true, and if called upon to testify to the matters herein I can competently testify thereto.

Executed on November 23, 2015 at Saratoga, California.

JENNIFER STILL, ESQ.

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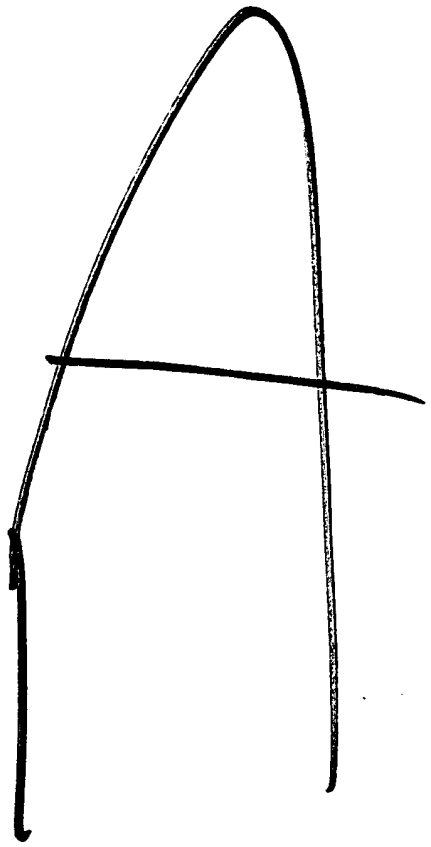

EXHIBIT A

[redacted]
10522596

FILED
ALAMEDA COUNTY

JAN 02 2014

CLERK OF THE SUPERIOR COURT
By [redacted] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner, v. CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	Case No. RP13-707598 AMENDED* ORDER (1) DENYING PETITION FOR MEDICAL TREATMENT AND (2) GRANTING IN PART APPLICATION TO SEAL PORTIONS OF RECORD. Date: December 23, 2013 Time: 9:30 am Dept: 31

The Petition of Latasha Winkfield as mother of Jahi McMath, a minor, and the motion of petitioner to seal came on for hearing on December 23 and 24, 2013, in Department 31 of this Court, the Honorable Evelio Grillo presiding. After consideration of the briefing and the argument, IT IS ORDERED: (1) the Petition of Latasha Winkfield as mother of Jahi McMath, a minor, is DENIED and (2) the motion of petitioner to seal is GRANTED IN PART.

*The court amends the Order of 12/26/13 to correct typographical errors and address several factual corrections requested by counsel. There are no substantive changes from the prior order.

PROCEDURAL AND FACTUAL BACKGROUND[1]

On December 9, 2013, Jahi McMath, a thirteen year old child, had a tonsillectomy performed at Children's Hospital of Oakland ("CHO"). Following the tonsillectomy Jahi began to bleed profusely from her mouth and nose, and within a matter of minutes, went into cardiac arrest and lapsed into a coma. As of December 26, 2013, Jahi is currently being maintained on a ventilator at CHO.

On December 20, 2013, Latasha Winkfield, the mother of Jahi McMath, filed a verified petition and ex parte application with the court pursuant to Probate Code section 3200 et seq. and 4600 et seq., seeking an order (1) authorizing the petitioner (Jahi's mother) to make medical care decisions for Jahi; and (2) for an injunction under to prohibit respondent CHO from withholding life support from Jahi. (Probate Code sections 3201, 4766, 4770.) The court set the application for hearing at 1:30 p.m. on December 20, 2013, in Department 31, and requested respondent CHO to submit written opposition to petitioner's ex parte application.

On December 20, 2013, the court heard Petitioner's application in Department 31. Christopher B. Dolan appeared for the petitioner and Douglas C. Straus appeared for respondent CHO. At the hearing, respondent CHO submitted its opposition papers and argued that respondent CHO had no duty to continue mechanical ventilation or any other medical intervention for Jahi, because she was deceased as the result of an irreversible cessation of all functions of her entire brain, including her brain stem. (Health & Safety Code section 7180.) In support of its position, respondent submitted the physician declarations of Robert Heidersbach,

[1] Due to the confluence of facts concerning the medical records of a minor and the publicity that accompanied this case, the parties presented many of their arguments to the court in chambers and supported those arguments with offers of proof. The court has attempted in this order to reflect and address all the issues raised in the case even if they were not formally presented and preserved in court filings and transcribed hearings.

MD, Sharon Williams, MD, and Robin Shanahan, MD. Dr. Heidersbach and Dr. Shanahan were the examining physicians who determined Jahi's medical status, *i.e.*, brain dead. The physician declarations, read together, unequivocally stated that Jahi was considered brain dead in accordance with accepted medical standards, and that there was no medical possibility that Jahi's medical condition was reversible, or that she would recover from her present condition, and that there was no medical justification to provide further medical intervention. Stated more plainly, CHO argued that Jahi was legally dead, as defined by Health and Safety Code section 7180 and 7181, and that neither Probate Code sections 3200 or 4600 et seq. authorized medical treatment of legally dead persons.[2] Petitioner responded with anecdotal evidence regarding Jahi's condition, and stated that Jahi was responsive to her mother's verbal stimulation, and to physical touching of her feet.

During oral argument on December 20, 2013, the court asked respondent's counsel whether the two examining physicians were affiliated with CHO.[3] Respondent's counsel responded that Drs. Heidersbach, and Shanahan did not work for CHO, that each satisfied the criteria for independence under Health and Safety Code section 7181, and thus intervention by the court was neither warranted, nor authorized by law. In effect, respondent's counsel argued that the court did not have jurisdiction to review the physicians' diagnosis of brain death because

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[2] It would appear to be self evident that where legal death has occurred, one cannot invoke the provisions of Probate Code sections 3200 and 4600 to appoint a guardian to make health care decisions on behalf of a deceased person, *i.e.*, a person for whom additional medical treatment would be futile. There are specific statutory requirements for dealing with the remains of deceased persons. (Health and Safety Code section 7000 et seq.) The issue presented by the petitioner in the instant matter was more complex: whether the petitioner's daughter was entitled to medical treatment in the form of life support (nutrition, intravenous fluids, ventilator breathing support, etc.) because her daughter was not legally dead. The issues in this case as presented by the petitioner necessarily required the court to reach the threshold issue of whether petitioner's daughter was legally dead.

[3] Health and Safety Code section 7181 states that a diagnosis of brain death requires confirmation by a second, independent physician.

two independent physicians had made the determination in compliance with Health and Safety Code section 7180 and 7181. On further questioning by the court, however, respondent's counsel conceded that both Drs. Heidersbach and Shanahan maintained hospital privileges with CHO. The declarations submitted by Drs. Heidersbach, and Shanahan both self-describe their status as "a member in good standing of the medical staff of Children's Hospital & Research Center at Oakland." (Heidersbach Dec., Para 1; Shanahan Dec., para 1.)

Because Health and Safety Code section 7181 requires confirmation of brain death by an independent physician (but does not define or otherwise set a standard for determining independence), the court determined that, on the unique facts of this case,[4] the independent second opinion required by section 7181 should be provided by a physician who had no affiliation with CHO. The court ordered the parties to meet and confer to select a physician unaffiliated with CHO to provide the second independent opinion required by Health and Safety Code sections 7180 and 7181. The parties met and conferred during a break in the hearing and CHO presented the court with the names of five physicians affiliated with the University of California San Francisco Medical School. Petitioner did not provide the names of any licensed California physicians as proposed independent experts. Counsel for Jahi stated he could not consent to the process because he stated that consent could be interpreted that the independent physician then could make a pronouncement of brain death that would authorize termination of support.

[4] The unique facts of this case include the fact of both affiant physicians being members of the CHO medical staff, the complete absence from the record of any information from which the court could determine whether the physician providing the second opinion was an "independent physician" within the meaning of Health and Safety Code section 7181, and the facts and circumstances surrounding Jahi's treatment while under the care of CHO, *i.e.*, immediate and dramatic death following a routine surgical procedure (a tonsillectomy), with virtually no information surrounding the circumstances of her treatment and death provided by CHO other than publically describing the outcome of the surgery as "catastrophic."

By order dated December 20, 2013, the court temporarily restrained CHO from changing Jahi's level of medial support. The order stated in part: "Respondent CHO, its agents, employees, servants and independent contractors are ordered to continue to provide Jahi McMath with the treatment and support which is currently being provided as per the current medications and physicians orders until further order of the court." The order also continued the hearing to Monday, December 23, 2013, and directed CHO to contact the UCSF physicians to determine whether any of them was available to examine Jahi and to provide the second independent opinion required by section 7181.

On Monday December 23, 2013, the court reconvened the hearing. At the hearing, respondent's counsel advised the court that the UCSF physicians had declined to provide a second section 7181 opinion on the advice of counsel, as pending merger discussions between UCSF and CHO could raise concerns regarding the independence of the UCSF physicians. In place of the UCSF physicians, CHO's counsel offered the appointment of Paul Fisher, MD, the Chief of Child Neurology for the Stanford University School of Medicine, as the physician to provide the second, independent physician's opinion pursuant to Health and Safety Code section 7181. Petitioner opposed the process but conceded that if the process would go forward that Dr. Fisher was qualified. During the December 23 hearing, petitioner's counsel also requested that Paul A. Byrne, MD be allowed to examine Jahi and provide a second section 7181 opinion, or alternatively, to provide expert testimony at the hearing.

By order dated December 23, 2013, the court appointed Dr. Fisher as the independent 7181 physician. Pursuant to that order, Dr. Fisher examined Jahi the afternoon of December 23, 2013. The court also continued the hearing to December 24, 2013, to receive Dr. Fisher's report and testimony from a CHO physician (Dr. Shanahan) who first determined that Jahi was brain

dead, as of December 11, 2013. By separate order dated December 23, 2013, the court extended the restraining order through December 30, 2013, or such other date as the court might later determine.

On December 24, 2013, this court, during closed and public sessions, received testimony from Dr. Shanahan and Dr. Fisher. During the course of the hearings, the court was presented with and entered into evidence Dr. Shanahan's and Dr. Fisher's examination notes, as well as documents setting forth the standards for determining brain death in infants and children. (See, e.g., Exhibit 1 (Dr. Fisher's examination notes); Exhibit 2 (Guidelines for Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendation. Court); Exhibit 3 (Pediatrics, Official Journal of the American Academy of Pediatrics, August 28, 2011, Guidelines for Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendation); Exhibit 4 (Table 3 of Exhibit 3); Exhibit 5 (Checklist, Brain Death Examination for Infants and Children); Exhibit 6 (Shanahan Declaration filed 12/20/13); and Exhibit 7 (Consultation and Examination notes of Robin Shanahan MD dated 12/11/2013).[5] The court provided Petitioner's counsel the opportunity to cross examine both Dr. Fisher and Dr. Shanahan.

Dr. Fisher initially testified in a closed session. Dr. Fisher's written report served as his opening statement and counsel for petitioner in cross-examination questioned Dr. Fisher about the accepted medical standards for determining brain death in minors, his physical examination of Jahi, and his analysis. At the conclusion of Dr. Fisher's cross-examination, petitioner's counsel stipulated that Dr. Fisher conducted the brain death examination and made his brain

[5] The court also received and considered the vita curricula of Dr. Fisher and Dr. Byrne. To provide a complete record, the court on its own motion augments the record to include those two documents as Exhibits 8 and 9.

death diagnosis in accord with accepted medical standards. In the open session immediately following, Dr. Fisher opined that Jahi was brain dead under accepted medical standards.

Dr. Shanahan then testified in a closed session. Dr. Shanahan testified as to the accepted medical standards for determining brain death in minors, the examination of Jahi that she conducted on December 11, 2013, and her conclusion on December 11, 2013, that Jahi was brain dead as of that date. Petitioner's counsel was then provided with the opportunity to cross examine Dr. Shanahan.

At the conclusion of Dr. Shanahan's cross-examination in closed session, petitioner's counsel objected to Dr. Shanahan's testimony. The court overruled the objection. Petitioner's counsel then requested a continuance to review additional medical records more carefully, to have time to consult an expert regarding Dr. Shanahan's examination of Jahi, and, if appropriate, to conduct further cross-examination of Dr. Shanahan. The court denied the request for a continuance. The court reasoned that the issue before the court was limited to whether the attesting physicians had conducted the 7180 and 7181 examinations in accord with accepted medical standards. The court determined, based on the testimony and medical records provided in the closed session (Exhibits 1 [Fisher notes] and 7 [Shanahan notes]), that although Jahi's complete medical records were relevant to the cause of her death they were not relevant to whether she had suffered brain death as defined under section 7181. Dr. Shanahan was then sworn in open court, and testified that Jahi was brain dead on December 11, 2013, under accepted medical standards.

The Court then took the matter under submission. The court returned to the bench after a brief recess and then denied the petition and dissolved the TRO effective 5:00 p.m. December 30, 2013.

ANALYSIS:

JURISDICTION OF THE COURT

During the initial and subsequent hearings, respondent's counsel argued that after two attesting physicians have determined a person to be brain dead pursuant to Health and Safety Code sections 7180 and 7181, that the court had no jurisdiction to review the issue. Or stated another way, counsel argued that the determination of brain death was a matter for physicians, and not judges to decide, and the court lacked jurisdiction to review the physicians' determination of brain death.

It is true that physicians, and not courts, are uniquely qualified (and authorized by statute) to make the determination of brain death, but it does not follow that such determinations are insulated from all judicial review. (*Dority v. Superior Court* (1983) 145 Cal. App.3d 273, 278.) In *Dority* the trial court appointed a guardian for an infant who had been determined by physicians to be brain dead under Health & Saf. Code, section 7189(a)[6], and after hearing unrefuted medical testimony concluding that the infant was brain dead, the trial court ordered the temporary guardian to give the appropriate consent to the health care provider to withdraw life support. (*Dority*, 145 Cal.App.3d at 276.) The child's parents and counsel for the minor petitioned for a writ of prohibition against removing the life support device. The Court of Appeal denied the writs and held that the trial court's order for withdrawal of the life support system, after hearing the medical evidence and taking into consideration the rights of all the parties

[6] It appears that the reference to Health & Saf. Code section 7189(a) might be a typographical error. Former section 7189, as operative during 1983, was added by Stats.1976, c. 1439, § 1, related to the revocation of health care directives, and was repealed by Stats.1991, c. 895 (S.B.980), § 1. Health & Saf. Code section 7180, the operative section for determining death as of 1983 (the year in which the events underlying *Dority* occurred) was added by Stats.1982, c. 810, p. 3098, § 2, and would have been the operative statute for determining death at that time.

involved, and after finding that the infant was dead in accordance with applicable statutes, was proper and appropriate. (*Dority*, 145 Cal.App.3d at 279.)

Dority acknowledged "the moral and religious implications inherently arising when the right to continued life is at issue," but concluded that the court has jurisdiction to resolve the issue. *Dority* recognized "the difficulty of anticipating the factual circumstances under which a decision to remove life-support devices may be made, [and] determined that it would be "unwise" to deny courts the authority to make such a determination when circumstances warranted." (*Dority*, 145 Cal.App.3d at 275.)

Dority states "[t]he jurisdiction of the court can be invoked upon a sufficient showing that [1] it is reasonably probable that a mistake has been made in the diagnosis of brain death or [2] where the diagnosis was not made in accord with accepted medical standards." (*Dority*, 145 Cal.App.3d at 280.) *Dority* is silent on what showing is necessary to establish "reasonable probability of a mistake." *Dority* and the statutes, sections 7180 and 7181, are silent as to when a diagnosis is made "in accord with accepted medical standards." *Dority* does not state that the two identified bases for jurisdiction are exclusive and the statute does not state they are exclusive. The court interprets the statute and holds that application of the statute permits an inquiry into whether the second physician was independent. The court's jurisdiction can be invoked on a showing that the second physician required by section 7181 was not "independent."

In this case there is clearly was a conflict between the party representing Jahi and the health care providers as to whether brain death had occurred and whether further medical intervention was warranted. Petitioner presented evidence that her daughter, Jahi, was responsive (reacted to) her touch (Winkfield Decl. at para. 9), arguably suggesting that it was possible that a mistake has been made in the diagnosis of brain death. Petitioner presented

evidence that CHO denied petitioner's request to have an independent physician examine Jahi and her studies and records (Winkfield Decl., para. 19) and that CHO repeatedly refused to provide petitioner with Jahi's medical records under the rationale that the hospital does not provide medical records of patients that they are still treating (Winkfield Decl. at paras. 20, 21).[7] These facts cast doubt on the neutrality of CHO and therefore also on the independence of the physicians who were "member[s] in good standing of the medical staff of Children's" who had examined Jahi and made findings of brain death. These facts are sufficient to invoke the jurisdiction of the court to review whether the diagnosis was made by an independent physician in accord with acceptable medical standards.[8]

NATURE OF THE HEARING AND RELATED DUE PROCESS CONCERNS.

Counsel for petitioner objected that petitioner was not provided a full and fair opportunity to present evidence regarding whether Jahi had suffered brain death. Specifically, counsel for petitioner asserted that petitioner was not provided timely access to Jahi's complete medical files, that he needed additional time in which to prepare for cross-examination, and that he had the right to present a competing physician to provide testimony on the issue of brain death.

Health and Safety Code sections 7180 and 7181 do not provide any guidance regarding the nature of a proceeding to address brain death under those sections. *Dority*, supra, 145

[7] As of the hearing on Friday December 20, 2013, petitioner and petitioner's counsel had not yet received copies of Jahi's medical records.

[8] There was some conflict in the argument at the December 20 hearing as to whether petitioner had been allowed to have a physician examine Jahi and/or review the records of Drs. Shanahan and Heidersbach, the physicians who declared Jahi to be brain dead. CHO's counsel (Mr. Strauss) contended that petitioner had consulted with three physicians of her choosing, each of whom confirmed the diagnosis of brain death. Petitioner's counsel denied Mr. Strauss' representation and further alleged that Jahi's medical records had not been provided to petitioner or petitioner's designated physicians, thereby precluding any meaningful review of Drs. Shanahan's and Heidersbach's diagnoses of brain death.

Cal.App.3d 273, 276, did not address the nature of a proceeding under section 7181. The Uniform Determination of Death Act prepared by the Uniform Law Commission does not address the nature of a proceeding. The court can discern three options for categorizing the nature of the proceeding: (1) a summary judicial review of physician reports; (2) a focused proceeding that permits limited discovery and presentation of evidence; and (3) a civil proceeding with challenges to the pleadings under CCP sections 430.10 and 435, discovery rights under CCP section 2016 et seq, motions for summary judgment under CCP section 437c, and a full trial on the merits.

The court rejects the first option as failing to provide appropriate due process to the interested parties. If the determination were so simple that the court could resolve it on the basis of declarations, then the court would not need to be involved at all in the process. (*Dority*, 145 Cal.App.3d at 278 [If the family and physicians agree, then "we find it completely unnecessary to require a judicial "rubber stamp" on this medical determination"].) If the determination is not simple, then the interested parties are entitled to cross-examine the physicians and to present their own evidence.

The court finds the second option consistent with the apparent intent of the legislature, California case law, and due process. Health and Safety Code sections 7180 and 7181 concern a single factual issue that is medical in nature. Physicians should be able to make the required examination and complete the required analysis in a relatively short time period. The legislature in Health and Safety Code section 1254.4 states that after a finding of brain death under section 7180, a hospital must continue previously ordered cardiopulmonary support for a "reasonably brief period" to afforded family or next of kin the opportunity to gather at the patient's bedside before removal of the support and that "in determining what is reasonable, a hospital shall

consider the needs of other patients and prospective patients in urgent need of care." This suggests that following a finding of brain death under section 7180, any challenge to the finding also be completed in relatively brief period.

California case law indicates that trial courts have conducted hearings under section 7180 expeditiously. In *Dority*, the physicians found no brain activity on November 22 and again about about one month later (mid-December), and the trial court held a hearing on January 17 and 21. The testimony at the *Dority* trial court hearing was unrefuted. Although *Dority* did not address the nature of the proceeding or hearing, if also did not criticize the conduct of the trial court. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [An opinion is not authority for propositions not considered].)

Regarding due process, the Court has considered the following general principles as stated in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal. 4th 371, 390-391:

> Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decision making process. Specifically, determination of the dictates of due process generally requires consideration of four factors: [1] the private interest that will be affected by the individual action; [2] the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; [3] the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and [4] the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The first three considerations, the private interest, the risk involved, and the dignitary interest of the proceeding, all suggest that the due process rights of the party affected by a physician's determination of death are substantial. The fourth factor, the government interest in the form of administrative burden, is addressed by the focused nature of the inquiry under Health and Safety Code sections 7180 and 7181.

The court finds the third option to be inconsistent with the apparent purpose of the statute and the related statutes. The inquiry is focused and Health and Safety Code section 1254.4 suggests that the proceedings be commenced and concluded in a "reasonably brief period."

The court finds that the nature of the proceedings is that of a regular civil proceeding, but that the trial court has the discretion to focus the case on the limited issues presented and to expedite and narrow the proceedings accordingly. Paraphrasing *Dority*, 145 Cal.App.3d at 275, "Considering the difficulty of anticipating the factual circumstances under which a decision to remove life-support devices may be made, [limiting the discretion of the court to fashion the proceedings to the circumstances] may ... be unwise." The trial court may issue orders shortening time to ensure that the case is not unduly prolonged, the trial court may expedite and limit discovery under CCP section 2019.020(a) and 2019.030, and the court may limit the scope of the evidence presented at the hearing under Evidence Code section 352.

This court endeavored to provide petitioner with due process while completing the proceeding in a "reasonably brief period." CHO provided some medical records to petitioner late on Friday December 20 and provided more complete records to petitioner's counsel on Monday December 23, 2013. The court appointed its own independent physician to examine Jahi on Monday December 23, and counsel for petitioner was present during that examination.

On Tuesday December 24, counsel for petitioner had the opportunity to cross-examine both Dr. Fisher and Dr. Shanahan.

During the proceedings, counsel for petitioner at various times requested that Paul A. Byrne, MD be allowed to examine Jahi and provide a second section 7181 opinion, or provide expert testimony at the hearing, or to review Jahi's records to assist in the cross-examination of Dr. Shanahan. Petitioner withdrew the request that Dr. Byrne be allowed to examine Jahi and provide an opinion based on his own examination. Petitioner did not pursue his request that Dr. Byrne provide expert testimony. During the discussions between the court and counsel it became apparent through a review of Dr. Byrne's publications that were the court to hold an Evidence Code 402 hearing to determine whether Dr. Byrne was qualified as an expert under Evidence Code 720 and *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, that Dr. Byrne might not qualify as an expert based on his religious and philosophical approach to the definition of death and the possibility that he would not be able to apply accepted medical standards. In addition, it became apparent that testimony and documents regarding the cause of death, as opposed to the fact of death, were not relevant to the court's inquiry. The court exercised its discretion in not continuing the hearing to permit petitioner to review Jahi's records to assist in the cross-examination of Dr. Shanahan. The court reasoned that the examinations were both under the accepted medical standards, the medical determinations were consistent, and that the detriment of a prolonged proceeding would materially outweigh any probable benefit to the court in making the limited finding required by section 7181.

