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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 Motion for Summary Adjudication Denied

The Motion for Summary Adjudication of Plaintiff Jahi McMath's First Cause of Action for Personal Injuries, filed jointly by all defendants ("Defendants") on March 23, 2017, was set for hearing on July 13, 2017, at 3:00 p.m. in Department 16 before the Honorable Stephen Pulido. A tentative ruling was published, directing counsel to appear in person or by CourtCall at the hearing to address it, which they did.

The matter was argued and submitted. Good cause appearing, IT IS HEREBY ORDERED THAT the motion is DENIED.

A. Basis of the Motion

The notice of motion states as follows: "The Motion for Summary Adjudication of the First Cause of Action for Personal Injuries is made on the grounds that Jahi McMath ["McMath"] lacks standing to sue for personal injuries because she was pronounced deceased in accord with California law in December 2013. The undisputed material facts establish that no mistakes were made in the determination of McMath's brain death in December 2013, and the diagnosis of McMath's brain death was made in accord with the accepted medical standards required by California law." (Notice of Motion, p. 3.)

B. Triable Issues of Fact Preclude the Grant of Summary Adjudication.

The court determines that, though Defendants have shown that the determination of brain death in December 2013 was made in accordance with accepted medical standards (see Separate Statement of Undisputed Material Facts ["UMF"] Nos. 2-20, 24-42 and 66), a triable issue of fact exists as to whether McMath currently satisfies the statutory definition of "dead" under the Uniform Determination of Death Act. (See Health & Safety Code § 7180(a); UMF No. 48, 51, 67-69, Plaintiffs' Response to Separate Statement ["PRSS"] Nos. 13, 14, 17, 19, 26, 28, 29, 31-34, 38-40, 48, 51, 62-65, 67-69, Plaintiffs' Separate Statement of Additional Disputed Facts ["ADF"] Nos. 1-57, 72-81, and evidence cited except that to which objections are sustained.)

Among other things, Plaintiffs introduced the declaration of a pediatric neurologist, D. Alan Shewmon, M.D., opining that while "[t]here is no question that in December 2013 at Oakland Children's Hospital, Jahi McMath fulfilled the widely accepted pediatric guidelines for determining brain death," "[t]here is equally no question in my mind that she no longer does, for the single reason that the first of the 'three cardinal findings in brain death' - coma, absence of brainstem reflexes, and apnea - is not fulfilled. Rather, she is intermittently responsive, placing her in the category of 'minimally responsive state."

(Shewmon Decl., ¶ 6.) Dr. Shewmon, who is board certified in Pediatrics, Neurology (with special competence in Child Neurology) and Clinical Neurophysiology, bases his opinion not only on his examination of video recordings (as to which Defendants have asserted evidentiary objections, addressed below) but also on his review of MRI and other tests performed on McMath at University Hospital in September 2014. (See Shewmon Decl., ¶¶ 28-31, including ¶ 31 ["Jahi's MRI revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties)" which "tells us in retrospect that in December 2013 when she was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow...."]) Dr. Shewmon also attests, based on his review of the medical records and a personal examination in December 2014, that despite dire predictions such as those described in the declaration by Dr. Heidi Flori on January 7, 2014, McMath's "subsequent course defied all predictions of what must happen to dead bodies maintained indefinitely on ventilators." (Shewmon Decl., ¶ 52; see also id., ¶ 54 ["With proper nutrition and other treatments appropriate for a patient requiring intensive care" after being transferred to St. Peter's Hospital in New Jersey" in early 2014, McMath's "intestines healed, her skin turgor and pulmonary status recovered to normal, and she regained spontaneous maintenance of blood pressure without pressor medications," which "recovery from impending multisystem failure ... is not possible for a ventilated corpse."])

Plaintiffs also introduced evidence by McMath's treating physician since November 15, 2014, Alieta Eck, M.D., that McMath "has experienced menarche and has now entered puberty," including having a "menstrual period in August and September of 2014, lasting five days," and "began to grow pubic hair in August 2015." Dr. Eck attests that "[p]uberty starts when the hypothalamus releases a hormone," and that it is her opinion, based on this and also on her examinations of McMath and observations that McMath has responded on occasions to directions to move a specific finger and to noxious stimuli, that McMath is not brain dead. (Eck Decl., ¶¶ 4-8; see also Decl. of Sharleen Bangura, R.N. [testimony by registered nurse caring for McMath since early 2014 that on some occasions McMath has squeezed her hand or moved different parts of her body on directions that she do so, and that her heart rate has changed in response to music].)