The court acted consistent with the trial court in *Alvarado by Alvarado v. New York City Health & Hospitals Corp.* (N.Y.Sup.,1989) 145 Misc.2d 687, 698, 547 N.Y.S.2d 190, *order vacated and appeal dismissed as moot,* 157 A.D.2d 604, 550 N.Y.S.2d 353 (1st Dep't 1990),

where the court addressed a similar situation and stated, "In the instant case, the Alvarados were notified before a determination was made, were given an opportunity to obtain an independent medical evaluation, and were offered a chance to have the matter discussed with religious leaders and friends. Therefore, it cannot be said that the family was deprived of its due process rights to participate in the medical care of the child."

FINDING OF BRAIN DEATH UNDER HEALTH AND SAFETY SECTIONS 7180 AND 7181.

A trial court may "hear testimony and decide whether the determination of brain death was in accord with accepted medical standards." (*Dority*, 145 Cal.App.3d at 279.) The law is unclear whether the court's determination is under the preponderance of the evidence standard, the clear and convincing evidence standard, or some other standard. This court applies the clear and convincing evidence standard.

The court is guided by *In re Christopher I* (2003) 106 Cal.App.4th 533, 552, where the court addressed the standard to be applied when removing life support from a minor who was in a persistent vegetative condition. In *Christopher*, the Court of Appeal noted that the Welfare and Institutions Code requires either proof by a preponderance of the evidence or clear and convincing evidence, depending on the rights being adjudicated, and then stated, "Given the impact of this decision on Christopher, imposition of the highest standard within the Welfare and Institutions Code - the clear and convincing standard of proof - is appropriate." The court went on to review the law in different states and concluded "The evidentiary standards employed by other courts considering withholding or withdrawal of life-sustaining treatment from

incompetent patients reinforce our belief that the clear and convincing standard is the correct one."

The court notes that although *Christopher* concerned a minor in a persistent vegetative condition, and, although there are medical differences between a coma, a persistent vegetative state, and brain death, those differences pale in comparison to the difference between being legally alive and being legally dead. When a court is called on to determine whether a person has suffered brain death and is now dead under the law or can have support withdrawn and will become dead under the law, the court must make that finding by clear and convincing evidence.

The court heard the testimony of Dr. Fisher and Dr. Shanahan. Both doctors presented consistent testimony that established the accepted medical standards for determining brain death in minors. Dr. Shanahan conducted a physical examination of Jahi on December 11, 2013, and Dr. Fisher conducted an examination on December 23, 2013. Both doctors conducted their examinations consistent with the accepted medical standards and both doctors reached independent conclusions of brain death based on their application of the standards to Jahi's condition. In addition, Dr. Shanahan reviewed an EEG taken on or about December 11, 2013, and Dr. Fisher reviewed a different EEG taken on December 23, 2013, and those tests reinforced their conclusions. Dr. Fisher conducted an additional test, a cerebral profusion test, and that test was also consistent with the conclusion of brain death. This clear and convincing evidence was the basis of the court's conclusion on December 24, 2013, that Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181.

The court is mindful of the language in *Dority* that states the fact of brain death "does not mean the hospital or the doctors are given the green light to disconnect a life-support device from a brain-dead individual without consultation with the parent or guardian. Parents do not lose all

control once their child is determined brain dead," and that a parent should be fully informed of a child's condition and have the right to participate in a decision of removing the life-support devices. (*Dority*, 145 Cal.App.3d at 279-280.) (See also, Health & Safety Code section 1254.4 [requiring reasonable amount of time to accommodate family in event of declaration of brain death].) The court expressly does not address whether that consultation and opportunity for participation required by Health & Safety Code section 1254.4 occurred in this case.

APPLICABILITY OF PROBATE CODE SECTIONS 4735 AND 4736.

Petitioner's initial memorandum argued that if under Probate Code section 4735 CHO made a determination to decline to comply petitioner's instructions on the basis that it would be "medically ineffective health care or health care contrary to generally accepted health care standards," then under Probate Code section 4736 CHO had the obligation "to make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision" and had the obligation to "[p]rovide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished."

Probate Code section 4736 appears to apply only when is it arguable whether the proposed health care would be medically effective. The court finds that Probate Code 4736 does not apply after a determination of death. The court notes that Probate Code section 4736 provides for some time to move a patient and Health and Safety Code section 1254.4 provides a "reasonably brief period" for family to gather at the bedside. Therefore, both statutes provide for a brief period following a determination of brain death before a hospital can remove all support. The court makes no findings and issues no orders under Probate Code sections 4735 and 4736.

MOTION TO SEAL

The Order of December 23, 2013, stated, "The court anticipates that the hearing will be closed to the public under CRC 2.550 et seq. because it involves the medical records of a minor." On December 23 and 24, 2013, petitioner moved to close the hearing in part and to seal and/or redact certain exhibits.

The court CLOSED the courtroom and SEALS the record on the oral testimony provided by Dr. Fisher and Dr. Shanahan in which they detailed their examinations of Jahi. This testimony was provided in chambers with a court reporter present.

The court REDACTS Exhibit 1 (Dr. Fisher's examination notes) in part because the redacted portion is not pertinent to the issues before the court and Jahi's family has an overriding privacy interest in the material that outweighs the public interest in the information. The court permits disclosure of the remainder of Exhibit 1. Although the exhibit reflects Dr. Fisher's examination of Jahi, Dr. Fisher was acting as a court appointed expert on a matter that petitioner had placed at issue in this case.

The court DOES NOT SEAL Exhibits 2-5. These are documents that reflect the accepted medical standards.

The court DOES NOT SEAL Exhibit 6 (Shanahan Declaration filed 12/20/13). This is already in the public file. In addition, although it concerns the medical information of a minor it is conclusory and does not disclose private information.

The court SEALS Exhibit 7. This exhibit reflects Dr. Shanahan's and Dr. Heidersbach's pre-litigation examinations of Jahi. These doctors were acting as agents of CHO and their notes reflect the medical information of a minor.

EXTENSION OF RESTRAINING ORDER, STAY OF THIS ORDER, AND PREPARATION OF JUDGMENT.

The court ORDERS that the Temporary Restraining Order is extended through Monday, December 30, 2013, at 5:00 pm. Until that time, Respondent CHO, its agents, employees, servants and independent contractors are ordered to continue to provide Jahi McMath with the treatment and support which is currently being provided as per the current medications and physicians orders until further order of the court.

In the event that before Monday, December 30, 2013, at 5:00 pm there is a change in Jahi's physiological condition despite CHO provision of the current level of treatment and support and petitioner wants an increased level of treatment and support that CHO is unwilling to provide, then the parties may seek the assistance of the court at any time. The court has provided its contact information to counsel.

The court STAYS the effect of this order until Monday, December 30, 2013, at 5:00 pm to permit petitioner or CHO to file a petition for relief with the Court of Appeal and to seek further relief from that court.

CHO is to submit a proposed final judgment consistent with this order on or before January 9, 2014. (C.R.C. 3.1312.)

The court sets a further case management conference for 1:30 pm on January 16, 2014, in Dept 31. If the case has been resolved or all further near term proceedings will be in the Court of Appeal, then counsel may so inform the court and the court will continue the case management conference to a later date.

IT IS SO ORDERED.

Dated: January 2, 2014

Evelio Grillo
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
The foregoing instrument is a true and
correct copy of the original
on file in this office

ATTEST: MAY 12 2015
CLERK OF THE SUPERIOR COURT
By _____ Deputy

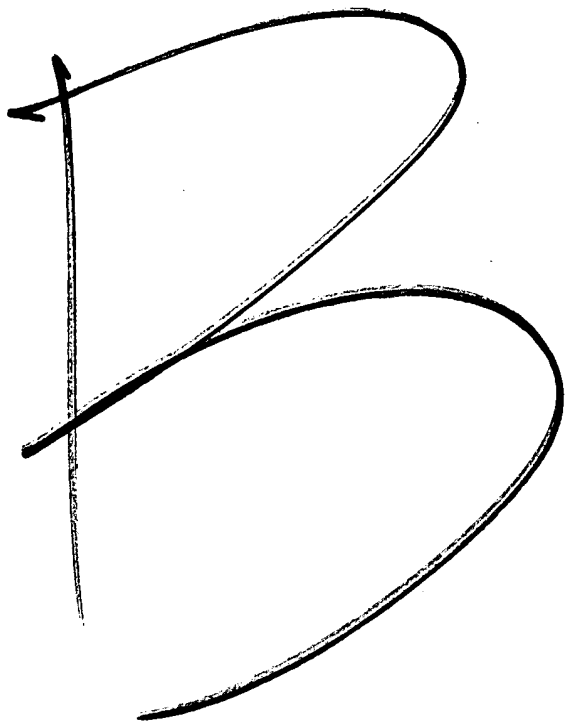

EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner, v. CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	Case No. RP13-707598 FINAL JUDGMENT DENYING PETITION FOR MEDICAL TREATMENT.

The Petition of Latasha Winkfield as mother of Jahi McMath, a minor, came on for hearing on December 23 and 24, 2013, in Department 31 of this Court, the Honorable Evelio Grillo presiding. The court issued a written order dated December 26, 2013, and an amended order dated January 2, 2014. The court now enters the following JUDGMENT:

(1) the Petition of Latasha Winkfield as mother of Jahi McMath, a minor, is DENIED

(2) the motion of petitioner to seal was GRANTED IN PART as stated in the orders dated December 26, 2013, and January 2, 2014.

(3) the motions of petitioner that respondent perform or permit surgical procedures was DENIED as stated in the order dated January 17, 2014.

Dated: January 17, 2014

Evelio Grillo
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RP13707598

Case Name: Winkfield vs. Children's Hospital Oakland

1. Order 1) on CMC and 2) Denying Request that Deft Perform or Permit Surgical Procedures
2. Final Judgment Denying Petition for Medical Treatment

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on January 17, 2014

21

Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

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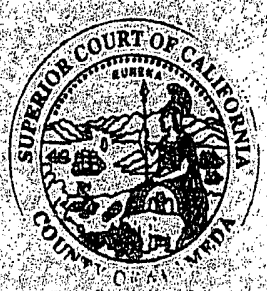
San Francisco, CA 94102

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
The foregoing instrument is a true and correct copy of the original on file in this office

ATTEST: MAY 11 2015
CLERK OF THE SUPERIOR COURT
By _____ Deputy



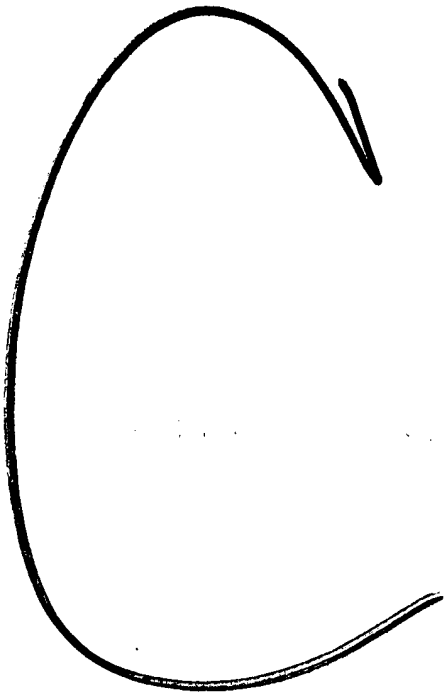


EXHIBIT C

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Attorneys for Plaintiff
LATASHA WINKFIELD

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

LATASHA WINKFIELD,

Plaintiff,

v.

CHILDREN'S HOSPITAL, et al.

Defendants.

Case No.: PR13-707598

WRIT OF ERROR CORUM NOBIS AND MEMORANDUM REGARDING COURT'S JURISDICTION TO HEAR PETITION FOR DETERMINATION THAT JAHI MCMATH IS NOT BRAIN DEAD

INTRODUCTION

Jahi McMath, by and through her Guardian Ad Litem and Mother, Nailah (Latasha) Winkfield, hereby petitions this Court, pursuant to a Writ of Error Corum Nobis, to reverse the brain death determination of Jahi McMath. In the alternative, Plaintiff pleads under the Court's inherent power to affect the interests of justice, that the Court has powers to affect a remedy where, as is here, dramatic changes have occurred making the previous determination now erroneous.

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Petitioner could not have known of these conditions, i.e., unequivocal evidence of brain existence and function, at the time the Court made its finding. Indeed, no one could as Jahi's brain, according to Dr. Fischer, as confirmed by Cerebral Blood Flow Studies and an EEG (Petitioner's attorney has requested these studies but has of yet received the raw data and images for the scientists to review) at that time, appeared to have met the Brain Death Criteria. Moreover, in the history of the State of California, and apparently the U.S., there has been no case where a supposedly brain dead individual was ever removed not from a vent, but instead, from the facility that wanted to remove the vent. There is but one other case, in the Middle-East, where a young woman, declared brain dead by a host of U.S. doctors, was later examined and treated by the International Brain Research Foundation and she was removed from the stigma of a brain death diagnosis, to an altered state of consciousness.

As can be seen from the Declaration of Christopher Dolan, and that of Phil De Fina PhD, Plaintiff has acted with all due diligence (testing having been preformed less than one week ago) to bring this matter before the court and the interests of justice require the Court enter a New Judgement finding that Jahi does not meet the criteria for brain death.

Petitioner supports this Petition with multiple Declarations from Board Certified experts in the area of Brain Function and Brain Death. Plaintiff is publishing to the Court, and to the world, the evidence which supports these conclusions, as well as a video depicting Jahi McMath following her mother's command. Personal medical details are being revealed, without a wholesale waiver of Jahi's Privacy Rights, to satisfy doubters and to allow others to evaluate the findings of the experts.

It should be noted that these are not Petitioner's experts, these are experts who have stepped forward with an interest in brain research and out of a humanitarian gesture as medical professionals dedicated to the care of patients such as Jahi McMath. No payment for expert opinions has been made by Petitioner or her Attorney.

In the alternative Petitioner provides analysis as to why, using other, statutory mechanisms the Court may exercise its jurisdiction in the interests of the furtherance of justice.

PETITIONER OBJECTS TO CHILDREN'S HOSPITAL PARTICIPATING IN THESE HEARINGS THEY HAVE NO STANDING

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It is axiomatic that in order for a party to have standing as to come before the court to argue for or against a proposition or motion, they must have standing, an actual interest in the instant controversy. Children's Hospital has no such interest. Their standing during the time of the Injunction Hearings, which played out before this Court in December and January of 2013-2014, was based on the fact that Jahi McMath was within their hospital. Plaintiff sought an Injunction against Children's Hospital removing Jahi's life support. Jahi was at that point characterized by Children's Hospital as merely ventilating a dead body. Additionally, they opposed the Petitioner's efforts to seek a Court Mandate that they care for Jahi as a living human being so as to provide her with basic medical care such as food, insertion of a trachea tube, and other treatments which would have provided Jahi with the best opportunity to improve her condition. Even though Jahi was preserved, thankfully, by the injunction and its extension, and finally the removal of Jahi from Children's Hospital Oakland, Children's Hospital's interest in this case ended when Jahi's body was signed over to the Coroner.

Other than seeking to be right at any costs to avoid some public embarrassment, and to avoid potential liability for the harms caused to Jahi and her family (which could be greatly reduced if they can continue to maintain the artifice of Jahi's death or to advance some agenda other than the specific issues concerning Jahi McMath), Children's Hospital has no "dog in this fight" now.

Petitioner is not seeking to be re-admit to Children's hospital, (indeed, far from it), she does not seek to compel Children's Hospital to do anything. Instead, Petitioner and her daughter, Jahi, seek mercy and justice from this Court to reverse an error that was unknown to anyone at the time of the Court's Determination, that Jahi's "brain death" was a *complete and irreversible cessation of all neurological function*, including at the Brain Stem. So, what justifiable rational does Children's have to argue to keep the shroud of death surrounding Jahi? The Court should rule that Children's Hospital has no standing in the matter.

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WRIT OF CORAM NOBIS[1]

Petitioner's counsel, cross-eyed from researching for a case of a brain death person having their death determination reversed, after days of study, can find no case like the one before the Court. The rational is simple, this is because this has never been attempted or done before. The lack of case law is not a reflection of the fact that no such remedy should be available to Jahi, under the law, it reflects more on how our society has reacted to the pronouncement of brain death and the emergence of protocols involving organ transplant that require prompt determination and rapid harvesting of organs while the heart is pumping blood to the healthy organs. Transplantation is a vital and valuable component to treating the sick in our society, indeed Petitioner's counsel is a registered organ donor. It is not organ donation as a philosophy which has led to this death of evidence and case law, it is the manner in which it must be executed so as to have maximum effect, quickly after brain death has been determined.

Brain death is a concept that developed in the '80s when technology had gotten to the point where the heart could still beat ,yet doctors, needing legal, ethical moral authority through a bright line determination, to determine when organs could be harvested. This led to the Uniform Determination of Death Act in the 80's. The Uniform Determination of Death Act, stated that when one is "brain dead" they no longer have an ability to regain *any* brain activity ever and this, combined with a lack of sensation of pain, justifies organ harvesting. (The reader may find the term harvesting to be offensive. This is the term used within the transplant community).

> The writ of error coram nobis is issued to correct an error of law that is based upon some issue of fact. *People v. Reid*, 195 Cal. 249; *People v. Darcy*, 79 Cal.App.2d 683; *People v. Dale*, 79 Cal.App.2d 370, 179 P.2d 870. Whatever may be said about the inception of the writ, the recognized present purpose is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding. It is not intended as a means of revising findings based on

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[1]A most excellent law review article maybe found authored by Morgan Pickett The Writ of Error Coram Nobis in California *Santa Cara Law Review* (1990) Volume 30, Number (hereinafter "*Pickett*").

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known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence. *People v. Reid*, supra; *People v. Mooney*, 178 Cal. 525; *People v. Cabrera*, 7 Cal.2d 11, *In re Paiva*, 31 Cal.2d 503. To correct an error of fact it is often necessary to modify a legal ruling, order, judgment or decree, but it is the fact and not the law that is the subject of change. *(In re Dyer* (1948, First App. Dist.)) 85 Cal.App.2d 394, 399.)

Where the errors are of "the most fundamental character," such that the proceeding itself is rendered "invalid," the writ of coram nobis permits a court to vacate its judgments. *Hirabayashi v. United States,* 828 F.2d 591, 604 (9th Cir.1987) (quoting *United States v. Mayer,* 235 U.S. 55, 69, 35 S.Ct. 16, 19–20, (1914)). District courts have authority to issue the writ under the All Writs Act, 28 U.S.C. 1651(a), and we review a denial of the writ *de novo* as if it were a dismissal of a claim under 28 U.S.C. § 2255. *Walgren,* 885 F.2d at 1420. (*Estate of McKinney By and Through McKinney v. U.S.* (9th Cir. 1995) 71 F.3d 779, 781.)

Repeatedly it has been said that the writ of error *coram nobis* is a limited writ aimed at reaching errors of fact outside of the record and is available only where no other remedies exist. The office of the writ is to bring to the attention of the trial court errors of fact, which, without negligence on the part of the defendant, were not presented to the court at the time of trial. *People v. Tuthill*, 32 Cal.2d 819, 821; People v. Gennaitte, 127 Cal.App.2d 544, 548.
(*People v. Gamboa* (1956) 144 Cal.App.2d 588, 590.)

The writ of error coram nobis may be used following judgment in a civil proceeding. In *Phelan v. Tyler*, 64 Cal. 80, 82, 83 the Court upheld the use of the Writ in a civil proceeding. Hence a proceeding for writ of error coram nobis constitutes a novel means of attacking a judgment. (*In re Dyer* (1948) 85 Cal.App.2d 394, 400.)

Where an issue in fact has been decided, there is . . .no appeal in the English law from its decision, . . . and its being wrongly decided is not error in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does

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not, after judgment, amount to error in the proceedings. . . . But there are certain facts which affect the validity and regularity of the legal decision itself . . .Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to traverse the judgment upon writ of error. To such cases the writ of error coram nobis applies; "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment.'[2]

The function of the Writ is to bring to the attention of a court errors of fact which could not have been discovered by the petitioner at an earlier date, and which if known to the court at the time would have prevented entry of the judgment. (*Pickett at p.15 citing e.g., People v. Shipman*, (1965) 62 Cal. 2d 226, 230,; *People v. Tuthill*, (1948) 32 Cal. 2d 819, 821,; *Reid,* 195 Cal. at 255.

Neither Dr. Fischer, Petitioner or even Children's Hospital could have known that an error had been committed stating that all and irreversible brain death had occurred. As no patient has ever lived this long before, and Jahi is a pediatric patient, this fact could only have been and was just actually, discovered in the last month. Petitioner has acted with all due haste (within 4 days).

This error could not have been brought to the attention of the Court within the time to appeal as there was no way to have tested Jahi during that period and, even if she had been tested, the findings would not be as they are now, nine months later. It is this passage of time which creates the evidence that total and irreversible is an error that no one could have predicted. Had the court been informed of what we know now, the court would have ruled Jahi was not brain dead because, as is the case now, she would not have met the definition of brain death.

A petition for a Writ of Error Coram Nobis is the legal equivalent of a simple motion to vacate a judgment. (*Pickett* at 19)

Although the writ may be sought in both criminal and civil actions, the proceedings for it are civil in nature. A petition for the writ does not initiate a new adversary suit or an independent proceeding; it instead is a continuation of the original proceeding. (*Pickett* at 21 *citing In re Paiva (1949) 51 Cal.2d 505.*) It allows the court to reconsider the judgment in light of the evidence of which

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[2] *Pickett* citing

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the Court was previously unaware. (*Pickett* at 23 fn.108 (*citations omitted*).

Herein, for the reasons stated, i.e., that no one could have known during the hearing (which ran fast and furious, with one day only for the independent Neurological exam) of the error of fact that Jahi's condition was not complete and irreversible cessation of al neurological function, including the Brain Stem. Now, in the presence of the facts provided for by Declarations of multiple, independent experts from numerous highly regarded institutions, the Judgment that Jahi McMath is brain dead can no longer stand. It is within this Court's power, jurisdiction and sound judgment to reverse the determination to clear Jahi from the dark cloud of death and to restore her to humanity so she can be treated not as "the body" but as Jahi.

THE COURT HAS JURISDICTION AS A MATER OF CONTROLLING THE JUST ADMINISTRATION OF IT'S ORDER

On December 24, 2013, the Court concluded that there was "clear and convincing" evidence that Jahi had suffered brain death, as defined under *Health and Safety* Code 7180 and 7181, and declared her dead. The question now becomes does the court still retain jurisdiction over this matter and, more specifically, to decide whether Jahi McMath is, currently, brain dead, as defined by those same code section? Petitioner submits that the Court does, indeed, have jurisdiction and that the interests of justice, which are literally those of life or death, demand that this Court exercise that jurisdiction to prevent perpetuation of a grave injustice: continuing to declare that Jahi McMath is dead when she is not.

In *Dority v Superior Court, San Bernardino* (1983) 145 Cal.App.3d 273, a 19 day old infant suffered a medical condition that led to his health deteriorating to the point he was placed on a ventilator. Later, a Cerebral Blood Flow (CBF) study and an Electroencephalograph (EEG) were done showing electro cerebral silence and an absence of blood flow to the brain. The infant's physicians determined that brain death had occurred and recommended removal of life support, i.e., a respirator. The hospital anticipated that even with respiratory support the child's bodily functions could only be maintained for several weeks. The child's organs continued to function beyond expectations and the parents chose to withhold consent to remove life support. The hospital, desirous of removing said

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support, petitioned the court for the appointment of a Temporary Guardian, the Director of the Department of Public Social Services.[3] The court appointed the guardian and, after taking unrefutted medical testimony that the child was brain dead pursuant to the statutory definition, the court declared the child dead and ordered the temporary guardian to provide consent to the healthcare providers to remove the ventilator. The parents and counsel for the minor child petitioned the court for a writ of prohibition against removing the life-support device. Before the court could act on the petition, the infant's bodily functions ceased and the life-support device was removed.

The court, in addressing whether the petition was rendered moot by the child's demise held that "[i]n light of the important questions raised by this case, this court has the discretion to render an opinion where the issues are of continuing public interest and are likely to recur in other cases." (*Dority at* 276.) The court further held that "[the novel medical, legal and ethical issues presented in this case are no doubt capable of repetition and therefore should not be ignored by relying on the mootness doctrine. This requires us to set forth a framework in which both the medical and legal professions can deal with similar situations." (*Id.*) *Dority* recognized "the difficulty of anticipating the factual circumstances under which a decision to remove life-support devices may be made, [and] determined that it would be "unwise" to deny courts the authority to make such a determination when circumstances warranted." (*Dority* at 275.)

In addressing the question of the court's jurisdiction over the review of the determination of brain death, *Dority* states "[the jurisdiction of the court can be invoked upon a sufficient showing that [1] it is reasonably probable that a mistake has been made in the diagnosis of brain death or [2] where the diagnosis was not made in accord with accepted medical standards." (*Dority* at 280.) *Dority* is silent on what showing is necessary to establish "reasonable probability of a mistake."

Like Dority, Jahi McMath's case was, and remains, a matter of international importance raising significant issues of public concern. Therefore, as the court in *Dority* continued to have jurisdiction following the complete death of the baby (both circulatory and brain death), even greater rational

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[3]In *Dority* the parents were suspected to be a cause of the child's brain death and were determined not to be suitable to act in the best interests of the child.

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exists for this court to continue to exercise its jurisdiction here where Jahi's circulatory system and, indeed all of her organs, continue to function and world class experts in Neurology and Brain Death will provide evidence that Jahi *no longer* meets the definition of brain death as she has neuralgic function.

As stated by *Dority , when it is reasonably possible that a mistake has been in the diagnosis of brain death,* the court has jurisdiction to hear the matter. Here, Petitioner has irrefutable evidence, that Jahi is no longer brain dead. Petitioner does not believe it necessary to challenge Dr. Fischer's diagnosis of the caseation of brain activity, at that time. The Petitioner challenges the determination that it was *irreversible* and believes such a proclamation was mistaken. Clearly, Jahi's condition was not "irreversible." This is not a failing of Dr. Fischer, there simply is no case, other than Jahi McMath's, where a pediatric patient has been diagnosed as brain dead but has continued to receive medical treatment and survived this long.

Petitioner, is in possession of current evidence, including MRI evidence of the integrity of the brain structure, electrical activity in her brain as demonstrated by EEG, the onset of menarche (her entering into puberty as evidenced by the beginning of menstruation) and her response to audible commands given by both her mother and an examining physician demonstrating that Jahi McMath's brain death was not "irreversible." Petitioner's experts will testify that Jahi may have, at the time of Dr. Fischer's examination, demonstrated evidence of brain death due to the swelling of her brain following the traumatic events that led to her suffering a loss of oxygen to her brain but, now that the swelling has receded, and she has had time to receive proper post incident medical care, she has demonstrable brain function.

DUE PROCESS

This Court, in it's Order of December 26. 2013, the Court offered the following analysis canceling Jahi's due process rights;

> Regarding due process, the Court has considered the following general principles as stated in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal. 4th 371, 390-391:
> Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the

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resulting decision and respect the dignity of the individual subjected to the decision making process. Specifically, determination of the dictates of due process generally requires consideration of four factors: [1] the private interest that will be affected by the individual action; [2] the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; [3] the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and [4] the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The first three considerations, the private interest, the risk involved, and the dignitary interest of the proceeding, all suggest that the due process rights of the party affected by a physician's determination of death are substantial. The fourth factor, the government interest in the form of administrative burden, is addressed by the focused nature of the inquiry under Health and Safety Code sections 7180 and 7181.

Jahi's right to due process requires that this court provide a forum for this matter to be heard and for her determination of death to be reversed.

THE COURT HAS JURISDICTION PURSUANT TO CCP § 128

California Code of Civil Procedure, Section 128, declares that the Court has inherent power "to amend and control its process and orders so as to make them conform to law and justice." (CCP § 128(8).)

Courts have the inherent power to create new forms of procedure in particular pending cases. "The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function." (Witkin, Cal. Procedure (2d ed.) Courts, s 123, p. 392.) This right is codified in Code of Civil Procedure section 187 which provides that when jurisdiction is conferred on a court by the Constitution or by statute ". . . all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." (See also Code Civ.Proc., s 128(8).) As the Supreme Court said in People v. Jordan, 65 Cal. 644 at p. 646, 4 P. 683 at p. 684, "in the absence of any rules of practice enacted by the legislative authority, it is competent for the courts of this State to establish an entire Code of procedure in civil cases, and an entire system of procedure in criminal cases, ..." (See also Citizens Utilities Co. v. Superior Court, 59 Cal.2d 805, 31 Cal.Rptr. 316, 382 P.2d 356 (1963), recognizing the inherent power of courts to adopt "any suitable method of practice . . . if the procedure is not specified by statute or by rules adopted by the Judicial Council.") (At p. 813, 31 Cal.Rptr. at 322, 382 P.2d at 362).

(James v. Superior Court (1978) 77 Cal.App.3d 169, 175.)

The instant petition is truly a case of first impression not only in California but, based on an extensive search of all Federal authorities, nationally. There simply has been no case in which brain death was determined and the patient managed to remove themselves, before Cardiovascular Death,

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from the facility which had received permission from the court to discontinue Life Support. This Court has the inherent power to adopt the requested process, as, in the absence of the Court exercising its inherent power, Jahi McMAth would continue to be declared legally brain dead when she isn't. *Health and Safety Code* Section 7181 specifically limits the legal determination of brain death to circumstances where there is "***irreversible cessation of all functions of the entire brain, including the brain stem.***" This Court, having made such determination, must consider the change in circumstances presented by Plaintiff's evidence which shows that Jahi's condition is now one in which Jahi now has brain function. Should the court refuse to do so Jahi would be barred from regaining her rightful place in our society as a living person.

CONCLUSION

In the interests of justice, and Jahi McMath's dignity and right to be considered a living human being, rather than, as she has been portrayed, a corpse, this Court must grant Petitioner Nailah Winkfield's Writ of Error Coram Noblis petition for hearing/reconsideration of this court's determination of her being brain dead pursuant to California Health and Safety Code Section 7181.

DATED: October 3, 2014

THE DOLAN LAW FIRM

By: _____

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LATASHA WINKFIELD

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

LATASHA WINKFIELD, an individual parent and guardian of Jahi McMath, a minor Plaintiff, v. CHILDREN'S HOSPITAL & RESEARCH CENTER AT OAKLAND, Dr. David Durand M.D. and DOES 1 through 10, inclusive Defendants.	Case No. PR13-707598 **PROOF OF SERVICE**

PROOF OF SERVICE

Latasha Winkfield v. Children's Hospital & Research Center at Oakland, et al.

Alameda County Superior Court Case No. PR13-707598

I, Alma Maciel, declare that:

I am employed in the County of San Francisco, State of California. I am over the age of 18, and am not a party to this action. My business address is 1438 Market Street, San Francisco, California 94102. On October 3, 2014, I served:

WRIT OF ERROR CORUM NOBIS AND MEMORANDUM REGARDING COURT'S JURISDICTION TO HEAR PETITION FOR DETERMINATION THAT JAHI MCMATH IS NOT BRAIN DEAD;

DECLARATION OF PHILIP DE FINA, Ph.D., IN SUPPORT OF PLAINTIFF'S WRIT OF ERROR CORAM NOBIS AND REQUEST FOR REVERES OF JUDICIAL DETERMINATION OF BRAIN DEATH OF JAHI McMATH;

DECLARATION OF CALIXTO MACHADO, M.D., IN SUPPORT OF PLAINTIFF'S IN SUPPORT OF PLAINTIFF'S WRIT OF ERROR CORAM NOBIS AND REQUEST FOR REVERSE OF JUDICIAL DETERMINATION OF BRAIN DEATH;

DECLARATION OF CHARLES J. PRETIGIACOMO, M.D., IN SUPPORT OF PLAINTIFF'S WRIT OF ERROR CORAM NOBIS AND REQUEST FOR REVERES OF JUDICIAL DETERMINATION OF BRAIN DEATH OF JAHI McMATH;

DECLARATION OF ELENA B. LABKOVSKY, PH.D

in said cause addressed as follows:

Douglas C. Straus Brian W. Franklin Noel M. Caughman ARCHER NORRIS A Professional Law Corporation 2033 North Main St., Suite 800 Walnut Creek, Ca. 94596-3759 Facsimile: (925) 930-6620 dstraus@archernorris.com aalter@archernorris.com bfranklin@archernorris.com	*Attorneys for Defendant Children's Hospital & Research Center at Oakland*
David Nefouse Andrea Weddle Alameda County Sheriff's Office Coroner's Bureau 480 4th Street Oakland, CA 94607 david.nefouse@acgov.org andrea.weddle@acgov.org	*Alameda County Coroner's Office*

California Department of Public Health Office of Legal Services 1415 L Street Sacramento, CA 95814	*California Department of Public Health*

/XX/ **(BY OVERNIGHT MAIL)** By enclosing a true copy of the documents in a Fedex envelope addressed to the above recipient(s), sealing and depositing the envelope, with delivery fees prepaid or provided for, and instructions to deliver overnight, at a box maintained by Federal Express in San Francisco, California following ordinary business practices.

/XX/ **(BY ELECTRONIC MAIL)** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above.

/ / **(BY MAIL)** By placing a true copy thereof enclosed in a sealed envelope. I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at San Francisco, California, following ordinary business practices.

/ / **(BY PERSONAL SERVICE)** By placing a true copy thereof enclosed in a sealed envelope. I caused each such envelope to be delivered by hand to the addressee(s) noted above.

/ / **(BY PROFESSIONAL MESSENGER SERVICE)** By placing a true copy thereof in a sealed envelope, and causing said envelope to be delivered by professional messenger service to the addressee(s) listed above.

/ / **(BY FACSIMILE)** I caused the said document to be transmitted by facsimile machine to the number indicated after the addressee(s) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 3, 2014, at San Francisco, California.

Alma Maciel

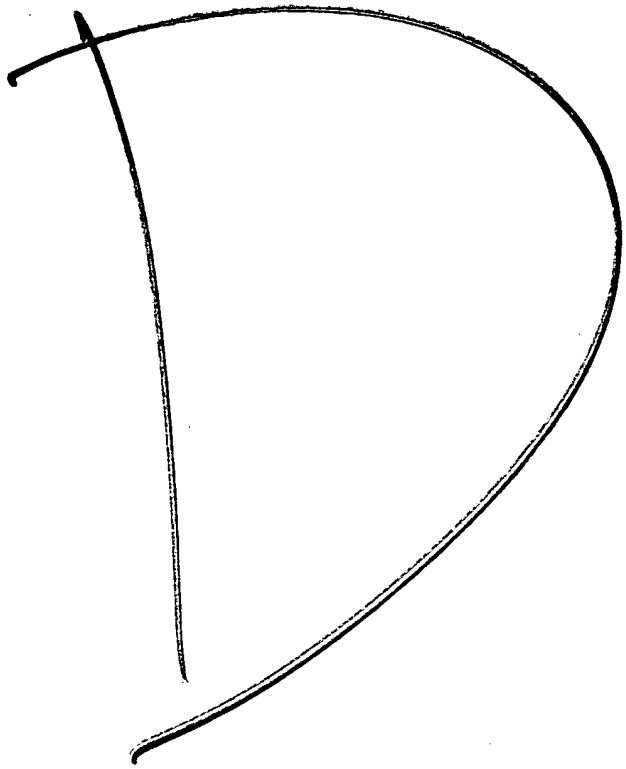

EXHIBIT D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner, v. CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	Case No. RP13-707598 ORDER FOLLOWING CASE MANAGEMENT CONFERENCE. Date: 9/30/14 Time: 1:30 pm Dept 31

The court held a case management conference at 1:30 pm on Tuesday, September 30, 2014. Christopher Dolan appeared for the Petitioner. Robert Straus appeared for Respondent. County counsel David Nefouse was present, but not appearing, on behalf of the Alameda County Coroner.

BACKGROUND.

On December 9, 2013, Jahi McMath, a thirteen year old child, had a tonsillectomy performed at Children's Hospital of Oakland ("CHO"). On December 11 and 12, 2013, Dr. Robert Heidersbach, and Dr. Robin Shanahan examined Jahi and concluded that she had suffered brain death under accepted medical standards.

On December 20, 2013, Petitioner filed this action seeking to compel Children's Hospital to provide medical treatment to Jahi. The parties agreed to an examination of Jahi by Paul Fisher MD, the Chief of Child Neurology for the Stanford University School of Medicine to provide an independent opinion pursuant to Health and Safety Code section 7181. Dr. Fisher examined Jahi the afternoon of December 23, 2013. Dr. Fisher opined that Jahi was brain dead under accepted medical standards. On December 24, 2014, the court held a hearing and then announced from the bench that the court's order was to deny the petition for medical treatment.

On December 26, 2014, the court issued a written order that denied the petition for medical treatment. In the course of addressing the claims in the petition, the court found that Jahi had suffered brain death as defined by Healthy and Safety Codes 7180 and 7181.

On January 3, 2014, the court held a hearing and issued an order that denied Petitioner's motion for a court order ordering either that Respondent insert a feeding tube and a tracheal tube into the person of Jahi McMath or that Respondent permit Petitioner to have a physician insert a feeding tube and a tracheal tube into the person of Jahi McMath at the hospital. In explaining that decision, the court stated, "Jahi McMath has been found to be brain dead pursuant to Health and Safety Code sections 7180-7181."

On January 17, 2014, the court entered a "Final Judgment" in this case. The judgment states, in part, "the Petition of Latasha Winkfield as mother of Jahi McMath, a minor, is DENIED" and "the motions of petitioner that respondent perform or permit surgical procedures was DENIED as stated in the order dated January 17, 2014."

On Wednesday September 24, 2014, counsel for petitioner sent an email to the court that stated:

Dear Clerk in Department 31

From preliminary information I have received, to be soon verified, I believe that I will be asking the court to reverse its ruling on brain death. As there is no other party with standing (the hospital was, dismissed after Jahi was released and we are not seeking to have her re-admitted - therefore Children's no longer has an interest), I expect to do this by ex-parte application pursuant to CCP Section 128(8)(B). I would request a hearing date next Thursday and would like to know what day the court would require briefing to be submitted by. I intend to have declarations from various healthcare providers (experts in Neurology, EEG's and Neuro Science) and live testimony from two expert witnesses. I also expect to submit video/photo evidence to the court.

I have made no announcements to any press as of this time but they are bound to catch wind so I also would like to confirm that Judge Grillo would hear the matter in Department 31 rather than some other courtroom where we can use a projector or TV to present evidence of a visual nature.

Please tell the Court that I understand that this matter placed a great strain on the court previously and I want to try and approach this deliberately and not by surprise to the Court.

On Thursday, September 25, 2014, the court notified counsel that it would set a case management conference for 1:30 pm on Tuesday , September 30, 2014.

On Friday September 26, 2014, counsel for petitioner sent an email to the court and all parties that stated:

Can we move the hearing date From September 30, 2014 to October, 2, 2014. I have experts flying in for this hearing and they are only available on Thursday. Also, will the court allow my experts to give testimony and if the hearing is continued to Thursday, when are the written materials due. Thank you for your assistance with this matter.

On Friday September 26, 2014, the court through its research attorney sent an email to the court and all parties that stated:

///

Counsel and Dr. Fisher,
I have spoken with Judge Grillo. The CMC will remain on calendar for Tuesday, September 30, 2014. It is a CMC and is not a hearing on the merits of any motion. The court does not expect to hear testimony. The court will want the parties to address this court's jurisdiction to entertain any motion given that judgement was entered in January 2014. Assuming jurisdiction, there might be other case management issues that the court will want to address.

The court held the CMC on Tuesday, September 30, 2014.

ORDER.

The CMC on September 30, 2014, was a CMC and there was no motion or application pending. Petitioner now asserts that there is new evidence and intends to seek an order in this case that Jahi McMath has not suffered brain death.

Petitioner must serve and file her motion or application on or before 2:30 pm on Friday, October 3, 2014.

Respondent CHO must serve and file any opposition on or before 12:00 noon on Wednesday , October 8, 2014.

Interested third parties such as the Alameda County Coroner and the California Department of Public Health may serve and file statements on or before 12:00 noon on Wednesday, October 8, 2014. The court will consider such statements as in the nature of amicus curiae filings. (*Lopez v. Nissan North America, Inc.* (2011) 201 Cal.App.4th 572, 579-590 ["the trial court issued a notice to the California Attorney General and the Department requesting the Department's position on" the relevant issue]; *Blue Cross of California, Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1246 ["The DMHC filed an amicus curiae brief in support of defendants' demurrer"].)

The court will hear Petitioner's motion or application on Thursday October 9, 2014, at 9:00 am. The court will hear the matter on the papers, including any audiovisual recordings. The court will not hear live testimony. (CRC 3.1306.)

The court ORDERS petitioner to give notice of this order to the Alameda County Coroner and the California Department of Public Health in a manner intended to permit them to participate in the hearing .

The court ORDERS that all of the above papers be served by email, by same day delivery, or by overnight delivery.

At the hearing on October 9, 2014, the court will consider several procedural matters in addition to hearing Petitioner's motion or application. To assist the parties in addressing the court's concerns, the court sets out its tentative analysis below. The analysis is below is expressly tentative and is not an order of the court. (*Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300 ["a trial court's tentative ruling is not binding on the court"].)

Tentative thoughts on jurisdiction. The court entered judgment in this case on January 17, 2014. The general rule is that the court loses jurisdiction on the entry of judgment. *Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177, states:

> Once a trial court makes a decision after regular submission, it has no power to set aside or amend its ruling for judicial error except under appropriate statutory proceedings. ... A judgment is a final determination of the rights of the parties in an action or proceeding. ... A judgment is final in this sense when it terminates the litigation between the parties on the merits and leaves nothing in the nature of judicial action to be done (other than questions of enforcement or compliance). ... After judgment a trial court cannot correct judicial error except in accordance with statutory proceedings.

Where, however, the plaintiff for petitioner sought and obtained injunctive relief, then the court retains jurisdiction to modify the relief "when the ends of justice will be thereby served." (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1079.) (See also *Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 404].) The court could, arguably, modify the relief granted. There are two problems with this: (1) the court denied the petition and did not grant relief and (2) petitioner is not seeking to modify the relief sought previously by seeking an order directing Children's Hospital to provide new or different medical services to Jahi McMath.

Tentative thoughts on notice of claims against the proper respondents. A complaint or petition must identify all necessary parties as defendants or respondents. (CCP 389(a).) A complaint or petition must also identify the claims in a case. (CCP 425.10.) Although a party may add parties and may amend or supplement a complaint, a party at a hearing on the merits cannot pursue claims against non-parties or seek relief that was not identified in the complaint or petition. To permit otherwise would be to deny the real parties in interest notice of the claims asserted and an opportunity to oppose the claims.

The petition in this case sought to compel Children's Hospital to provide services to Jahi. Petitioner now seeks to compel some state entity, presumably the Alameda County Coroner or the California Department of Public Health, to void Jahi McMath's death certificate. Petitioner therefore seeks to assert new claims against entities that were and are not parties to this case. It would seem that if Petitioner were to seek an order in this case that Jahi is not brain dead, then Petitioner would need to supplement the petition to name the interested parties and to state her new claim. (CCP 464.) The court has found no case law addressing whether a party may move to file a supplemental petition or complaint after entry of judgment.

Tentative thoughts on access to the courts and due process. Petitioner argues that this court's order of December 26, 2013, decided that Jahi McMath had suffered brain death and that Petitioner therefore must return to this court in this case to seek relief. The fact that this case resolved many issues concerning Jahi does not, however, mean that this case is a procedural vehicle for all future legal issues concerning Jahi.

Health and Safety Code section 103225 et seq sets out a procedure for amending a record of death. The California Department of Public Health Vital Records has a form "Affidavit to Amend a Death Record." (Form VS 24 (Rev 1/08.).)[1] Petitioner may seek relief from the California Department of Public Health. If Petitioner is not satisfied with the result at the California Department of Public Health, then Petitioner may file a petition for a writ under CCP 1095 or CCP 1094.5.

Petitioner could file an action asserting a claim of some form against appropriate defendants (E.g., California Department of Public Health Vital Records, Alameda County Coroner, etc.) seeking declaratory and/or injunctive relief.

The fact that this court made a finding of brain death based on the evidence presented in December 2013 would not appear to prevent this court, or some other court, or the California Department of Public Health from reaching a different conclusion based on new facts. California law on claim preclusion and issue preclusion permits "reexamination of the same questions between the same parties where in the interim the facts have changed or new facts have occurred which may alter the legal rights of the parties." (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230.)

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[1](http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/CorrectingorAmendingVitalRecords.aspx)

The court expresses no opinion on the proper procedural vehicle for petitioner to request a determination that Jahi McMath has not suffered brain death, is not deceased under the law, and that her death certificate should be voided. The court's tentative thinking is that the issue is not presented properly in this case.