The court has considered Defendants' argument that Health & Safety Code § 7180(a) states that "[a] determination of death must be made in accordance with accepted medical standards," as well as their evidence that no formal neurologic examination has been performed on McMath since December 2013 in accordance with the "Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendation" published in 2011 (the Guidelines"). (See Health & Safety Code § 7180(a); UMF Nos. 48, 51, 67-69, and evidence cited therein.) Defendants have not cited legal authority, however, that the absence of such a formal re-examination is dispositive of the issue of brain death when raised in a cause of action alleging a change of circumstances since a prior determination, or requires exclusion of all expert or other evidence as to brain function falling short of such a re-examination. (See, e.g., Memo., p. 22, citing Dority v. Superior Court (1983) 145 Cal.App.3d 273, 278 [discussed below]; Memo., p. 26 [citing no authority].) Though McMath concedes that no formal "re-determination" has been made, she introduces evidence as to tests and neurological opinions that her expert attests were not done to "determine brain death" or to "substitute for the accepted medical standards" but to evaluate the structure and electrophysiological functioning of McMath's brain many months after the prior determination. (See PRSS Nos. 67-69 and evidence cited, including Shewmon Decl., ¶¶ 29-35.)

In the absence of authority requiring exclusion of such expert testimony, and in light of admissible expert testimony and other evidence introduced by McMath in support of her allegations of "changed circumstances" since December 2013, the court finds that there is a triable issue of fact as to whether McMath currently satisfies the statutory definition of "dead" under Health & Safety Code § 7180(a), or at least as to whether a subsequent examination in accordance with accepted medical standards is warranted under the circumstances. (See Health & Safety Code § 7180(a)(2) [defining death as including "irreversible cessation of all functions of the entire brain, including the brain stem"]; First Amended Complaint ("FAC"), ¶¶ 30-36, including ¶ 33 [alleging that McMath's ovulation and breast development constitute changed circumstances since the diagnosis of brain death in December 2013]; Eck Decl., ¶¶ 4-8 [attesting to McMath's menstrual periods, growing of pubic hair and other conditions of puberty]; Shewmon Decl., ¶¶ 28-33 [attesting, based on MRI scans and other tests performed on McMath in September 2014, that McMath's "higher brain structures" are "partially preserved" and that "in December 2013 when she was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain"]; Shewmon Decl., ¶ 29 [attesting that tests performed on McMath in September 2014 "to evaluate ... the structure and electrophysiological functioning of

Jahi's brain 9 months after" the determination of brain death in December 2013 are "'consistent with' the possibility that Jahi is currently not brain dead...."])

Even if Defendants are correct that a subsequent determination in accordance with the Guidelines is necessary to contravene the prior determination in December 2013 - a proposition that Defendants repeat throughout their papers and argument without citation to legal authority - at the very least a triable issue exists as to whether there are changed circumstances pertaining to McMath's condition so as to warrant a subsequent determination in accordance with accepted medical standards. (See, e.g., UMF Nos. 48, 51, 67-69, PRSS Nos. 13, 14, 17, 19, 26, 28, 29, 31-34, 38-40, 48, 51, 62-65, 67-69, ADF Nos. 1-57, 72-81, and evidence cited except that to which objections are sustained.)

C. Defendants Have Not Met Their Burden as to Their Collateral Estoppel Defense.

As the court stated in its tentative ruling published before the hearing, while Defendants' papers are "heavy" on discussion of the medical determination of brain death that took place in December 2013, they are "light" on discussion of the applicable legal standards for the court to apply in circumstances, such as those herein, in which the plaintiff alleges and introduces expert testimony of continuing brain function based on the circumstances since the prior determination. For example, though Defendants include a one-paragraph argument on the last page of their memorandum that the claim is barred by collateral estoppel, this issue is not identified in the Notice of Motion and is accompanied by only a single case citation about collateral estoppel in general. (See Notice of Motion, p. 3; Memo., p. 29.) The court notes that, in its order of March 14, 2016, addressing a similar collateral estoppel argument in the context of Defendants' demurrers to the FAC, the court stated in part as follows:

"Collateral estoppel is an affirmative defense as to which the defendants bear a 'heavy' burden of proof. (Kemp Bros. Const., Inc. v. Titan Elec. Corp. (2007) 146 Cal.App.4th 1474, 1482.).... The court has concerns, for example, about whether the factual determinations in the context of the expedited probate petition - which was filed for the purpose of determining whether CHO should be ordered to continue providing medical care to Jahi - should necessarily be binding on Jahi in a civil lawsuit for damages brought on her own behalf. There are circumstances in which '[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.' (Rest.2d Judgments § 28(3).) Here, the prior expedited petition did not involve the same type of discovery and presentation of evidence as is involved in a civil action.... [¶] Further, ... California law on 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.) Jahi has included new allegations in the FAC as to such changed circumstances. (See, e.g., FAC, ¶¶ 30-36.) Such allegations are to be taken as true on demurrer. (See, e.g., Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967.)"