Dated: October 1, 2014

Evelio Grillo
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RP13707598

Case Name: Winkfield vs. Children's Hospital Oakland

1) Order Following Case Management Conference

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2014
~~September 29, 2014~~

Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

Dolan, Christopher B.
The Dolan Law Firm
1438 Market Street
San Francisco, CA 94102__

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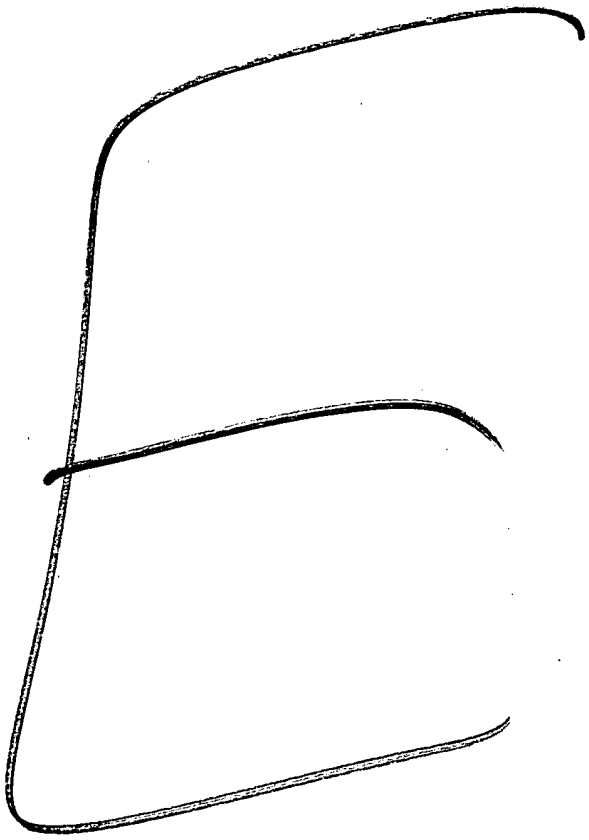


SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner, v. CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	Case No. RP13-707598 ORDER APPOINTING DR. PAUL FISHER AS COURT EXPERT WITNESS

On September 30, 2014, Petitioner Latasha Winkfield ("Petitioner") petitioned this court to hold a hearing regarding the court's jurisdiction to allow Petitioner to provide new evidence that Jahi McMath, is not "brain dead" as previously found by the court. The court has scheduled a hearing for 9:00 a.m. on October 9, 2014 in Department 31.

Pursuant to Evidence Code section 730, when it appears to the court that expert evidence is or may be required by the court or by any party to the action, the court on its own motion may appoint an expert to investigate, to render a report, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence may be required.

After receiving Petitioner's moving papers on October 3, 2014, the court determined that such expert evidence is required in this matter. In its prior December 23, 2013 order, the court

appointed Dr. Paul Graham Fisher as the court appointed expert to conduct an independent examination of Jahi McMath pursuant to Health and Safety Code section 7181. Dr. Fisher performed an examination of Jahi McMath on December 23, 2013. Based on Dr. Fisher's previous examination of Jahi McMath as the court appointed independent expert and the court's determination that further expert medical evidence is required by the court in this matter, IT IS HEREBY ORDERED that the court appoints Dr. Paul Graham Fisher as the court appointed expert witness.

Attached to this order are: (1) Dr. Fisher's curriculum vitae, and (2) Dr. Fisher's letter dated October 6, 2014, which includes Dr. Fisher's examination and consultation finding of Jahi McMath on December 23, 2013, and a copy of the criteria for brain death in a child posited in Pediatrics 2011; 128;e720-740.

Dated: October 6, 2014

Evelio Grillo
Judge of the Superior Court

October 6, 2014

The Honorable Evilio M. Grillo
Superior Court of Alameda County California

Dear Judge Grillo:

I have reviewed the five (5) declarations provided to me your court offices on October 3, 2014, specifically declarations of D. Alan Shewmon, M.D.; Philip De Fina, Ph.D.; Charles J. Prestigiacomo, M.D.; Calixto Machado, M.D.; and Elena B. Labkovsky, Ph.D.

In order for you to review and interpret those declarations, I provide below a number of facts and thoughts, raised by those documents.

1. Criteria for brain death in a child are those posited in *Pediatrics* 2011;128:e720-740 (attached), as endorsed by the American Academy of Pediatrics, Child Neurology Society, American Academy of Neurology, and numerous other professional societies. "The American Academy of Neurology's Practice Parameters for Determining Brain Death in Adults," as referenced by Dr. Shewmon, and "AMA (American Medical Association) guidelines," as referenced by Dr. Prestigiacomo are not the relevant guidelines in the instance of Jahai McMath.

2. The diagnosis and determination of brain death requires serial neurological examinations performed in person by different attending physicians. No records of any on-site or in-person serial neurological examination of Jahai McMath, performed by a physician, have been presented to me via these declarations.

3. Videos of hand and foot movements, coincident with verbal commands heard on audio, cannot affirm or refute brain death, and are not substitutes for in-person serial neurological examinations by a physician.

4. No apnea test has been performed or reported in the declarations, as required for a determination of brain death.

5. A repeat apnea test would not cause harm to Jahai McMath.

6. Dr. Prestigiacomo has referred to a "sleep apnea test," and that is not the correct examination in the determination of brain death.

7. A "flat" electroencephalogram (EEG), or electro-cerebral silence, is not required for the determination of brain death (see *Pediatrics* 2011;128:e720-740). The EEG performed on 9/1/14 was not performed in standard conditions, but rather at an apartment and Dr. Machado does note artifacts, which he attributes to movement. Electrical artifacts cannot be excluded as the cause of reported electrical activity, but again, electro-cerebral silence is not requisite to the determination of brain death.

8. No cerebral blood flow radionuclide brain scan has been performed or reported in the declarations, and that is the test used to determine cerebral blood flow in order to assist in the determination of brain death, not magnetic resonance angiography (MRA) (see *Pediatrics* 2011;128:e720-740).

9. MRA is not a technique used to determine cerebral blood flow.

10. Magnetic resonance imaging (MRI), as performed on 9/26/14, provides a structural picture of the brain and is not part of the determination of brain death. A picture of persistent brain tissue inside the skull does not negate the determination of brain death. Liquefaction of the brain is not requisite to the determination of brain death. There are no specific anatomic or pathologic changes noted in brain death.

11. Heart rate analysis, as presented from 9/1/14, is not part of and not relevant to the determination of brain death.

12. Menarche and menstrual cycles are not relevant to the determination of brain death.

13. A bispectal index (BIS) monitor has no role in and is not relevant to the determination of brain death.

14. I cannot determine from the declarations whether Ms. Labkovsky has completed EEG technician certification in the United States, such as that required by the American Association of Electrodiagnostic Technologists (AAET) or American Board of Registration of Electroencephalographic and Evoked Potential Technologists (ABRET). EEG Neurofeedback Certification is not considered the appropriate certification to conduct diagnostic EEGs, such as EEGs in the determination of brain death.

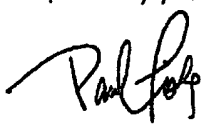
Overall, none of the current materials presented in the declarations refute my 12/23/14 examination and consultation finding (attached), or those of several prior attending physicians who completed the same exams, that Jahai McMath met all criteria for brain death. None of the declarations provide evidence that Jahai McMath is not brain dead.

I want to note on the record that I have not and will not accept any compensation for my services providing expertise in the matter of Jahai McMath, and I have no affiliations with the McMath family, UCSF Benioff Children's Hospital Oakland, or their legal counsels. I continue to extend my sympathies to the family and friends of Jahai McMath.

I hereby grant permission for the court to share this document privately or public, at your discretion. My *curriculum vitae* is attached.

I reserve the right to amend these opinions should additional materials become available for my review.

Respectfully yours,



Paul Graham Fisher, M.D.

Palo Alto, California

October 6, 2014

Children's Hospital Oakland

747 Fifty Second Street • Oakland, CA 94609 • (510) 428-3000

TREATMENT AND PROGRESS RECORD

MR # 059459

MCMATH, JAMI

10/24/00

FISHER, PAUL LOCATION PICU

DATE	TIME	
12/23/13	1845	NEUROLOGY CONSULTATION NOTE

ASKED BY COUNSEL FOR PATIENT AND CHO TO PERFORM WORKSHEET BRAIN DEATH EXAM IN BRIEF, 13 1/2-YEAR-OLD FEMALE S/P TONSILLECTOMY, COMPLICATED BY HEMORRHAGE & CARDIAC ARREST, AND THEN CATASTROPHIC BRAIN INJURY. PATIENT HAS ALREADY HAD 2 BRAIN DEATH EXAMINATIONS, ONE BY A NEUROLOGIST, ONE BY A CLINICAL CARE MD.

PREVIOUSLY, 12/11 HEAD CT - STRIKINGLY DECREASED DENSITY THROUGHOUT BRAIN, WITH EFFACEMENT OF VESSELS.

12/11 EEG - ELECTROCEREBRAL SILENCE.

TODAY, EEG - ELECTROCEREBRAL SILENCE, REVIEWED BY MYSELF.

RADIONUCLIDE CEREBRAL BLOOD FLOW STUDY/SPECT - NO BLOOD FLOW IN BRAIN.

MEDICATIONS AT PRESENT -

ANTIFICIAL TEARS

VASOPRESSIN

NO SEDATIVES

ABG EARLIER TODAY 7.45/30/71/-3.5

LABS 144 | 110 / 4.6 | 25

ON MY EXAM:

VS - T 36.5, P 70-71, BP 90-107/58-62, O_2 SAT 95-98%

ON MECHANICAL VENT, NO SPONTANEOUS RESPIRATORY EFFORT

CVR - NO RESPIRATORY VARIABILITY, NO MURMUR.

NEUROLOGIC -

MENTAL STATUS - NO EYE OPENING, NO MOVEMENT, NO VOCALIZATION

CRANIAL NERVES - FUNDI PALE, PUPILS 5 mm OU ARREFLEXIC, NO OCULOCEPHALIC REFLEX, NO OCULOVESTIBULAR REFLEX (NO

85740 (8/00)

DATE	
12/23/13 1845	RESPONSE TO CALORICS), NO RESPONSE TO FACIAL PAIN, NO CORNEAL REFLEX TO TOUCH OR AIR, NO GAG. MOTOR - FLACCID TONE THROUGHOUT. NO MOVEMENT. REFLEXES - NO DEEP TENDON REFLEXES, NO BABINSKI SIGN, NO SPINAL REFLEXES. SENSORY - NO RESPONSE TO PAIN IN EXTREMITIES X 4, OR TRUNK. AUTONOMIC - Ø RESPIRATORY, NO CARDIAC VARIABILITY, NO SPHINCTERIC REFLEX. APNEA TEST RESULTS, WITH VENT OFF, 100% O_2 START 1538 7.319/49/126/-1.4 END 1547 7.198/73.3/143.4/0.4 THAT IS, PATIENT FAILED APNEA TEST OVERALL, UNFORTUNATE CIRCUMSTANCES OF 13-YEAR-OLD WITH KNOWN, IRREVERSIBLE BRAIN INJURY AND NOW COMPLETE ABSENCE OF CEREBRAL FUNCTION AND COMPLETE ABSENCE OF BRAINSTEM FUNCTION, CHILD MEETS ALL CRITERIA FOR BRAIN DEATH, BY PROFESSIONAL SOCIETIES AND STATE OF CALIFORNIA. MOREOVER, ANCILLARY TESTS EEG SHOWS NO ELECTRICAL BRAIN ACTIVITY, AND BLOOD FLOW STUDY SHOWS NO CEREBRAL BLOOD FLOW. BY MY INDEPENDENT EXAM, CHILD BRAIN DEAD 12/23/13 AT 1845. REDACTED REDACTED Paul Fisher MD CA LIC 684211 Fisher, Paul Graham office (650) 721-5889

APPENDIX 1 Check List for Documentation of Brain Death

McMATH, JAHI DOB 10/24/00

12/23/13 1845

Brain Death Examination for Infants and Children

Two physicians must perform independent examinations separated by specified intervals.

Age of Patient	Timing of first exam	Inter-exam interval
Term newborn 37 weeks gestational age and up to 30 days old	☐ First exam may be performed 24 hours after birth OR following cardiopulmonary resuscitation or other severe brain injury	☒ At least 24 hours ☐ Interval shortened because ancillary study (section 4) is consistent with brain death
31 days to 18 years old	☐ First exam may be performed 24 hours following cardiopulmonary resuscitation or other severe brain injury	☒ At least 12 hours OR ☐ Interval shortened because ancillary study (section 4) is consistent with brain death

Section 1. PREREQUISITES for brain death examination and apnea test

A. IRREVERSIBLE AND IDENTIFIABLE Cause of Coma (Please check)

☐ Traumatic brain injury ☒ Anoxic brain injury ☐ Known metabolic disorder ☐ Other (Specify)

B. Correction of contributing factors that can interfere with the neurologic examination	Examination One		Examination Two	
a. Core Body Temp is over 95° F (35° C)	☒ Yes	☐ No	☐ Yes	☐ No
b. Systolic blood pressure or MAP in acceptable range (Systolic BP not less than 2 standard deviations below age appropriate norm) based on age	☒ Yes	☐ No	☐ Yes	☐ No
c. Sedative/analgesic drug effect excluded as a contributing factor	☒ Yes	☐ No	☐ Yes	☐ No
d. Metabolic intoxication excluded as a contributing factor	☒ Yes	☐ No	☐ Yes	☐ No
e. Neuromuscular blockade excluded as a contributing factor	☒ Yes	☐ No	☐ Yes	☐ No

If ALL prerequisites are marked YES, then proceed to section 2, ISE confounding variable was present. Ancillary study was therefore performed to document brain death. (Section 4)

Section 2. Physical Examination (Please check) NOTE: SPINAL CORD REFLEXES ARE ACCEPTABLE	Examination One Date/ Time		Examination Two Date/ Time	
a. Pupils are unresponsive to deep painful stimuli	☒ Yes	☐ No	☐ Yes	☐ No
b. Pupils are midposition or fully dilated and light reflexes are absent	☒ Yes	☐ No	☐ Yes	☐ No
c. Corneal, cough, gag reflexes are absent Sucking and rooting reflexes are absent (in neonates and infants)	☒ Yes ☐ Yes	☐ No ☐ No	☐ Yes ☐ Yes	☐ No ☐ No
d. Oculovestibular reflexes are absent	☒ Yes	☐ No	☐ Yes	☐ No
e. Spontaneous respiratory effort while on mechanical ventilation is absent	☒ Yes	☐ No	☐ Yes	☐ No

☐ The _____ (specify) element of the exam could not be performed because _____

Ancillary study (EEG or radionuclide CBF) was therefore performed to document brain death. (Section 4)

Section 3. APNEA Test	Examination One Date/ Time 1440	Examination Two Date/ Time
No spontaneous respiratory efforts were observed despite final $PaCO_2$ > 60 mm Hg and a ≥ 20 mm Hg increase above baseline. (Examination One)	Pretest $PaCO_2$: 41.0	Pretest $PaCO_2$:
No spontaneous respiratory efforts were observed despite final $PaCO_2$ ≥ 60 mm Hg and a ≥ 20 mm Hg increase above baseline. (Examination Two)	Apnea duration: 7 min	Apnea duration: min
Apnea test is contraindicated or could not be performed to completion because _____	Posttest $PaCO_2$: 73.3	Posttest $PaCO_2$:

Ancillary study (EEG or radionuclide CBF) was therefore performed to document brain death. (Section 4)

Section 4. ANCILLARY testing is required when (1) any components of the examination or apnea testing cannot be completed; (2) if there is uncertainty about the results of the neurologic examination; or (3) if a medication effect may be present.

Ancillary testing can be performed to reduce the inter-examination period however a second neurologic examination is required. Components of the neurologic examination that can be performed safely should be completed in close proximity to the ancillary test

	Date/Time	
Electroencephalogram (EEG) report documents electrocerebral silence OR		☒ Yes ☐ No
Cerebral Blood Flow (CBF) study report documents no cerebral perfusion		☒ Yes ☐ No

Section 5. Signatures

Examiner One

I certify that my examination is consistent with cessation of function of the brain and brainstem. Confirmatory exam to follow.

(Printed Name) _____ (Signature) _____

(Specialty) _____ (Page 69 License #) _____ (Date mm/dd/yyyy) _____ (Time) _____

Examiner Two

I certify that my examination and/or ancillary test report confirms unchanged and irreversible cessation of function of the brain and brainstem. The patient is declared brain dead at this time

Date/Time of death 12/23/13 1845

(Printed Name) NEUROLOGY CA 684211 (Signature) 12/23/13 1845

(Specialty) _____ (Page 69 License #) _____ (Date mm/dd/yyyy) _____ (Time) _____

Please see full handwritten note. PF

Paul Fisher MD

Fisher, Paul Graham

UC CA 684211

Office (650) 721-5589

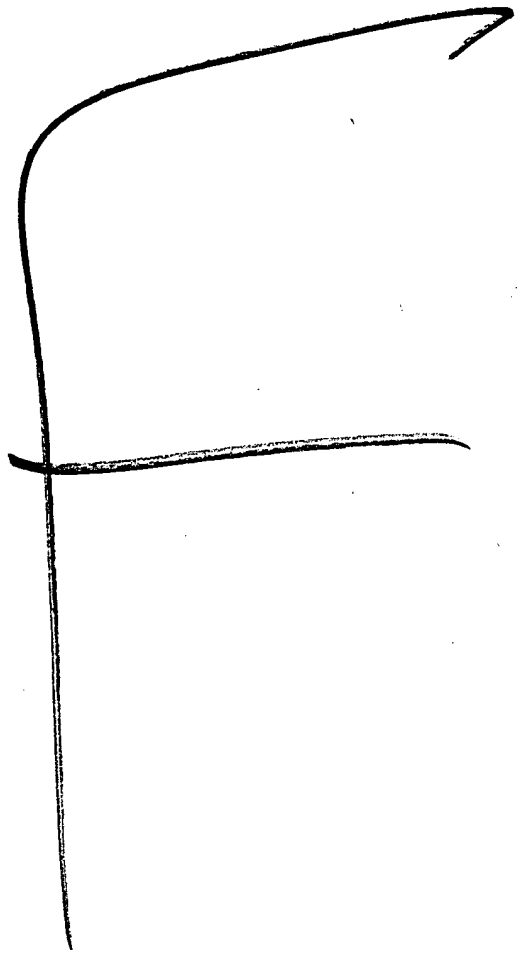


EXHIBIT F

October 6, 2014

The Honorable Evilio M. Grillo
Superior Court of Alameda County California

Dear Judge Grillo:

I have reviewed the five (5) declarations provided to me your court offices on October 3, 2014, specifically declarations of D. Alan Shewmon, M.D.; Philip De Fina, Ph.D.; Charles J. Prestigiacomo, M.D.; Calixto Machado, M.D.; and Elena B. Labkovsky, Ph.D.

In order for you to review and interpret those declarations, I provide below a number of facts and thoughts, raised by those documents.

1. Criteria for brain death in a child are those posited in *Pediatrics* 2011;128:e720-740 (attached), as endorsed by the American Academy of Pediatrics, Child Neurology Society, American Academy of Neurology, and numerous other professional societies. "The American Academy of Neurology's Practice Parameters for Determining Brain Death in Adults," as referenced by Dr. Shewmon, and "AMA (American Medical Association) guidelines," as referenced by Dr. Prestigiacomo are not the relevant guidelines in the instance of Jahai McMath.

2. The diagnosis and determination of brain death requires serial neurological examinations performed in person by different attending physicians. No records of any on-site or in-person serial neurological examination of Jahai McMath, performed by a physician, have been presented to me via these declarations.

3. Videos of hand and foot movements, coincident with verbal commands heard on audio, cannot affirm or refute brain death, and are not substitutes for in-person serial neurological examinations by a physician.

4. No apnea test has been performed or reported in the declarations, as required for a determination of brain death.

5. A repeat apnea test would not cause harm to Jahai McMath.

6. Dr. Prestigiacomo has referred to a "sleep apnea test," and that is not the correct examination in the determination of brain death.

7. A "flat" electroencephalogram (EEG), or electro-cerebral silence, is not required for the determination of brain death (see *Pediatrics* 2011;128:e720-740). The EEG performed on 9/1/14 was not performed in standard conditions, but rather at an apartment and Dr. Machado does note artifacts, which he attributes to movement. Electrical artifacts cannot be excluded as the cause of reported electrical activity, but again, electro-cerebral silence is not requisite to the determination of brain death.

8. No cerebral blood flow radionuclide brain scan has been performed or reported in the declarations, and that is the test used to determine cerebral blood flow in order to assist in the determination of brain death, not magnetic resonance angiography (MRA) (see *Pediatrics* 2011;128:e720-740).

9. MRA is not a technique used to determine cerebral blood flow.

10. Magnetic resonance imaging (MRI), as performed on 9/26/14, provides a structural picture of the brain and is not part of the determination of brain death. A picture of persistent brain tissue inside the skull does not negate the determination of brain death. Liquefaction of the brain is not requisite to the determination of brain death. There are no specific anatomic or pathologic changes noted in brain death.

11. Heart rate analysis, as presented from 9/1/14, is not part of and not relevant to the determination of brain death.

12. Menarche and menstrual cycles are not relevant to the determination of brain death.

13. A bispectal index (BIS) monitor has no role in and is not relevant to the determination of brain death.

14. I cannot determine from the declarations whether Ms. Labkovsky has completed EEG technician certification in the United States, such as that required by the American Association of Electrodiagnostic Technologists (AAET) or American Board of Registration of Electroencephalographic and Evoked Potential Technologists (ABRET). EEG Neurofeedback Certification is not considered the appropriate certification to conduct diagnostic EEGs, such as EEGs in the determination of brain death.

Overall, none of the current materials presented in the declarations refute my 12/23/14 examination and consultation finding (attached), or those of several prior attending physicians who completed the same exams, that Jahai McMath met all criteria for brain death. None of the declarations provide evidence that Jahai McMath is not brain dead.

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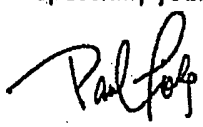
I reserve the right to amend these opinions should additional materials become available for my review.

Respectfully yours,



Paul Graham Fisher, M.D.

Palo Alto, California

October 6, 2014

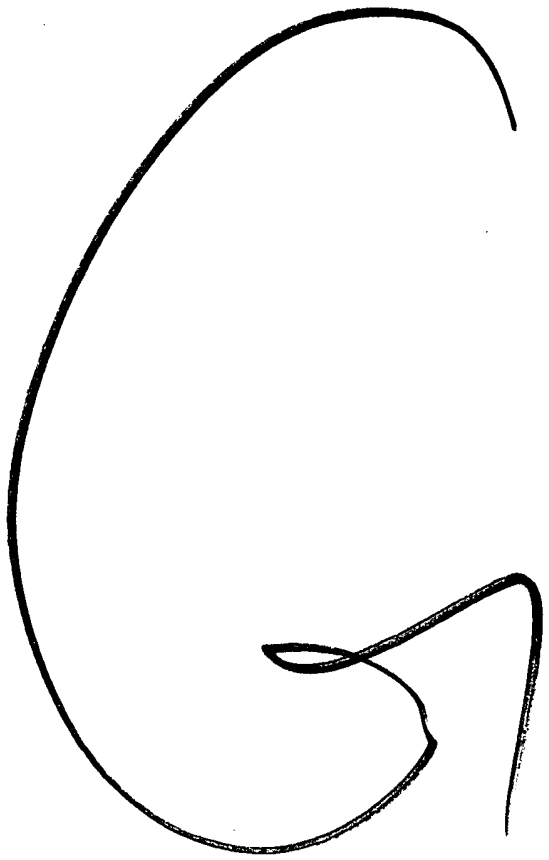


EXHIBIT G

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LATASHA WINKFIELD, the Mother of Jahi McMath, a minor Petitioner, v. CHILDREN'S HOSPITAL OAKLAND, Dr. David Durand M.D. and DOES 1 through 100, inclusive Respondents	Case No. RP13-707598 CASE MANAGEMENT ORDER (1) CONFIRMING PETITIONER'S WITHDRAWAL OF PETITION FOR WRIT OF ERROR CORAM NOBIS AND (2) STATING THERE WILL BE NO CMC ON 10/9/14.

BACKGROUND.

On December 9, 2013, Jahi McMath, a thirteen year old child, had a tonsillectomy performed at Children's Hospital of Oakland ("CHO"). On December 11 and 12, 2013, Dr. Robert Heidersbach, and Dr. Robin Shanahan examined Jahi and concluded that she had suffered brain death under accepted medical standards.

On December 20, 2013, Petitioner filed this action seeking to compel Children's Hospital to provide medical treatment to Jahi. The parties agreed to an examination of Jahi by Paul Fisher MD, the Chief of Child Neurology for the Stanford University School of Medicine to provide an independent opinion pursuant to Health and Safety Code section 7181. Dr. Fisher

examined Jahi the afternoon of December 23, 2013. Dr. Fisher opined that Jahi was brain dead under accepted medical standards. On December 24, 2014, the court held a hearing and then announced from the bench that the court's order was to deny the petition for medical treatment.

On December 26, 2014, the court issued a written order that denied the petition for medical treatment. In the course of addressing the claims in the petition, the court found that Jahi had suffered brain death as defined by Health and Safety Codes 7180 and 7181.

On January 3, 2014, the court held a hearing and issued an order that denied Petitioner's motion for a court order ordering either that Respondent insert a feeding tube and a tracheal tube into the person of Jahi McMath or that Respondent permit Petitioner to have a physician insert a feeding tube and a tracheal tube into the person of Jahi McMath at the hospital. In explaining that decision, the court stated, "Jahi McMath has been found to be brain dead pursuant to Health and Safety Code sections 7180-7181."

On January 17, 2014, the court entered a "Final Judgment" in this case. The judgment states, in part, "the Petition of Latasha Winkfield as mother of Jahi McMath, a minor, is DENIED" and "the motions of petitioner that respondent perform or permit surgical procedures was DENIED as stated in the order dated January 17, 2014."

On Wednesday September 24, 2014, counsel for petitioner sent an email to the court that stated, in part, "From preliminary information I have received, to be soon verified, I believe that I will be asking the court to reverse its ruling on brain death."

On Tuesday, September 30, 2014, the court held a case management conference to discuss procedural matters. On Wednesday, October 1, 2014, the court entered a written order that set a briefing schedule for any motion or application that petitioner might bring and outlined the court's procedural concerns.

On Friday, October 3, 2014, Petitioner filed a petition for a writ or error coram nobis. The hearing was scheduled for Thursday, October 9, 2014.

On Monday, October 6, 2014, the court entered an order appointing Paul Fisher MD as the court's independent expert under Evidence Code 730. This order attached a letter from Dr. Fisher explaining his concerns with the evidence presented in support of the petition for a writ of error coram nobis.

On Wednesday, October 8, 2014, Petitioner filed an objection to the court's order appointing Paul Fisher MD as the court's independent expert and separately filed a notice of motion to continue the hearing set for Thursday, October 9, 2014.

On Wednesday, October 8, 2014, Petitioner sent an email to the court at 9:57 am stating:

> Counsel;
>
> It is my intention to try and take the hearing on the Writ off calendar for tomorrow and re-file it, requesting a hearing date of November 14. This will give every party ample time to brief the very complex issues in this matter.

On Wednesday, October 8, 2014, court staff sent an email to counsel at 10:21 am stating:

> Counsel,
>
> Regarding Mr. Dolan's recent email, I have conferred with Judge Grillo. He states:
>
> 1. Petitioner may unilaterally DROP the pending petition/motion. This will take the matter off the court's calendar.
> 2. Petitioner may seek to CONTINUE the pending petition/motion. This will require consent of the parties or an order of the court. If the parties agree to a continuance the court will continue the pending petition/motion. If the parties do not agree to a continuance then the pending petition/motion will remain on calendar for 10/9/14 and the court will hear petitioner's request for a continuance that that time.
> 3. Petitioner must inform the parties and the court as soon as possible whether petitioner wants to DROP or to CONTINUE the pending petition/motion. The other parties do not need to filed their briefs (scheduled to be due today at 12:00 noon) until after petitioner makes that decision.

On Wednesday, October 8, 2014, Petitioner sent an email to the court at 11:04 am stating:

> Although Petitioner is withdrawing its petition/motion, we request that the Court convene with the parties at the scheduled time tomorrow for the limited purpose of discussing if the various medial experts can communicate with Dr. Fisher to discuss his findings and concerns.
>
> Given that Dr. Fisher is the Court appointed expert, Petitioner requests permission from the Court to allow the various experts to contact Dr. Fisher.

On Wednesday, October 8, 2014, court staff sent an email to counsel at 12:10 pm stating:

> Counsel,
>
> I have conferred with Judge Grillo.
> The court will, at petitioner's request, drop petitioner's motion set for 10/9/14.
> The court will not hold a CMC in this case on 10/9/14.
> If petitioner elects to seek relief in this case, then petitioner may request a CMC at a later date in this case. At any such CMC the court will decide whether to set the matter for further hearing and set any briefing schedule.
> If petitioner elects to file a different case, then any CMC regarding proceedings in that case should be held in that case.
> The court notes that if petitioner elects to file a different case, then petitioner must file a notice of related case informing the court of this case. CRC 3.300.

All of the above emails were copied to all counsel in this case, including counsel for interested non-parties the Alameda County Coroner or the California Department of Public Health.

ORDER.

The court issues this order to confirm the decisions made in the above email communications with counsel.

Petitioner withdrew the petition set for 10/9/14. The court will, at petitioner's request, drop that hearing.

The court will not hold a CMC in this case on 10/9/14. If petitioner elects to seek relief in this case, then petitioner may request a CMC at a later date in this case. At any such CMC the court will decide whether to set the matter for further hearing and set any briefing schedule.

If petitioner elects to file a different case, then any CMC regarding proceedings in that case should be held in that case.

If petitioner elects to file a different case, then petitioner must file a notice of related case informing the court of this case. (CRC 3.300.)

Dated: October 8, 2014

Evelio Grillo
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RP13707598

Case Name: Winkfield vs. Children's Hospital Oakland

1) CASE MANAGMENT ORDER 1) CONFIRMING PETITIONER'S WITHDRAWL OF PETITION FOR WRIT OF ERROR CORAM NOBIS AND 2) STATING THERE WILL BE NO CMC ON FOR 10/9/2014

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

October 9, 2014

Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

Douglas C. Straus
Brian W. Franklin
Noel M. Caughman
ARCHER NORRIS
A Professional Law Corporation 2033
North Main St., Suite 800
Walnut Creek, Ca. 94596-3759

David Nefouse
Andrea Weddle
Alameda County Sheriff's Office
Coroner's Bureau
480 4th Street
Oakland, CA 94607

Dolan, Christopher B.
The Dolan Law Firm
1438 Market Street
San Francisco, CA 94102

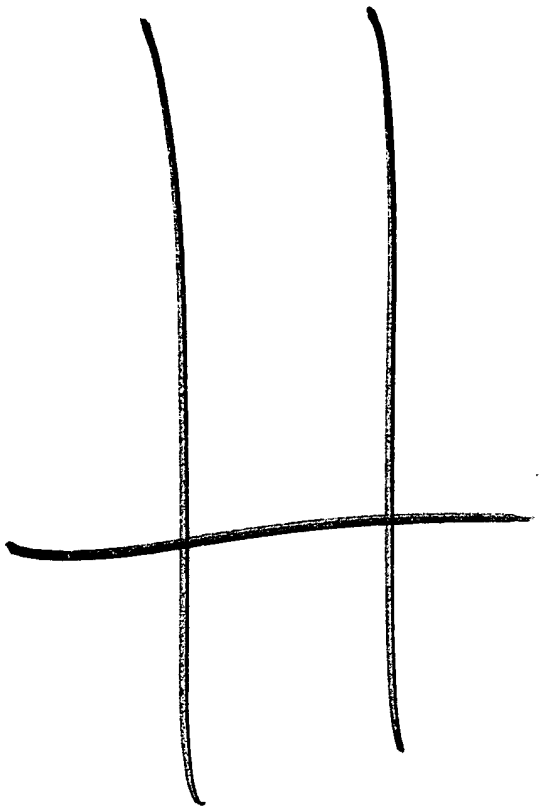


EXHIBIT H

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
ADMINISTRATION BUILDING
1221 OAK STREET, OAKLAND, CALIFORNIA 94612
BEFORE THE HONORABLE ROBERT B. FREEDMAN, JUDGE
DEPARTMENT NO. 16

---oOo---

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; and JAHI McMATH, a minor, by and through her Guardian Ad Litem, LATASHA NAILAH SPEARS WINKFIELD,

Plaintiffs,

vs. CASE NO. RG15-760730

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

Defendants.
_____/

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JULY 30, 2015

---oOo---

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Taken Before: CAROL HARABURDA, RPR, CSR No. 8052
Court Certified Realtime Reporter

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

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35 Quail Court, Suite 303
Walnut Creek, California 94596
925.937.4477

AGNEW & BRUSAVICH
BY: BRUCE M. BRUSAVICH, Attorney at Law (Court Call)
20355 Hawthorne Boulevard
Torrance, California
310.793.1400

FOR DEFENDANT FREDERICK S. ROSEN, M.D.:

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BY: THOMAS STILL, Attorney at Law
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Saratoga, California 95070-9998
408.861.6500
tstill@hinshaw-law.com

FOR DEFENDANT UCSF BENIOFF CHILDREN'S HOSPITAL
Of OAKLAND:

GALLOWAY, LUCCHESE, EVERSON & PICCHI, a Professional Corporation
BY: G. PATRICK GALLOWAY, Attorney at Law
KAREN A. SPARKS, Attorney at Law
1676 North California Boulevard, Suite 500
Walnut Creek, California 94596
925.930.9090
pgalloway@glattys.com
ksparks@glattys.com

---oOo---

THURSDAY, JULY 30, 2015 - 1:55 P.M.

---oOo---

P R O C E E D I N G S

THE COURT: Good afternoon, ladies and gentlemen. We are here today, thanks to the hospitality of Judge Appel, but, also, because Department 20 is being retrofitted, as we speak, for a retirement gathering for Judge Brick. As many of you know, Judge Brick is retiring, to our misfortune, and leaving the Court and going on to other things.

(Other court matters heard.)

THE COURT: Good afternoon. Your appearances, please.

MR. CHANG: Good afternoon. Andrew Chang for plaintiffs.

THE COURT: Mr. Chang, good afternoon.

MR. STILL: Good afternoon, Your Honor. Thomas Still for defendant Frederick Rosen, M.D.

MR. GALLOWAY: Good afternoon, Your Honor. Patrick Galloway appearing on behalf of UCSF Benioff Children's Hospital Oakland along with Karen Sparks of my office, Your Honor.

THE COURT: Good afternoon to all of you.

Do we have Mr. Brusavich on the line?

THE CLERK: State your appearance, please.

MR. BRUSAVICH: Bruce Brusavich for the plaintiff.

THE COURT: Good afternoon.

You are here for this very difficult matter. The Court has invited additional comments from counsel in the tentative ruling, so you are welcome to make comments -- that all of you have to make.

Just to put it in context, it seems to the Court that whatever decision is made on this threshold issue as to whether a claim can be asserted, and with no disrespect to the minor, whose first name is Jahi, if a claim can be asserted as a living plaintiff or if the Court decides conversely, and I would think that the party that's aggrieved by that decision would want to get a review of that decision before the entire case goes forward, because that would have a major impact on the trial plan, trial management, damages issues and the like, so I invite comment, whichever way the Court elects to proceed with the issues before it today as to what the thoughts of the parties are on that issue.

Then, secondly -- and putting this hypothetically, but for a valid legal purpose, if somehow the Court were to confirm or adopt Judge Grillo's ruling as it relates to the first cause of action, and that case

goes forward on that basis, and then next week, next month, next year, Jahi appears in court and says, Hello, I'm here, is the Court bound by the principle of res judicata under those circumstances issue preclusion.

I trust counsel understands, I don't ask this question in any mirthful way. It's a serious question as to what the preclusive effects of both the death certificate and Judge Grillo's order.

All right. Let's begin with plaintiffs' counsel.

MR. CHANG: I would be happy to go first. Thank you, Your Honor, and thanks for your thoughtful tentative ruling.

You know, I think this is a very difficult issue, and I think there -- I would hope there is a long way to go before we go to the appellate court. By that, what I mean is: These issues are so difficult and important and really a first impression that before we get a final ruling on this threshold issue, it seems to me that we really have to really flesh out, not just the paperwork that was submitted to support the defendants' claim that we should be precluded from claiming that Jahi is alive.

It's not just about paper. It's about what does the paper stand for? By that I mean, of course, the complaint. The complaint was filed just a few months ago. It's really -- the allegations are bare as to this issue

of collateral estoppel and the death certificate.

Certainly we weren't obligated to plead a complaint initially, but anticipated that defense -- it's not like a statute of limitations, but, in any event, the defense has now raised the legal issue.

And the first thing I really want to address upon the Court is that I would ask the Court, no matter how it is inclined today, at this moment, to make sure that we're given a reasonable possibility -- I'm sorry -- an opportunity to amend.

I know in the tentative ruling the Court indicated that and asked specifically that question. If I did sustained with leave to amend, what would plaintiffs be able to allege, and I will go through that.

THE COURT: That's the question. Go ahead.

MR. CHANG: Yes, that's a very good question, of course, for demurrer, and I will get into that.

But before I do that, with the Court's indulgence, I would like to -- or before I track the Court's tentative, which is what I plan to do, so I can precisely answer the Court's concerns.

I want to kind of point out that the overriding theme on this threshold issue, as far as plaintiffs are concerned, is that this is an equitable issue, and it starts from the first fundamental principle that

collateral estoppel and res judicata are equitable principles. The case law makes that very clear.

Now, what does that mean? What it means is we don't just go right to equity, because as the Court knows we first go into the traditional elements of res judicata and collateral estoppel. What are those elements? I think we pointed them out in the briefs. I think it's well-established essentially five elements, and of those five only the fifth one is undisputed from plaintiffs' perspective.

The fifth one, of course, as the Court noted, is the same parties, and so clearly that is met; but as to every one of the other four, we do dispute that those traditional elements have been met.

I want to first go to the identical issue element, which is number one. Again, I want to focus on the fact that courts have in the context of discussing that element number one have also discussed the principles of equity and public policy within that. So what I'm saying is if you look at the cases --

THE COURT: May I pause you for just a moment, since I'm not in my home court.

Can I have some water?

THE CLERK: Sure.

(Remarks outside the record.)

THE COURT: Go ahead.

MR. CHANG: The -- so when I first discussed the element one of identical issue, Your Honor, I would like to point out that on that element number one, if you look at the Union Pacific case, which is just a recent case just last year that we cited in our papers, and it is found at 231 Cal 4th. If you look at pages 179 to 180 of that opinion, Your Honor, the Court discusses the change of circumstances doctrine within the discussion of element number one, whether the issue in the first proceeding and the second are identical.

Let me just really quickly quote what the Court says in its opinion -- to make that clear that this is -- this does impact traditional elements.

"The railroad claims that these factors change over time and therefore the facts and circumstances in 2004 are not identical to those in 1994."

That is directly relating to, quote, "The question turns on whether the issues that were determined in the first proceeding were" -- quote -- "identical to any of the issues that were to be determined in this proceeding."

THE COURT: So what is different about the issue --

MR. CHANG: What is the changed circumstances?

THE COURT: Whether Jahi is a living person with capacity standing to bring --

MR. CHANG: It's not so much --

THE COURT: -- a personal injury and medical malpractice claim.

MR. CHANG: Well, the difference is change of circumstances since December of 2013. This is why this case is so novel, because this is really, I think both parties can see, there is no other case like this, as far as we found and I don't think the defense has either.

I would imagine there's nothing out there, because in this case, an unprecedented key, one -- over one-and-a-half years later Jahi is still on life support maintenance. And as a 13-year-old girl at the time, and she's now 14 and a half, 14-and-a-half plus, and she has entered puberty. She has developed breasts. She has had her first period. She has shown that she is someone responsive, not in a substantial way, but certainly responsive enough.

And, critically, we have teams of expert neurologists lined up to opine when we get there, and if it's sooner than later, that's fine. That, in fact, she does have hypothalamic brain function, because you can't have puberty, you can't have the development of things that go along with puberty unless you have hypothalamic

brain function. Of course, the Court knows, and Judge Grillo also knew that the definition of brain death in the statute is irreversible cessation of all brain functions. All brain functions. That's what the statute reads.

We have teams, several teams of experts that will opine that she has brain function, and that there are many parts of her brain that are intact.

THE COURT: Let me interrupt again, because of the significance of the case.

MR. CHANG: Sure.

THE COURT: You observed that doctrines of res judicata and collateral estoppel issue preclusion are equitable concepts.

MR. CHANG: Yes.

THE COURT: Are you suggesting that if you are able to get past a demurrer, the Court should hold an evidentiary hearing separate and apart from a jury trial, that the parties would be entitled to have, absent this unique complicating circumstance, on the question of whether there are changed circumstances and whether a determination of death needs to be revisited, is that what you're suggesting?

MR. CHANG: I am suggesting that it is an issue of fact, whether a person is still alive, yes.

THE COURT: Okay. But is the determination of

that issue an equitable issue for the Court or an issue for trial by a jury?

MR. CHANG: That's a very good question. I don't have an answer for you right now. I think that has to be explored; but, in some fashion, yes, of course, we are arguing that it is an issue of fact that has to be decided by a trier fact. Whether it's the Court or a jury, I can't answer which way it goes down the road.

THE COURT: All right. Then --

MR. CHANG: That is precisely why, not only are we here on demurrer, the very early stages, but this is the very first demurrer, and we did not in our complaint allege specifics to preempt any argument of issue preclusion, whether collateral estoppel, or res judicata, or the death certificate. And, Your Honor, I will get to the death certificate in a minute, but that issue really points out the issue of fact.

But, you know, the defendants are focusing on, we have a right to -- hospitals have a right to rely on a finding of death, so that we can expeditiously decide whether we can withdraw life support.

We don't disagree with that. We don't disagree with that at all. In fact, that is what happened, within days in a very expeditious proceeding, because of the exigency of the situation, a decision had to be made as to

whether Jahi met the definition, but it was very quick.

They had some experts. The Court appointed an independent expert. We didn't have any real time -- any time, significant time to find certainly the team of neurologists that we've found now.

So, that gets to, actually, the second element that I want to talk about, unless the Court has questions about identical, we can always go back to that if the Court does.

THE COURT: Not at this point. Go ahead.

MR. CHANG: I'm sorry. Elements two through four of the traditional elements of collateral estoppel have to do, as the Court knows, with issues that were actually decided with a final, and were they necessarily determined. They are kind of all similar. They mean pretty much the same thing.

Here, again, equitable principles, the Courts have declared are very critical to determining whether those elements are present and whether in the traditional sense collateral estoppel should be applied.

I want to go right to that, because the Court has relied, as it should, on the Supreme Court's decision in Lucido vs. -- I don't have the full name in front of me.

THE COURT: Go ahead.

MR. CHANG: But -- in Lucido the Court in a

footnote said that in deciding whether those elements two through four are met, it looked at whether the party had the opportunity -- quote, "Had the opportunity to present their entire case" end quote, at the former proceeding, And the Court then proceeded --

THE COURT: Let me interrupt you.

MR. CHANG: Yes.

THE COURT: It's Lucido vs. Superior Court.

MR. CHANG: Thank you.

THE COURT: So I want to get your comment on whether there is a distinction between an opportunity to present their entire case based on the facts and circumstances that were known or discoverable at the time of the hearings before Judge Grillo, on one hand, and, on the other hand, subsequent events.

MR. CHANG: Yes.

THE COURT: Okay. There is new evidence based on findings, events, subsequent to Judge Grillo's hearing and order.

MR. CHANG: Correct.

THE COURT: How does that play into the assessment whether the preclusive effect factor applies or not?

MR. CHANG: Well, I think they supplement each other, and that is exactly what we're arguing. We are

arguing, one, as to the identical issue.

We can argue change of circumstances preclude a finding of identical issues; and, two, as to the other elements of -- traditional elements of collateral estoppel, the fact that we did not have, because of the exigency of the situation, an opportunity to present our entire case at that very, very quick proceeding.

I then want to move from Lucido, which recognizes that, that ties it together, to a case that is not cited in our opposition brief, but the Court did ask for any additional analogous authority.

The one case -- or one of the cases that I found that I would like to tell the Court about is Smith vs. Exxon Mobile Oil Corp., 2007 153 Cal.App.4th 1407 at pages 1416-1420. It talks about the restatement of judgment, or restatement second of judgment, Sections 28 and 29. If you look at those restatement sections, it -- like the case I'm about to talk about -- the Smith case, ties in the parties' opportunity to present the entire case at that first proceeding, whether it did have an opportunity, and if it did not, then that lack of opportunity prevents issue preclusion in both the equitable sense and the traditional sense.

That case is actually very helpful, because it's quite similar to our case, in some ways, in a significant

way. What happened in that case was it was a wrongful death case, and there was a prior proceeding that was claimed for personal injury.

In that first proceeding Mobil Oil Corporation was prepared to have an expert talk about significant items of injury and damage to the plaintiff, but during -- as the witness was about to testify, he had a family tragedy and was unavailable. Mobile -- the Court said: Well, you can have a substitute, Mobile; and Mobile did its best, but because the trial was ongoing it couldn't find an appropriate substitute for that expert.

The trial went ahead, and it wasn't too long before there came a verdict for the plaintiff and that was the first proceeding.

Then in the second proceeding for wrongful death, the same parties, same issue, but here the Court of Appeal said that the depravation of crucial evidence or witnesses at the earlier trial is also among the considerations mentioned in the restatement second of judgments as militating against preclusion.

THE COURT: Obviously, I will have to read the case.

MR. CHANG: Yes.

THE COURT: But I am not quite following, what was the event in the first case that defendant was able to

assert that would preclude the second case or a claim in the second case?

MR. CHANG: We didn't have a family tragedy or anything like that, but it was very similar in effect, because what we had was an expedited proceeding.

THE COURT: No, that's not what I'm asking you. Let me try to be more clear on the question.

MR. CHANG: Okay.

THE COURT: I take it, there is a first trial at which a key expert witness becomes unavailable because of the expert's family tragedy?

MR. CHANG: Yes.

THE COURT: Okay. That case went to judgment?

MR. CHANG: Yes.

THE COURT: All right. In favor of --

MR. CHANG: Of the plaintiff.

THE COURT: All right. That was a personal injury action?

MR. CHANG: Yes, it was.

THE COURT: Okay. Then there is a second action based on asserting a wrongful death claim?

MR. CHANG: Correct.

THE COURT: On behalf of the survivors?

MR. CHANG: Correct.

THE COURT: Okay. What is the issue of the

defendant?

MR. CHANG: So the plaintiff sought to use the issue preclusion to prevent the defendant from putting on a witness that brought those damages.

THE COURT: I got it.

MR. CHANG: I'm sorry.

THE COURT: Okay.

MR. CHANG: I moved too fast in explaining that case.

THE COURT: I've got it now. Thank you.

MR. CHANG: The intent of trying to use collateral estoppel is identical to here. It's issue preclusion, but -- and the similarity is not the unavailability of a witness -- well, in a sense it is. We didn't have a family tragedy that prevented an expert lined up to go testify. We just didn't have, because of the expeditious nature of the proceeding, the time to get -- and we can allege facts for this, and we can come up with declarations and evidence that will satisfy the Court down the road, but the point is that that kind of issue is extremely important in deciding whether to apply collateral estoppel at this point -- or at this early point of a proceedings.

You know, again, this goes to the equitable nature of collateral estoppel, and it ties into the

traditional elements, and together all of these principles that underlie whether to apply collateral estoppel are critical and have to be examined thoroughly before that prior proceeding judgment is given preclusive effect, because a preclusive effect, obviously, is devastating because it's like -- it -- you just can't obviously present any case.

The courts, when they talk about collateral estoppel, they key in on that, of course, because those public policies of whether to apply issue preclusion, you know, entail detailed examination of whether it would be equitable to apply it.

I think in this case, again, to go back, whether a person is entitled to try to continue to claim she is still a living person is -- I can't imagine a more fundamental and important issue that a person, a living person should be entitled to try to prove. If we lose, we lose, but we can't lose at this threshold stage of the proceedings.

Let me move to the death certificate.

THE COURT: Okay.

MR. CHANG: The issues and concerns are similar with the death certificate. I want to highlight for the Court, and we cited it in our papers. Health & Safety Code 103550, which provides -- and it's right on point --

that a certified copy of a death certificate is merely, quote, "prima facie evidence in all courts and places of the facts stated therein," end quote.

Well, what does that mean? It means, as the Court commented in part of its tentative ruling, that certainly we can take judicial notice of the existence of the issuance of the death certificate. But as far as the contents of the death certificate, that is something that, A, you can't take judicial notice of because you can't take judicial notice of the truth and the facts contained in a writing. You can only take it of the existence.

Now, as to whether or not that -- even beyond that, the death certificate is preclusive and presumptive -- well, it's not even presumptive. You can't rebut it. Well, this Health & Safety Code section makes clear that you can. Of course, you can: Marriage certificates, birth certificates, death certificates, all kinds of public documents where an entity -- or a department of the public entity has declared something, certainly you are entitled to rebut that if you have proof, and, of course, we do have proof. In fact, I have got a stack of documents here --

THE COURT: We're not there yet.

MR. CHANG: We are not there yet, but I just want to say that if we have to get there, we will.

That we are challenging the validity of that death certificate primarily because it was a rush job, and it was done for the benefit of the mother, because the mother could not get a disposition permit to allow her to take her child out of Children's Hospital, where they wouldn't provide life support, because they found the brain death, and take her to a state where they would.

THE COURT: You are getting outside the framework of the evidence that the Court can consider.

MR. CHANG: I just want to -- that goes to what we can amend if the Court wants more specific allegations, Your Honor. That's all.

That's why I waive it rather than file it, because it is not the time to do it. I just want you to know that given leave to amend we will allege specific facts that will highlight what we do plan to prove. I just want to point that out so that we're not hitting the end of the road today.

The last thing is on the negligent infliction. I think -- we accept the Court's tentative ruling that it wants us to allege with more specificity that plaintiffs meaningfully perceived the failure to respond to Jahi on the part of Dr. Rosen as distinguished from other Children's Hospital staff and personnel. We will do that, Your Honor. I have no problem with doing that, and so

that's all I have at this time.

THE COURT: Thank you.

MR. CHANG: Thank you.

THE COURT: Who would like to begin on the defense side?

MR. STILL: Your Honor, Tom Still, on behalf of Dr. Rosen.

What I would like to do with the Court's permission is talk first about the death certificate issue because we just heard that.

THE COURT: That's fine.

MR. STILL: I think as Your Honor alluded to by his comments decides that it was a rush job and hurried through and somehow invalid, I don't know where that comes from, but the fact is that it's properly before the Court.

Your Honor's tentative ruling granting judicial notice of it is appropriate, and to your point in your tentative, you asked: What's the significance of the death certificate as to the issue of an individual standing to bring a lawsuit who is named in the death certificate, who is the decedent.

There are two important points that we draw from that. Two points of significance; number one is that enacting the survivor action statute that the Court refers to in the tentative, the legislature determined that a

death certificate is proof of death, final proof of death.

Number two, the second point I think is significant is that the survival action is the only cause of action that is -- that is available with the decedent.

THE COURT: So let me pause you for a moment, as well -- and not to stir up new theories that you can't think up on your own. But are you suggesting that the remedy where there are facts and not as disputed as likely would be in Jahi's case, certainly will be in Jahi's case, that a death certificate was wrongfully issued.

For some reason it's Mr. Still and Mr. Still walks in here, are you required to bring a mandate proceeding or something to compel the revocation of the certificate?

MR. STILL: In fact, that would be the remedy. They would have to do that. I don't want to get outside the evidence, but, I believe, in fact, and one of the briefs alluded to it. Mr. Dolan has attempted to do that, and the county has denied his efforts to have the death certificate revoked or changed.

THE COURT: Let me ask, because this may become a related case issue. Were the efforts to which you refer occurred, did that result in a court case that was filed?

MR. STILL: Not that I'm aware of.

THE COURT: Under Rule 3.300, actually, if there

was a case of some kind filed and -- this Court would want to know about it.

MR. STILL: I think -- and as I Understood your tentative, Judge, in asking, What's the significance of the death certificate? The parties haven't really addressed that. Again, it's the -- a common law. There was no cause of action, and we're talking the 1800s. No cause of action for wrongful death and no survivor action.

Common law, there was no personal injury action that could be brought by the decedent.

The legislature then enacted the survivor statute. When they did that, they recognized that in a situation where there is a determination of death, the only claim by the decedent, if you will, is for a successor in interest on behalf of the estate to bring that, and it's a statutory creation.

That statute requires that a death certificate be produced, so the legislature was saying, look, it's a final determination of death that we're going to rely upon, and, secondly, the survivor action is the only claim that can be brought with regards to that decedent.

Later the legislature enacted statutory -- the wrongful death statute, so that we have that claim.

I think the death certificate is significant, but -- in fact, if we just set that aside, even if he

hadn't produced it, Judge, the principle of collateral estoppel would prevent the first cause of action.

I want to turn now to your question in the tentative in which you started with, and that is these four elements.

Number one, are the issues identical? Absolutely. Judge Grillo's court, as Your Honor pointed out in the tentative, the question was: Is Jahi legally dead? That is exactly the issue that is before us today. I submit the issues are identical.

Do we have privity of the parties? Absolutely. Identical parties.

Is this a final determination? Absolutely. No motion for reconsideration brought as to Judge Grillo's ruling; no writ, no appeal, no challenge.

Now --

THE COURT: Let me pause you for a moment. My recollection is, because I do think I looked at the Court of Appeal's Website in preparing for this hearing, and I may be confabulating this, but I thought that there was an appeal, a writ petition to the Court of Appeal from Judge Grillo's order? It was issued before his final order.

MR. CHANG: I looked at this, also. Yes, there was, and then it was declared moot by the Court of Appeal in light of her move to New Jersey.

MR. STILL: I believe, Your Honor, I thought it was withdrawn.

MR. BRUSAVICH: May I interrupt for a moment?

I can hear counsel perfectly well. I'm having a hard time understanding the Court. Is there a positional thing with the microphone or something?

THE COURT: Counsel, there is a microphone here. I am in borrowed quarters.

(Remarks outside the record.)

THE COURT: Counsel, I will try to keep my voice up.

MR. BRUSAVICH: Thank you.

THE COURT: Go ahead, Mr. Still.

MR. STILL: Your Honor, I would submit that in terms of whether the judgment in this case from Judge Grillo's order is final or not, absolutely, as the tentative ruling alludes to.

(Interruption in court proceedings.)

THE COURT: I will keep my voice up. Go ahead, Counsel. Sorry.

MR. STILL: It's okay.

(Remarks outside the record.)

MR. STILL: So we have got identical issues, privity, and we have got a final judgment. What counsel alluded to repeatedly was, really, this question of, was

it actually litigated in the former proceeding?

He talks about this rush of time, this expedited matter, that there was a lack of opportunity to present witnesses, the entire case wasn't presented.

First, we go to Judge Grillo's orders. He has an unbelievable road map.

THE COURT: I read them in detail. I don't know if the Court came to the same conclusion or not, but an impressive item of judicial effort.

MR. STILL: Absolutely.

THE COURT: A difficult question.

MR. STILL: Both sides got to be heard. They got to present evidence, documents, witnesses.

Unlike the case counsel cited, we don't have an expert that they can point to that is unavailable, or that they were prevented from calling a new one or waiting until the expert was presented. That wasn't the case.

In fact, the Court said, you know, we want to have an independent third party, and so they proposed a number of individuals, and Mr. Goldman, on behalf of the petitioners or plaintiff, stipulated to Dr. Paul Fisher, the pediatric neurologist.

He stipulated, number two, that Dr. Fisher was qualified.

Number three, he stipulated that Dr. Fisher had

performed his evaluation appropriately, applying the criteria to determine whether or not there was irreversible brain death.

We had in that situation, as you know from reading that order, plenty of opportunity for that issue to be litigated.

In fact, I would argue, unlike in this case where the question as to whether Jahi is deceased or not, is going to dictate the recovery of money damages. In that matter before Judge Grillo the issue was whether to withdraw life support, a far more weighty issue, and I am confident, particularly when you read his file and the orders, he gave sufficient time. He gave opportunity to both sides. There was due process and an independent expert who determined irreversible brain death. Remember, that was on top of two other physicians who made that determination.

THE COURT: I think Judge Grillo was careful to point out, there is still a judicial function that is not merely the opinion of the two independent medical professionals, the Court does still have a role.

MR. STILL: Correct.

THE COURT: Okay.

MR. STILL: Correct.

Now, the next issue that I want to turn to, Your

Honor, was a question in your tentative ruling, and that was essentially: Would plaintiffs be able to allege facts sufficient to reopen this issue in an amended pleading?

Number one, under the Uniform Determination of Death Act, the UDDA, by definition, applying the standards that Paul Fisher and the others applied, death is medically irreversible. It can't be changed in subsequent proceedings.

Secondly, I want to refer the Court to a case that I think is very instructive on this. Evans vs. Celotex Corp. It's a 1987 case, 194 Cal.App.3d 741. In that case --

THE COURT: Give me the cite again.

MR. STILL: Yes, sir. 194 Cal.App.3d 741.

THE COURT: 741?

MR. STILL: 741.

THE COURT: Go ahead.

MR. STILL: In Evans a deceased man's family sought to sue a defendant for wrongful death after that same defendant had successfully defended a suit brought by that man during his lifetime.

(Interruption in court proceedings.)

THE COURT: Go ahead.

MR. STILL: I want to highlight why I think the Evans case is important, and it's this issue of: Can they

allege facts, and is there change and new circumstances that they are going to be able to put in an amended complaint?

In Evans, as I was saying, the family of the deceased man wanted to sue for wrongful death, sue the same defendant that successfully defended a case brought by the man during his lifetime.

The family argued collateral estoppel shouldn't apply here. New facts have been developed. After this man died there was an autopsy that allowed us to make a diagnosis as with regards as to why he died, asbestosis.

The Court said no, huh-uh, collateral estoppel does apply. We are not going to relitigate these issues, and -- and I'm quoting now: "An exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence, otherwise there would be no end to litigation."

What plaintiff here is proposing is essentially the never ending litigation. They just want to bring in a little -- potentially, possibly more persuasive evidence.

I think the Court needs to recall, Dr. Paul Byrne was someone that Mr. Dolan wanted to have see this young lady. He withdrew his request. I mean, they even had an expert, a so-called expert ready to see the child and they just withdrew the request.

What we have here, like in the Evans case, is an effort to just bring in perhaps evidence a little more persuasive, but no different than what really was addressed initially.

This is my second point on this question of new facts and changed circumstances, so I contend that the five elements -- or the four elements for collateral estoppel are met, then plaintiff will argue, hey, we have an exception.

The exception doesn't and cannot apply in this case, because death is a final determination. It's recognized in nature, by statute, and science and medicine.

Your Honor asked: Is there any analogous authority that prevents the plaintiffs from reopening by using this exception? The answer is yes; three areas, and I want to cite some cases that Your Honor may want to look to.

A determination of death is so important and final that this exception does not apply as in these analogous cases of adoption, parentage and paternity.

Adoption, parentage and paternity; we are talking about weighty issues where, like in this case, a final determination was made that we just don't go back and revisit.

The first one is at 148 Cal.App.3d 81. The guardianship of Carolyn S. It's a 1983 case where the Court recognized that the public policy of maintaining the parent-child relationship and ensuring the finality of a paternity judgment precluded subsequent challenges, including by grandparents, who were not even parties to the underlying case. So the grandparents in the case wanted to challenge these issues related to the parent-child relationship and paternity, and the Court: Said, no, huh-uh, way too important. It's a final decision. The exception doesn't apply.

The second case is --

THE COURT: Are you suggesting that case did not go out on a standing issue, but rather the finality of the earlier decision?

MR. STILL: Well, they are cited in a Supreme Court case in 2001, and I'll get to it in a minute, but Estate of Camp, 131 Cal.App.4th 69. It involved a challenge to an adopted child's right to inherit from their adopted parents. Again, the Court basically was looking at: Is this final public policy, and are we going to apply the exception, and the answer is no.

The third case is 59 Cal.App.4th 1509, Wier vs. Ferreira. It's a parentage case having to do with a dissolution of judgment and the desire of one side to

relitigate it, challenging the child's right to inherit. Again, the Court looked at the issues, and said: Huh-uh, the exception does not apply.

The short answer is: We have got three areas where there are analogous cases like this one; adoption, parentage and paternity.

Now, all of these cases were cited with approval in 2001 in the Supreme Court case, 24 Cal.4th 904, Estate of Griswold.

The last point I want to make, Your Honor, is that with regard to the effort to the effect that we have new facts and changed circumstances, I think public policy weighs against that. There is a societal interest in a uniform standard of death and a uniform way to determine it, and that has been embodied in the Uniform Determination of Death Act.

We need to have finality of these judgments. The judgment of Judge Grillo, for legal status purposes, life insurance, property rights, tort litigation, potential criminal prosecution and other scenarios, and, also, public policy has to look at the cost involved if we allow people to read this in weighty issues like this where it's already been determined. What medical resources are going to support them --

THE COURT: Let me ask the same question that I

did at the outset of this discussion. Again, I don't mean to make light of it in anyway. Nobody who is involved in the law in any way could question the general principle of the value of finality so that life can go on.

But if life does go on, and, hypothetically, as improbable as it may seem, Jahi may walk in and say: I'm here, does that mean that the Court cannot revisit the issue?

MS. SPARKS: Your Honor, if I may, I have actually thought about that question, and I believe I can try to answer it if the Court would permit me?

THE COURT: Certainly.

MS. SPARKS: If we look back at the reason the Uniform Determination of Death Act was first developed, it was developed to apply in those situations where death is not obvious, where there is -- where circulation is being artificially maintained, and yet there is reason to believe that neurological studies will show that there is no longer any brain function.

So that is the situation which the Uniform Determination of Death Act was applied, and that in the Uniform Determination of Death Act is how the determination of death was made in this case.

THE COURT: I got that part.

MS. SPARKS: Now if the plaintiff walks in and

talks to the Court, we are actually in a different ballgame, I would believe, because we are no longer dependent for determining death on the Uniform Determination of Death Act. We don't have to determine whether or not -- we don't have to go to a neurologist to determine whether or not her brain is functioning, that is obvious to all experts and nonexperts alike.

So, I guess, what I'm saying is, well, one, that hadn't happened. It may and probably will never happen, and we could certainly deal with the situation at that point if it did happen.

But with regards to the law that we're dealing with here, I think we would be outside the scope of the UDDA, but if we are still talking about neurological evidence, brain function we are --

THE COURT: I think -- excuse me.

MS. SPARKS: -- we are clearly still within.

THE COURT: I think it's plaintiffs' position that that might somehow come about, not necessarily that full function would be restored.

All right. Unless you have some authority which bears on this admittedly hypothetical --

MS. SPARKS: No, that was a concern of mine and those were my thoughts on that.

THE COURT: Thank you.

Okay. Mr. Still?

MR. STILL: I will refer to Mr. Galloway.

THE COURT: Go ahead, sir.

MR. GALLOWAY: Well, Your Honor, there is not much more I can add, but let me just see if I can follow Mr. Still's road map.

First of all, with regard to the death certificate. I think that the Court has accurately pointed out in its tentative ruling that the death certificate is not being used to determine the time or the cause of death, but the very fact that there has been an official determination of death, and that is set forth and that's clearly the case law here.

But, also, as Mr. Still pointed out, and I don't want to take the Court's time just reiterating what he has already said, but, clearly, the first cause of action, at best, Your Honor, in my opinion, is a survivor action under 377.2, and as was pointed out, and as the code says, it requires the attachment of the death certificate.

Obviously, the legislature has embraced the need for a death certificate, the value of a death certificate, and how it determines that there has been finality in terms of determining death under the appropriate statute. That has been discussed, and so I don't think I need to spend much more time with that.

I think, also, there is no question, Your Honor, that the traditional elements of collateral estoppel have been well established. As the Court has pointed out referencing the various cases, and the best I can determine from counsel's argument here today, they are trying to take the position that there should be some exception to the collateral estoppel issue preclusion in this particular case.

I don't think there is any question having reviewed and re-reviewed Judge Grillo's rulings in this case that this matter has been fully litigated. There has been a determination why an independent physician, Dr. Paul Fisher, that there was irreversible cessation of all brain function, and that the issue of death has been necessarily and finally determined, and, again, the death certificate has been issued.

Now, looking at the issue of new circumstances as raised by plaintiffs' counsel, in my opinion, Your Honor, it does not apply for the following reasons: Death by its very nature is intended to be final.

Another thing that I think is very important is that plaintiffs' own brief pretty much establishes that the exception does not apply, because death is fixed and permanent in nature, and counsel referred to the Union Pacific case. I looked at their brief and their brief

does talk about specifically some issues are not static, that is, they are not fixed and permanent in nature. It comes right out of that case.

The fact of the matter is that in this particular case, Your Honor, death was static. It's final, and it's fixed and permanent in nature.

So for those reasons, Your Honor, I would respectfully request that with regard to the first cause of action that the Court sustain our demurrer.

I don't know that I even need to talk about the third cause of action, because we have already talked about it.

THE COURT: I don't think that's necessary.

MR. GALLOWAY: A step further.

THE COURT: I think that's covered. Thank you, Mr. Galloway.

I sense you could go on, Mr. Chang, as long as I --

MR. CHANG: Me?

THE COURT: I'm looking at you. Let me tell you what the Court contemplates here.

There are some authorities cited that were not in the briefing provided in response to the Court's invitation.

So what I want to do is take the matter under

submission, and reflect on what was very useful and very high-quality argument by all counsel.

I will make a determination as to whether or not the Court wants to invite any additional briefing, whether it's for plaintiffs to respond to the authority cited today that were not previously referenced, or for any other reason, or simply take the matter under submission and issue a final ruling.

I understand that you request leave to amend both as to the first and second cause of action.

I raised the issue at the outset about potential mutual interest in getting a determination as to the first cause of action before the case goes forward.

You have explained to me you believe that there should be an evidentiary hearing perhaps at trial on the issues, so the Court is going to reflect on all of this.

If I come to the conclusion that further briefing and/or argument will be useful, I will set a further hearing for that purpose, and if not, I will issue an order and we will go on to the next step. Fair enough?

MR. CHANG: That's sound good, Your Honor, but I do want to address some points that were made -- just quickly -- and in reply.

Also, I do want to ask the Court, in addition to its thoughts about supplemental briefing, is to seriously

consider just giving us a chance to amend our complaint to make allegations that address all the issues we talked about today and implore the Court to give us a chance.

THE COURT: I understand, that's part of your request.

MR. CHANG: Okay. Because this is a difficult issue, and I know the Court anticipates that whoever ultimately wins this issue -- although, I suppose if the Court sustains with leave to amend, I don't know if the Court of Appeal is going to really take up the issue at that point. I think it's only without leave.

Let me just say --

THE COURT: I will leave that to the Court of Appeal.

MR. CHANG: Yes, we will leave that to the Court of Appeal.

That also highlights why we really want a chance to amend so we can allege the facts that we have not had an opportunity to allege yet.

THE COURT: Okay. I've got that.

MR. CHANG: The first thing I want to say, just a brief response to opposing counsel, is: Why are we focusing so much on death? I understand we have to focus on death, but what's the flip side of death? It's life. Life is not static. Life goes on. A person is entitled

to prove that life goes on, just as they are entitled to prove that you're not alive. Now --

THE COURT: So, I, contrary to my own instinct, I do have to ask for clarification.

Are you suggesting that somebody who has -- somebody in Jahi's position, who may be brain dead by all medical definitions, but continues to have cardiopulmonary function supported by ventilators and other medical support has a -- the same standing to bring a fully living person's personal injury claim, is that what you're saying?

MR. CHANG: No. If we fail to convince the Court or the finder of fact that she has brain function, if we lose that, then we lose, because we do accept the fact medically -- and our team of experts will address that directly. They will address the fact that she does have brain function, and, therefore, she is not brain dead.

THE COURT: Clarified.

MR. CHANG: Is it clear enough for you? Thank you for helping me get to that.

Now equitable principles, like I said at the beginning, they are not an exception to collateral estoppel. It's not like we're trying to avoid collateral estoppel. It ties right into the traditional elements of collateral estoppel, Your Honor, the cases make very clear

that equity is a huge part of this formula, and that's why we don't fault Judge Grillo. He did the best he could. In fact, he did an amazing job, considering how quickly the Court had to decide that issue.

But that is precisely why that is not the identical issue that we are dealing with today, because in all the cases that counsel just cited to me about adoption and parentage, I'm sure those were after full proceedings that were not expedited. They were fully litigated.

If this had been a process --

THE COURT: Let's not speculate. The Court is going to take a look.

MR. CHANG: I will, too. But I bet you, Your Honor, that that is true, because where else would you have an expedited proceeding like this when -- because the hospital has to decide quickly, can it withdraw --

THE COURT: I want to spend our time as productively as possible. I don't want to speculate on what the basis of those holdings are without actually having read that.

MR. CHANG: All right. Well, it does highlight, though, that's our point about this proceeding, the first proceeding, is that it was --

THE COURT: I think I take your point on that issue, as to whether plaintiffs had a full and fair

opportunity, the equivalent of that, that it might be available in a more conventional trial.

MR. CHANG: One last thing, Your Honor. The evidence of Celotex Tech Corporation case that both parties -- or we certainly cited it, and look at that case carefully, because that case also points out the difference between that case, where preclusion was applied, where in our case where it should not be applied. Because if you read that decision carefully, you will see that the reason they applied issue preclusion is because when they looked at the new facts and circumstances, they realized, oh, they don't materially change the outcome.

So what the party tried to relitigate was with something that didn't have any impact on anything. Here we have something that goes right to the heart of our claim that Jahi is alive. It goes to the fact that she is alive, and that she does have brain function, and so it's not just their new facts, but they have to be material.

In Evans it wasn't. Here it is crucial to our claim that she is alive, and she should be entitled to pursue a claim for personal injury.

THE COURT: All right. Thank you.

MR. CHANG: Thank you.

THE COURT: Counsel, you may have some additional thoughts or comments, but I think we have covered the

territory for now.

We do have a reporter, which the Court misses most of the time, so if somebody would see fit to provide the Court with an electronic copy of the transcript, that would be helpful, not essential, but helpful to the Court, and you could e-mail that to Department 20's e-mail address.

MR. STILL: Your Honor, I had arranged for the reporter and will take care of it.

THE COURT: Excellent.

I'll take the matter under submission and get back to you with whatever course of action that the Court chooses to follow as promptly as possible. Thank you all.

We are in recess.

(Proceedings concluded at approximately 3:10 p.m.)

REPORTER'S CERTIFICATION

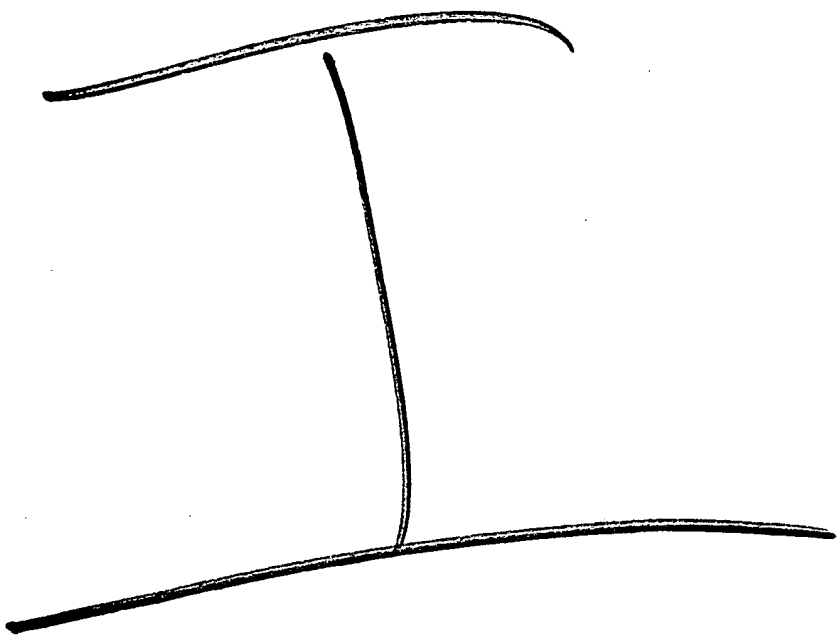
---oOo---

I, CAROL HARABURDA, do hereby certify that I am a certified shorthand reporter of the State of California and duly appointed shorthand reporter.

That the foregoing pages are a full, true, and correct transcript of my shorthand notes taken in the above-mentioned matter.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 2nd day of AUGUST 2015.

CAROL HARABURDA, RPR, CSR NO. 8052
Certified Shorthand Reporter
Court Certified Realtime Reporter
State of California



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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Spears Plaintiff/Petitioner(s) VS. Rosen Defendant/Respondent(s) (Abbreviated Title)	No. RG15760730 Order Demurrer to Complaint Sustained

The Demurrer to Complaint by Defendant Frederick S. Rosen, M.D. ("Dr. Rosen"), filed on June 16, 2015, was set for hearing on 07/30/2015 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. A tentative ruling was published directing counsel to appear at the hearing.

The matter was argued and submitted, and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

A. First Cause of Action

Dr. Rosen's demurrer to the First Cause of Action for personal injuries on behalf of Jahi McMath ("Jahi") is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to allege facts sufficient to state a cognizable cause of action by Jahi against Dr. Rosen and the other named defendants for negligence, including facts to the effect that Jahi has standing to bring the cause of action despite the issuance of a death certificate on January 3, 2014. (See Dr. Rosen's Request for Judicial Notice filed on June 16, 2015 ["RJN"], Exh. D; Health & Safety Code § 103550; see also Hanson v. Grode (1999) 76 Cal.App.4th 601, 606 ["in any medical malpractice action, the plaintiff must establish: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence"].)

Plaintiff Latasha Nailah Spears Winkfield ("Winkfield") and/or other appropriate plaintiff(s) also has/have leave to amend to include a separate and alternative cause of action on a negligence theory as the personal representative of Jahi or, if none, the successor in interest to Jahi within the meaning of C.C.P. §§ 377.30-377.32. If brought as successor in interest, the plaintiff(s) must also execute and file an affidavit or declaration as required by section 377.32. The inclusion of such a separate and alternative cause of action shall not constitute a waiver or admission that Jahi cannot bring a cause of action on her own behalf. (See, e.g., Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1388 ["modern rules of pleading generally permit plaintiffs to 'set forth alternative theories in varied and inconsistent counts'"]; Rader Co. v. Stone (1986) 178 Cal.App.3d 10, 29; Mendoza v. Continental Sales Co. (2006) 140 Cal.App.4th 1395, 1402.)

The instant demurrer is based primarily on the assertion that Jahi lacks standing to bring the First Cause of Action because a death certificate was issued on January 3, 2014, and because this court issued orders and a judgment in Case No. RP13-707598 denying Winkfield's petition for medical treatment for Jahi after the court reviewed medical evidence to the effect that Jahi was legally dead as defined by

Health and Safety Code sections 7180-7181. (RJN, Exhs. A, B, C and D.) While the court grants the request for judicial notice of such certificate and orders, the court cannot (and does not) take judicial notice of the truth of factual conclusions in the orders or death certificate, and makes no binding determination as to their preclusive effect. (See, e.g., Steed v. Department of Consumer Affairs (2012) 204 Cal.App.4th 112, 120 ["Judicial notice is properly taken of the existence of a factual finding in another proceeding, but not of the truth of that finding."]) Nevertheless, in light of the uncontroverted issuance of such orders and the death certificate, it is appropriate for any cause of action asserted directly by Jahi to have allegations providing a basis for Jahi to have standing notwithstanding such orders and certificate.

Without making any binding determinations on this demurrer, the court notes that a death certificate is prima facie evidence of the facts stated therein but is subject to rebuttal and explanation. (See Health & Safety Code § 103550 ["Any ... death ... record that was registered within a period of one year from the date of the event ... is prima facie evidence in all courts and places of the facts stated therein"]; In re Estate of Lensch (2009) 177 Cal.App.4th 667, 677 n. 3 ["Of course, a death certificate is "subject to rebuttal and to explanation"], quoting Morris v. Noguchi (1983) 141 Cal.App.3d 520, 523 n. 1.) The court notes that, while it appears that plaintiffs have not petitioned the California Department of Vital Records to void or amend the death certificate, Dr. Rosen has not submitted authority that this is a prerequisite in order for Jahi to have standing.

As to Dr. Rosen's arguments that collateral estoppel and/or res judicata applies to the determinations in Case No. RP13-707598, it may or may not be appropriate for the court to make a determination in this regard at the pleading stage. These are affirmative defenses as to which Dr. Rosen has the burden of proof. (See, e.g., Vella v. Hudgins (1977) 20 Cal.3d 251, 257.) Under California law, the "theory of estoppel by judgment or res judicata ... extends only to the facts in issue as they existed at the time the judgment was rendered and does not prevent a reexamination of the same questions between the same parties where in the interim the facts have changed or new facts have occurred which may alter the legal rights of the parties." (City of Oakland v. Oakland Police and Fire Retirement System (2014) 224 Cal.App.4th 210, 230.) In amending, Jahi has leave to include allegations in this regard.

B. Second Cause of Action

Dr. Rosen's demurrer to the Second Cause of Action for negligent infliction of emotional distress (NIED), brought by Plaintiffs Winkfield and Sandra Chapman ("Chapman"), is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to allege facts sufficient to constitute a cause of action against Dr. Rosen on such a theory, including allegations that the plaintiffs were "present at the scene of the injury-producing event at the time it occur[red] and [were] then aware that it [was] causing injury to the victim...." (Bird v. Saenz (2002) 28 Cal.4th 910, 915; Thing v. La Chusa (1989) 48 Cal.3d 644, 667-668.)

As in Bird, "plaintiffs cannot prevail on a claim for NIED based solely on the" allegedly negligent surgery performed by Dr. Rosen, as "no plaintiff was present in the operating room at the time that event occurred." (Bird, supra, 28 Cal.4th at p. 916.) To the extent that the "injury-producing event" was Dr. Rosen's failure to "diagnose and treat" Jahi's medical condition after the surgery, plaintiffs do not have sufficient factual allegations that they "meaningfully ... perceived any such failure" on the part of Dr. Rosen as distinguished from the acts and omissions of Children's Hospital Oakland ("CHO") nurses and other personnel. (Cf. Bird, supra, 28 Cal.4th at p. 917.)

C. Third Cause of Action

Dr. Rosen's demurrer to the Third Cause of Action for wrongful death, to the extent brought by Plaintiff Marvin Winkfield, is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to omit Mr. Winkfield as a plaintiff on this cause of action or to include allegations sufficient to give him standing to bring such a cause of action. (See C.C.P. § 377.60; Phraner v. Cote Mart, Inc. (1997) 55 Cal.App.4th 166, 168-169.) In their opposition memorandum, plaintiffs "acknowledge that it appears Mr. Winkfield, Jahi's stepfather, does not have standing to assert the alternative claim for wrongful death." (Opp., p. 15.) If this is the case, he shall be omitted as a plaintiff in a First Amended Complaint.

D. Requests for Judicial Notice

As with Dr. Rosen's RJN, Plaintiffs' Request for Judicial Notice, filed on July 17, 2015, requesting judicial notice of letters of authorization from the New Jersey Department of Human Services, is GRANTED (see Evid. Code § 452(c)), but the court does not take judicial notice of the truth of factual matters asserted in the exhibits.

E. Joinder

On June 25, 2015, Defendant UCSF Benioff Children's Hospital Oakland ("CHO") filed a Joinder in Dr. Rosen's demurrer to the First and Third Causes of Action, stating that it incorporates by reference the pleadings and papers filed by Dr. Rosen. As CHO also filed a separate demurrer and motion to strike directed to the same causes of action, the court addresses CHO's demurrer to the First and Third Causes of Action by separate order, noting CHO's joinder in the arguments made by Dr. Rosen.

F. Leave to Amend

Plaintiffs shall have 14 days after the date reflected in the clerk's declaration of service of this order in which to file and serve a First Amended Complaint. Dr. Rosen shall have 14 days after service thereof in which to respond. C.C.P. § 1013 applies to the calculation of these dates.

G. Case Management Conference

By separate order, the court is scheduling a continued Case Management Conference at 2:00 p.m. on December 11, 2015, in Department 20. The court will advance or continue the conference to coincide with any hearing date selected if there is a further challenge to the contemplated amended pleading.

Dated: 10/20/2015

facsimile

Judge Robert B. Freedman

SHORT TITLE:	CASE NUMBER:
Spears VS Rosen	RG15760730

ADDITIONAL ADDRESSEES

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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Case Number: RG15760730
Order After Hearing Re: of 10/20/2015

DECLARATION OF SERVICE BY MAIL

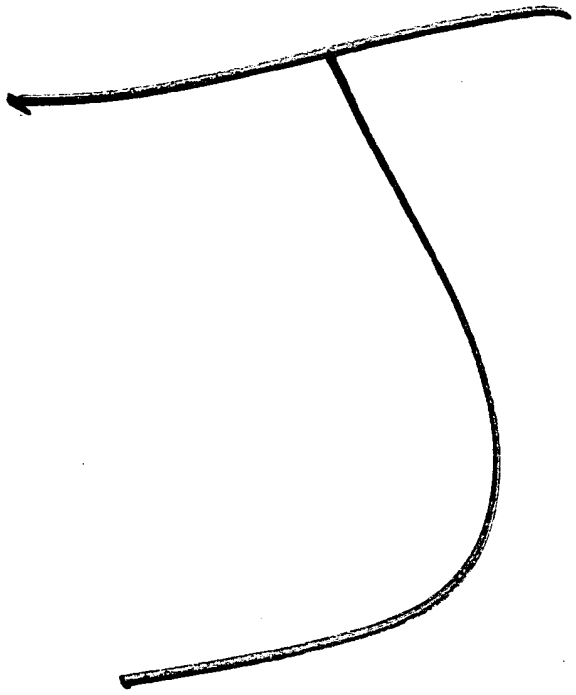
I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 10/20/2015.

Chad Finke Executive Officer / Clerk of the Superior Court

By digital _____

Deputy Clerk



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; and JAHI McMATH, a minor, by and through her Guardian Ad Litem, LATASHA NAILAH SPEARS WINKFIELD, Plaintiffs, vs. FREDERICK S. ROSEN, M.D.; UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND (formerly Children's Hospital & Research Center at Oakland); MILTON McMATH, a nominal defendant, and DOES 1 THROUGH 100, Defendants.	CASE NO. RG 15760730 ASSIGNED FOR ALL PURPOSES TO: JUDGE ROBERT B. FREEDMAN - DEPT. "20" **FIRST AMENDED COMPLAINT FOR DAMAGES FOR MEDICAL MALPRACTICE** Date Action Filed: 02/02/15

FACTUAL ALLEGATIONS

1. JAHI McMATH was born in Oakland, California, on October 24, 2000.

2. LATASHA NAILAH SPEARS WINKFIELD is the biological mother of JAHI McMATH.

3. MARVIN WINKFIELD is the husband of LATASHA NAILAH SPEARS WINKFIELD and the step-father of JAHI McMATH.

4. SANDRA CHATMAN (hereinafter "CHATMAN") is the biological maternal grandmother of JAHI McMATH and the mother of LATASHA NAILAH SPEARS WINKFIELD and was part of the family unit helping to raise JAHI McMATH. CHATMAN and JAHI had a close and loving relationship.

5. MILTON McMATH is the biological father of JAHI McMATH and is joined in this lawsuit as a nominal defendant.

6. Defendant FREDERICK S. ROSEN, M.D. (hereinafter "ROSEN") is an otolaryngologist or ear, nose and throat (ENT) surgeon who holds himself out as a specialist in ear, nose and throat surgeries for children and adolescents.

7. At all times mentioned herein, Children's Hospital & Research Center at Oakland (hereinafter "CHO"), now known as UCSF BENIOFF CHILDREN'S HOSPITAL OF OAKLAND, was a hospital in Oakland, California, which held itself out as a specialist in caring for and treating children with the highest standards of care.

8. At all times relevant hereto, all of the defendants were the agents, servants and employees or joint venturers of all the other defendants, and at said times were acting in the course and scope of such agency, service, employment and joint venture.

9. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1 through 100, inclusive, and therefore sues these defendants by fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believes and thereon alleges that each of the fictitiously named defendants are legally responsible in some manner for the occurrences therein alleged and were legally caused by the conduct of defendants.

10. In 2013, defendant ROSEN diagnosed JAHI McMATH with sleep apnea. ROSEN recommended a complex and risky surgery for sleep apnea which included the removal of her tonsils and adenoids (an adenoidtonsillectomy); the removal of the soft pallet and uvula or a uvulopalatopharyngoplasty (UPPP) and a submucous

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resection of her bilateral turbinates. JAHI had never been subject to a trial of a continuous positive airway pressure (CPAP) machine to treat her sleep apnea, despite the fact that such a trial is usually recommended before such a drastic surgery, especially in children. Furthermore, before a UPPP is performed on a child, it is usually recommended that the surgeon start with removing the tonsils and the adenoids only to see if that more modest procedure would cure the sleep apnea. For example, see: www.webmd.com/sleep-disorders/sleep-apnea/uvulopalatopharyngoplasty-for-obstructive-sleep-apnea.

11. On December 9, 2013, at 15:04 hours, defendant ROSEN took JAHI to the operating room at CHO to perform this extensive surgery. In ROSEN's Operative Report of his procedure, he noted that he found a "suspicion of medialized carotid on right." This meant that JAHI probably had an anatomical anomaly and that her right carotid artery was more to the center and close to the surgical site. Although this congenital and asymptomatic anomaly would otherwise have had no impact on JAHI's life, it raised a serious issue as to this extensive surgical procedure. According to the medical literature, this posed an increased risk factor for serious hemorrhaging during or after surgery. Despite this fact, ROSEN failed to note in any of his orders for the nurses, doctors and other health care practitioners who would be following JAHI postoperatively, including the post-anesthesia care unit (PACU) and pediatric intensive care unit (PICU) nurses, to put these health care workers on notice that JAHI had a congenital abnormality with her right carotid artery that would put her at a higher risk of postoperative bleeding.

12. After surgery, at approximately 7:00 p.m., JAHI was taken to the PACU then the PICU, but plaintiff LATASHA NAILAH SPEARS WINKFIELD was initially denied permission to visit JAHI. Approximately 30 minutes later, she decided to enter the PICU to visit JAHI, and she was alarmed to find her daughter coughing up blood into a plastic emesis container.

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13. Plaintiff LATASHA NAILAH SPEARS WINKFIELD expressed her concern to the nursing staff about the amount of blood JAHI was coughing up. The nurses assured plaintiff LATASHA NAILAH SPEARS WINKFIELD that the bleeding was "normal." A nurse then gave a suction wand to LATASHA NAILAH SPEARS WINKFIELD and instructed her as to how to suction blood out of her daughter's mouth. The nurses also gave her paper towels to help catch all of the blood. At that time, although JAHI was bleeding from the mouth, the packing and bandages in her nose were dry.

14. LATASHA NAILAH SPEARS WINKFIELD complied with the directions and instructions of the CHO nurse as to suctioning the blood from the front of her daughter's mouth for approximately 60 minutes. At that time, another CHO nurse came by and admonished LATASHA NAILAH SPEARS WINKFIELD for suctioning JAHI, claiming that it could remove blot clots that are vital for her healing. LATASHA NAILAH SPEARS WINKFIELD stopped suctioning, but her daughter continued coughing up blood, and by this point, the bandages and packing in JAHI's nose were also becoming bloody. LATASHA NAILAH SPEARS WINKFIELD pleaded with the nurses to call a doctor to JAHI's bedside, to no avail.

15. Later, the nurse that had originally instructed LATASHA NAILAH SPEARS WINKFIELD to suction the blood from her daughter's mouth returned and admonished her for not suctioning the blood from her daughter's mouth. This nurse then picked up the suctioning wand and began suctioning the blood from JAHI's mouth.

16. LATASHA NAILAH SPEARS WINKFIELD again began requesting that a doctor be called to address her daughter's ongoing and significant bleeding. As far as LATASHA NAILAH SPEARS WINKFIELD was concerned, the nursing staff at CHO did not appear to be contacting a physician since none was coming to her daughter's assistance. LATASHA NAILAH SPEARS WINKFIELD estimated that JAHI had lost 3 pints of blood or more. At that time, one nurse said the bleeding was

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normal, and another nurse said she did not know if it was normal or not.

17. Concerned about the amount of bleeding that she witnessed her daughter suffering, LATASHA NAILAH SPEARS WINKFIELD contacted her mother CHATMAN who she knew to be a nurse with many years of experience working in a hospital. CHATMAN arrived at bedside late in the evening of December 9, 2013, as the nursing staff was changing, at approximately 10:00 p.m. CHATMAN immediately became alarmed with the amount of blood she saw in the emesis tray, all over JAHI's clothing and bedding and in the receptacle that collected the blood from the suctioning device. CHATMAN immediately confirmed with the nurses that the blood in the suctioning receptacle was all JAHI's, and she advised the nurses that this was an excessive amount of bleeding for the procedure. CHATMAN then insisted that the nurses contact the doctors to come to her granddaughter's aid.

18. CHATMAN advised her daughter LATASHA NAILAH SPEARS WINKFIELD that JAHI was bleeding excessively and was at risk of having serious medical complications from the loss of blood and the lack of medical care she was receiving from the nurses and the refusal of doctors to attend to JAHI. After that point, LATASHA NAILAH SPEARS WINKFIELD and CHATMAN contemporaneously witnessed JAHI continue to bleed as her medical condition deteriorated from the medical neglect and the failure of the CHO medical staff to respond to the declining condition of JAHI.

19. At approximately 12:30 a.m., or 00:30 hours, on the morning of December 10, 2013, CHATMAN was watching the monitors and noted that there was a serious and significant desaturation of JAHI's oxygenation level of her blood. She also witnessed her heart rate drop precipitously. CHATMAN then called out for the nursing and medical staff to institute a Code. At 00:35 hours on December 10, 2013, the Code was called. At that time CHATMAN observed a doctor finally come to the bedside of JAHI and state, "Shit, her heart stopped." The

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cardiopulmonary arrest and Code was documented to last until 03:08 hours, or for 2 hours and 33 minutes, an extremely long period of time. During this time, the doctors and nurses failed to timely establish an airway for JAHI and no consideration was apparently given to perform an emergency tracheotomy when it was apparent after endotracheal intubation attempts were not resulting in prompt and adequate oxygenation of JAHI in a timely manner.

20. During the resuscitation efforts in the morning of December 10, 2013, approximately two liters of blood was pumped out of JAHI's lungs.

21. During the Code, a nurse who had been caring for another child in the PICU approached CHATMAN to console her. This nurse told CHATMAN, "I knew this would happen."

22. In nursing notes added to the chart on December 15, 2013, by the night shift registered nurse responsible for JAHI who charted JAHI's postoperative hemorrhaging and that her vital signs and symptoms were critical, noted that she had repeatedly advised the doctors in the PICU of JAHI's deteriorating condition and blood loss. She charted: "**This writer was informed there would be no immediate intervention from ENT or Surgery**." The registered nurse who took over for the night shift nurse and was also responsible for JAHI, also added an addendum to her nurse charting for December 9 and 10, which chart note was added on December 16, 2013. This nurse also noted that despite her repeated notification and documentation of JAHI's post surgical hemorrhaging and critical vital signs to the doctors in the PICU, no physicians would respond to intervene on behalf of JAHI.

23. On December 11, 2013, LATASHA NAILAH SPEARS WINKFIELD was advised that EEG brain testing indicated that JAHI had sustained significant brain damage. On December 12, 2013, LATASHA NAILAH SPEARS WINKFIELD and MARVIN WINKFIELD were advised that a repeat EEG also revealed that JAHI had suffered severe brain damage. They were advised that JAHI had been put on the

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organ donor list and that they would be terminating her life support the next morning. Upset that the hospital administration was pushing them to donate JAHI's organs and terminate life support without explaining what had happened to their daughter, LATASHA NAILAH SPEARS WINKFIELD and MARVIN WINKFIELD made inquiries as to what happened. Nobody with the hospital administration explained what happened.

24. Rather than provide the WINKFIELDS and CHATMAN with an explanation as to what happened to JAHI, the administration of CHO continued pressuring the family to agree to donate JAHI's organs and disconnect JAHI from life support. At one point, David J. Duran, M.D., the Chief of Pediatrics, began slamming his fist on the table and said, "What is it you don't understand? She is dead, dead, dead, dead!" Unknown to the family at the time, medical facilities were contacting CHO offering to accept the transfer of JAHI. These offers were given to Dr. Duran on his orders and he did not share those with the family.

25. The administration at CHO then instructed visitors of JAHI to be given different and distinctive visitor badges so they would be identifiable by the CHO staff and administration. Security guards were instructed to follow the family. CHO employees were tasked with getting JAHI's mother to sign the organ donation forms. At one point, she was confronted in the chapel while praying for JAHI to sign the forms.

26. LATASHA NAILAH SPEARS WINKFIELD then obtained a restraining order preventing CHO from terminating JAHI's life support. Eventually, an agreement was reached whereby JAHI was released to LATASHA NAILAH SPEARS WINKFIELD. As part of this court-supervised negotiated agreement, CHO was insisting on being provided a disposition permit from the Coroner. The Coroner's Office did not know what to do and was reluctant to issue a disposition permit without issuing a death certificate.

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27. On January 3, 2014, Deputy Coroner for the County of Alameda Jessica D. Horn issued a death certificate for JAHI noting a date of death of December 12, 2013, at 15:00 hrs. However, the Certificate of Death did not state a cause of death and instead notes under the Immediate Cause of Death "pending investigation." The death certificate, therefore, was invalid and violated California *Health & Safety Code* § 102875. The Certificate of Death also failed to include a physician's certification and contains no signature of a physician certifying to the death, as required by California *Health & Safety Code* § 102825.

28. On May 29, 2015, the State of California Department of Vital Records, the Chief of the Death and Fetal Death Registration Section and the Center for Health Statistics and Information were petitioned to rescind, cancel, void or amend JAHI's death certificate. These departments wrote back that they lacked standing to take such action and that the request should be directed to the coroner who issued the Certificate of Death.

29. On June 18, 2015, Muntu Davis, M.D., Health Officer for the Alameda County Health Care Service Agency and the local Registrar of Births and Deaths, was petitioned to rescind, cancel, void or amend JAHI's death certificate. Dr. Davis had previously indicated that the request should be directed to the state agencies. To date, Muntu Davis, M.D., has not acted on the request.

30. Since the Certificate of Death was issued, JAHI has been examined by a physician duly licensed to practice in the State of California who is an experienced pediatric neurologist with triple Board Certifications in Pediatrics, Neurology (with special competence in Child Neurology), and Electroencephalography. The physician has a subspecialty in brain death and has published and lectured extensively on the topic, both nationally and internationally. This physician has personally examined JAHI and has reviewed a number of her medical records and studies performed, including an MRI/MRA done at Rutgers University Medical Center on September 26, 2014. This doctor has also examined

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22 videotapes of JAHI responding to specific requests to respond and move.

31. The MRI scan of September 26, 2014, is not consistent with chronic brain death MRI scans. Instead, JAHI's MRI demonstrates vast areas of structurally and relatively preserved brain, particularly in the cerebral cortex, basal ganglia and cerebellum.

32. The MRA or MR angiogram performed on September 26, 2014, nearly 10 months after JAHI's anoxic-ischemic event, demonstrates intracranial blood flow, which is consistent with the integrity of the MRI and inconsistent with brain death.

33. JAHI's medical records also document that approximately eight months after the anoxic-ischemic event, JAHI underwent menarche (her first ovulation cycle) with her first menstrual period beginning August 6, 2014. JAHI also began breast development after the diagnosis of brain death. There is no report in JAHI's medical records from CHO that JAHI had began pubertal development. Over the course of the subsequent year since her anoxic-ischemic event at CHO, JAHI has gradually developed breasts and as of early December 2014, the physician found her to have a Tanner Stage 3 breast development.

34. The female menstrual cycle involves hormonal interaction between the hypothalamus (part of the brain), the pituitary gland, and the ovaries. Other aspects of pubertal development also require hypothalamic function. Corpses do not menstruate. Neither do corpses undergo sexual maturation. There is no precedent in the medical literature of a brain dead body developing the onset of menarche and thelarche.

35. Based upon the pediatric neurologist's evaluation of JAHI, JAHI no longer fulfills standard brain death criteria on account of her ability to specifically respond to stimuli. The distinction between random cord-originating movements and true responses to command is extremely important for the diagnosis of brain death. JAHI is capable of intermittently responding intentionally to a verbal command.

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36. In the opinion of the pediatric neurologist who has examined JAHI, having spent hours with her and reviewed numerous videotapes of her, that time has proven that JAHI has not followed the trajectory of imminent total body deterioration and collapsed that was predicted back in December of 2013, based on the diagnosis of brain death. Her brain is alive in the neuropathological sense and it is not necrotic. At this time, JAHI does not fulfill California's statutory definition of death, which requires the irreversible absence of *all brain function*, because she exhibits hypothalamic function and intermittent responsiveness to verbal commands.

DEFENDANTS ROSEN, CHO AND DOES 1-100

BREACHED THE APPLICABLE STANDARDS OF CARE

37. Plaintiffs incorporate herein by reference paragraphs 1 through 36 above as though fully set forth herein.

38. Defendant ROSEN was negligent and fell below the applicable standard of care in not recommending that JAHI be provided with a CPAP machine and monitored to see if her sleep apnea improved.

39. In the event that the CPAP machine was tried and did not prove successful in addressing JAHI'S sleep apnea, then defendant ROSEN fell below the standard of care in not recommending that he first operate and only remove JAHI's tonsils and adenoids to see if her sleep apnea improved.

40. During the subject surgery, defendant ROSEN discovered that JAHI might have a medialized right carotid artery. Defendant ROSEN fell below the standard of care when he failed to mention this condition in any of his postoperative orders which he knew would have been read and relied upon by the nurses and doctors who would have been responsible to care for JAHI postoperatively in the PACU and in the PICU. By failing to note JAHI's possible medialized right carotid artery and the significance of that condition that she was

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at a higher risk of life-threatening bleeding, the medical staff at CHO were not provided the important medical information which ROSEN should have provided them.

41. Defendant ROSEN fell below the applicable standard of care in failing to follow up on his patient who he suspected of having a possible medialized right carotid artery, especially given the fact that he failed to document this condition in his postoperative orders and, therefore, no one else would have had this special and important information which he, alone, possessed.

42. The nurses and medical doctors at CHO, including the fellows, residents and attending physicians, fell below the applicable standard of care by allowing JAHI to bleed for hours without insisting that the surgeon, ROSEN, return to bedside and address the source of the bleed. In the event that ROSEN was not available or refused to respond, medical staff at CHO had the duty to get another surgeon involved with JAHI's care in order to identify and address the source of the significant blood loss which was getting worse and worse over time.

43. JAHI's nurses violated the Standards of Competent Performance as set forth in the directives of the Nurse Practice Act. JAHI's nurses were responsible to act as JAHI's patient advocates by initiating action to improve health care or to change decisions or activities which are against the interest of the patient. If the nurses charting on December 15 and 16 was accurate and they were continually advising the doctors of JAHI's significant blood loss and the doctors refused to respond, JAHI's nurses had the responsibility to challenge the physician's lack of action and to activate the hospital's nursing hierarchy chain of command reporting system in order to get the medical care and attention which the nurses knew JAHI needed. The nurses' failure to so act resulted in JAHI's continued decline until she finally arrested.

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FIRST CAUSE OF ACTION

FOR PERSONAL INJURIES

ON BEHALF OF JAHI McMATH

(Against Defendants ROSEN, CHO and DOES 1 THROUGH 100)

44. Plaintiffs incorporate herein by reference paragraphs 1 through 43 above as though fully set forth herein.

45. As a result of the professional negligence of the defendants, plaintiff JAHI McMATH has been injured and has sustained a profound impact to the quality of her life.

46. As a result of the negligence of the defendants, plaintiff JAHI McMATH has incurred medical expenses and will incur medical, nursing and other related expenses in the future, in an amount that will be established according to proof.

47. As a result of the negligence of the defendants, plaintiff JAHI McMATH will suffer a loss of earning capacity in the future, according to proof at the time of trial.

SECOND CAUSE OF ACTION

FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

ON BEHALF OF PLAINTIFFS

LATASHA NAILAH SPEARS WINKFIELD AND CHATMAN

(As Against Defendants CHO AND DOES 1 THROUGH 100)

48. Plaintiffs incorporate herein by reference paragraphs 1 through 47 above as though fully set forth herein.

49. At approximately 7:00 p.m. on December 9, 2013, plaintiff LATASHA NAILAH SPEARS WINKFIELD witnessed her daughter JAHI McMATH suffering from continuous postoperative bleeding that continued to get worse. When her pleas for medical intervention to the nursing staff were ignored, she contacted her mother CHATMAN who she knew to be an experienced and trained nurse. By 10:00

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p.m., CHATMAN arrived at JAHI's bedside. CHATMAN realized immediately that her grandchild was suffering from excessive bleeding and that continued blood loss could result in serious personal injury or death. Plaintiff CHATMAN then began insisting that doctors be called to the bedside to address the complication of bleeding.

50. Plaintiff CHATMAN advised LATASHA NAILAH SPEARS WINKFIELD that the prolonged bleeding was not normal and that JAHI McMATH was suffering from complications of surgery which were not being properly addressed medically. From that point on, both plaintiffs LATASHA NAILAH SPEARS WINKFIELD and CHATMAN were aware that JAHI was being harmed by the inadequate and substandard nursing care she was receiving at CHO, by her surgeon who had not checked on the status of his patient or by the other medical staff at CHO.

51. As a result of the contemporaneous observation of JAHI McMATH losing significant amounts of blood while the cause of the bleeding was not addressed by the medical staff at CHO, plaintiff LATASHA NAILAH SPEARS WINKFIELD and CHATMAN suffered serious emotional distress caused by the defendants in an amount to be established according to proof at the time of trial.

52. LATASHA NAILAH SPEARS WINKFIELD became so emotionally distraught and overcome that she was admitted into CHO for observation.

THIRD CAUSE OF ACTION

FOR WRONGFUL DEATH ON BEHALF OF PLAINTIFF

LATASHA NAILAH SPEARS WINKFIELD

(Against Defendants ROSEN, CHO, MILTON McMATH and DOES 1 THROUGH 100)

53. Plaintiffs incorporate herein by reference paragraphs 1 through 52 above as though fully set forth herein.

54. In the event that it is determined JAHI McMATH succumbed to the injuries caused by the negligence of the defendants, plaintiff LATASHA NAILAH

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SPEARS WINKFIELD has lost the love, companionship, comfort, care, affection, society and moral and financial support of her daughter, according to proof at the time of trial.

WHEREFORE, plaintiffs pray as follows:

AS TO THE FIRST CAUSE OF ACTION, PLAINTIFF JAHI McMATH SEEKS:

1. General damages in excess of the jurisdictional limit of this Court;
2. Special damages according to proof;
3. All costs of suit incurred herein;
4. Pre-judgment interest as allowed by law; and
5. Such other and further relief as the Court deems just and proper.

AS TO THE SECOND CAUSE OF ACTION, PLAINTIFFS LATASHA NAILAH SPEARS WINKFIELD AND CHATMAN SEEK:

1. General damages in excess of the jurisdictional limit of this Court;
2. Special damages according to proof;
3. All costs of suit incurred herein;
4. Pre-judgment interest as allowed by law; and
5. Such other and further relief as the Court deems just and proper.

AS TO THE THIRD CAUSE OF ACTION, PLAINTIFF LATASHA NAILAH SPEARS WINKFIELD SEEKS:

1. General damages in excess of the jurisdictional limit of this Court;
2. Special damages according to proof;
3. All costs of suit incurred herein;
4. Pre-judgment interest as allowed by law; and

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5. Such other and further relief as the Court deems just and proper.

DATED: November 3, 2015

AGNEWBRUSAVICH
A Professional Corporation

By: _____
BRUCE M. BRUSAVICH
Attorneys for Plaintiffs

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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 **AGNEW**BRUSAVICH, 20355 Hawthorne Blvd., 2nd Floor, Torrance, California. On November 4, 2015, I served the within document **SUMMONS ON FIRST AMENDED COMPLAINT and FIRST AMENDED COMPLAINT FOR DAMAGES FOR MEDICAL MALPRACTICE**

☐ 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 hand delivery 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:

Thomas E. Still HINSHAW, MARSH, STILL & HINSHAW 12901 Saratoga Avenue Saratoga, CA 95070-9998 tstill@hinshaw-law.com	ATTORNEYS FOR FREDERICK S. ROSEN, M.D. (408) 861-6500 FAX (408) 257-6645
G. Patrick Galloway GALLOWAY, LUCCHESE, EVERSON & PICCHI 2300 Contra Costa Boulevard Suite 350 Pleasant Hill, CA 94523-2398 pgalloway@glattys.com	ATTORNEYS FOR DEFENDANT UCSF BENOIFF CHILDREN'S HOSPITAL (925) 930-9090 FAX (925) 930-9035
Andrew N. Chang ESNER, CHANG & BOYER Southern California Office 234 East Colorado Boulevard Suite 750 Pasadena, CA 91101 achang@ecbappeal.com	ASSOCIATE ATTORNEY FOR PLAINTIFFS LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; and JAHI McMATH, a minor, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD (626) 535-9860 FAX (626) 535-9859

I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice, it would be deposited with the 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.

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

☐ (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.

Executed this 4th day of November, 2015 at Torrance, California.

JAN DUNN

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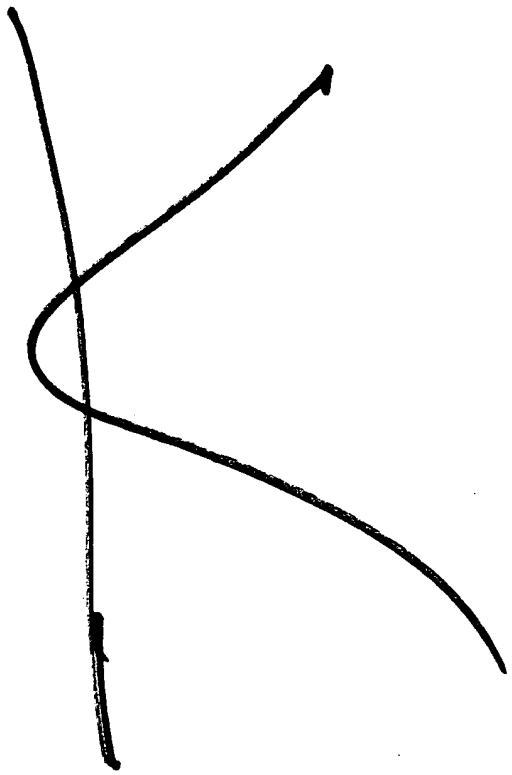
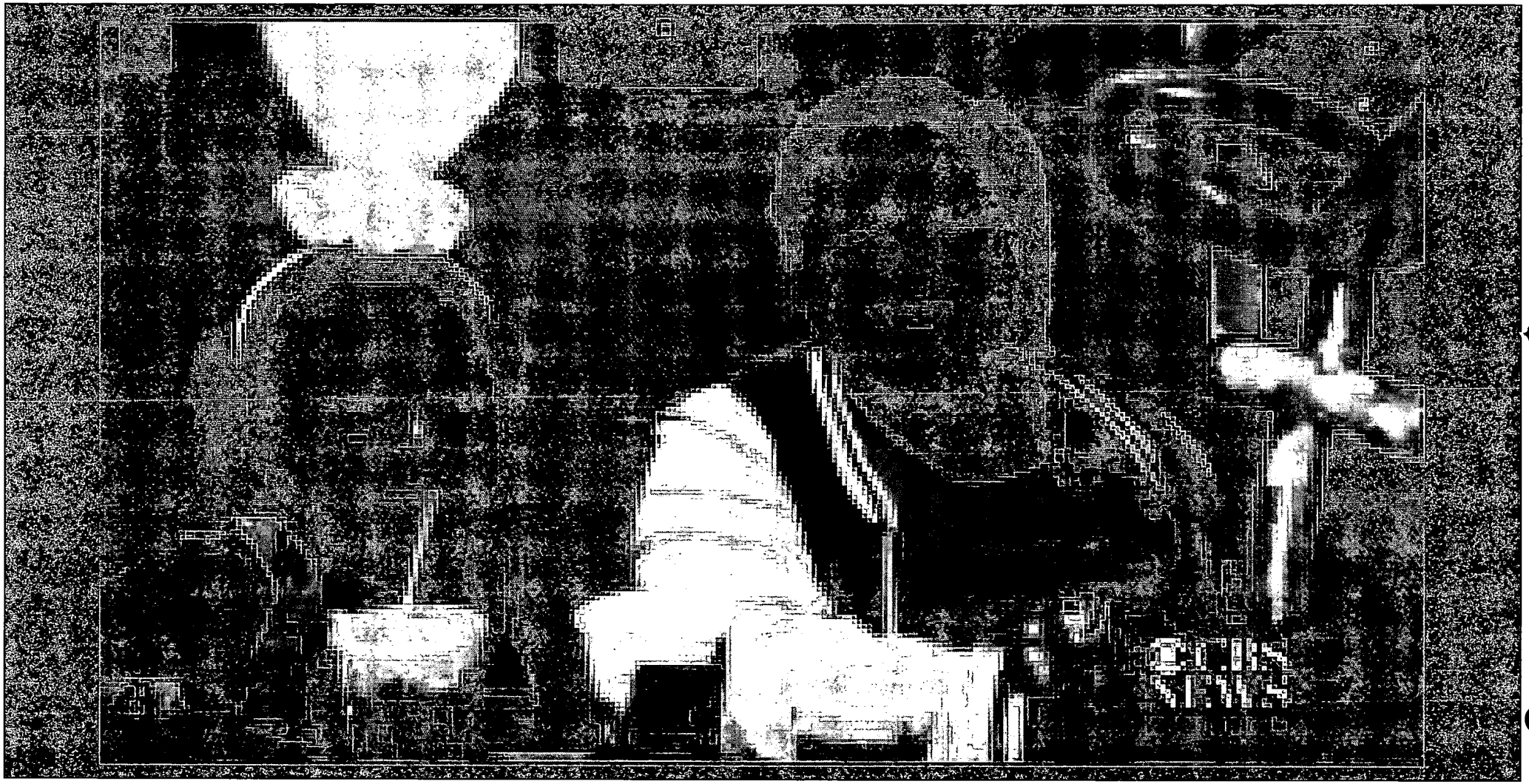


EXHIBIT K



PROOF OF SERVICE
(C.C.P. §§ 1013a, 2015.5)

I, the undersigned, say:

I am now and at all times herein mentioned have been over the age of 18 years, a resident of the State of California and employed in Santa Clara County, California, and not a party to the within action or cause; my business address is 12901 Saratoga Avenue, Saratoga, California 95070.

I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, mailing via Federal Express, hand delivery via messenger service, and transmission by facsimile machine. I served a copy of each of the documents listed below by placing said copies for processing as indicated herein.

NOTICE OF RELATED CASE;
AND APPLICATION TO ORDER CASES RELATED

XX If MAILED VIA U.S. MAIL, said copies were placed in envelopes which were then sealed and, with postage fully prepaid thereon, on this date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the U.S. Postal Service at Saratoga, California on this date in the ordinary course of business; and there is delivery service by U.S. Postal Service at the place so addressed.

____ If MAILED VIA FEDERAL EXPRESS, said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

____ If HAND DELIVERED, said copies were provided to_____, a delivery service, whose employee, following ordinary business practices, did hand deliver the copies provided to the person or firm indicated herein.

____ If VIA FACSIMILE TRANSMISSION, said copies were placed for transmission by this firm's facsimile machine, transmitting from (408) 257-6645 at Saratoga, California, and were transmitted following ordinary business practices; and there is a facsimile machine receiving via the number designated herein, and the transmission was reported as complete and without error. The record of the transmission was properly issued by the transmitting fax machine.

RECIPIENTS:

Christopher B. Dolan Aimee E. Kirby THE DOLAN LAW FIRM The Dolan Building 1438 Market Street San Francisco, CA 94102	Attorney for LATASHA WINKFIELD, the Mother of Jahi McMath, a minor, in Case No. RP13-707598
Douglas C. Straus Brian W. Franklin Noel M. Caughman ARCHER NORRIS A Professional Law Corporation North Main St., Suite 800 Walnut Creek CA 94596-3759	Attorney for UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND (formerly Children's Hospital & Research Center at Oakland) in Case No. RP13-707598

David Nefouse Andrea Weddle Alameda County Sheriff's Office Coroner's Bureau 480 4th Street Oakland, CA 94607	Alameda County Coroners Office
California Department of Public Health Office of Legal Services 1415 L Street Sacramento, CA 95814	California Department of Public Health
Bruce M. Brusavich Puneet K. Toor AGNEWBRUSAVICH 20355 Hawthorne Blvd., 2nd Floor Torrance, CA 90503	Attorneys for Plaintiffs LATASHA WINKFIELD, MARVIN WINKFIELD, SANDRA CHATMAN, and JAHI MCMATH, a minor, by and through her Guardian Ad Litem, Latasha Nailah Spears Winkfield in Case No. RG15760730
G. Patrick Galloway, Esq. Joseph E. Finkel, Esq. Karen Sparks, Esq. GALLOWAY, LUCCESE, EVERSON & PICCI 2300 Contra Costa Blvd., Suite 30 Pleasant Hill, CA 94523-2398	Attorneys for UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND in Case No RG15760730
Andrew N. Chang, Esq. ESNER, CHANG & BOYER 234 East Colorado Blvd., Suite 750 Pasadena, CA 91101	Attorneys for Plaintiffs LATASHA WINKFIELD, MARVIN WINKFIELD, SANDRA CHATMAN, AND JAHI MCMATH, a minor, by and through her Guardian Ad Litem, Latasha Nailah Spears Winkfield in Case No. RG15760730

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on November 23, 2015.

Ursula M. Walters

Ursula M. Walters

Court: Alameda County Superior Court
Action No: RG 15760730
Case Name: Spears (McMath) v. Rosen, M.D., et al.