Given Defendants' failure to state in their notice of motion that they are seeking summary adjudication based on their affirmative defense of collateral estoppel, their failure to address this defense other than in a single paragraph at the end of their memorandum, their failure to cite additional authority in this regard at the hearing, and the evidence submitted in McMath's opposition papers as to "changed circumstances" that could warrant a new determination of McMath's current condition, the court finds that Defendants have failed to meet their "heavy burden" of showing the application of this affirmative defense as a matter of law, even though there is a more developed factual record. (See, e.g., UMF No. 48, 51, 67-69, PRSS Nos. 13, 14, 17, 19, 26, 28, 29, 31-34, 38-40, 48, 51, 62-65, 67-69, ADF Nos. 1-57, 72-81, and evidence cited except that to which objections are sustained.)

D. Defendants Have Not Demonstrated That a Prior Determination of Death Is Not Otherwise Subject to Re-Examination.

A similar conclusion applies to Defendants' argument, also raised and rejected by the court at the pleading stage, that the determination of death made in December 2013 must be accorded finality for any and all other purposes under Health and Safety Code sections 7180 and 7181 absent a re-examination or order setting it aside. As stated in the court's order of March 14, 2016:

"CHO contends that a determination of brain death in the context of a probate petition initiated by the guardian of an individual as to whom there is doubt as to her life or death status, based on the procedures set forth in Health and Safety Code sections 7180 and 7181, is a determination that (at least

unless set aside) must be accorded finality to serve the purposes of the Uniform Determination of Death Act (UDDA). As CHO observes, such statutes serve the purpose of allowing the family, physicians and others to take actions based on such a determination, including cessation of life support, removal of organs for transplant, probate of the decedent's estate, and the like. (See, e.g., H&S Code § 7151.40.)

"Nevertheless, ... the only authority cited by [moving defendant] ... is Dority v. Superior Court (1983) 145 Cal.App.3d 273.... In Dority, ... 'the parents became unavailable by their actions, requiring the court to appoint a temporary guardian. The guardian, faced with a diagnosis of brain death, correctly sought guidance from the court. The court, after hearing the medical evidence and taking into consideration the rights of all the parties involved, found [the individual] was dead in accordance with the California statutes and ordered withdrawal of the life-support device.' (Id., p. 280.) The Court of Appeal held that the 'court's order was proper and appropriate.' (Id.)

"While Dority supports the appropriateness of the judicial proceeding in Case No. RP13-707598, in which [McMath's mother Latasha] Winkfield sought the court's intervention because of uncertainty as to the treating physicians' diagnosis of brain death and Winkfield's assertion that CHO should continue providing life support to Jahi, it does not directly address CHO's assertion that a court's determination in the context of a such a dispute is to be accorded finality in any and all other proceedings or disputes that may arise subsequent to the life-support dispute in which the court's intervention was sought. In the absence of other authority addressing this assertion, the court declines to make a final determination in this regard at the pleading stage." (3/14/2016 Order, pp. 2-3.)

The same remains true on the present record. In its tentative ruling published before the hearing on the instant motion, the court asked the parties to address whether there was further authority for it to consider in this regard, beyond the Dority decision cited in the moving and reply papers. Defendants did not bring any additional authority to the court's attention. As the court previously ruled, while Health & Safety Code sections 7180 and 7181 and Dority, supra, support the appropriateness of the proceedings and examination made in the context of McMath's guardian's petition to require Children's Hospital Oakland (CHO) to keep McMath on life support, such authority does not establish that a determination of death in such a proceeding is final for any and all subsequent purposes, even where (as here) there is evidence of changed circumstances arguably warranting a new determination. (See, e.g., UMF Nos. 48, 51, 67-69, PRSS Nos. 13, 14, 17, 19, 26, 28, 29, 31-34, 38-40, 48, 51, 62-65, 67-69, ADF Nos. 1-57, 72-81, and evidence cited except that to which objections are sustained.)

Given the drastic nature of a summary adjudication motion, and the heavy burden placed on the moving party to establish the absence of any triable issue, the court determines that Defendants have not met this heavy burden. (See, e.g., Security Pacific Nat. Bank v. Bradley (1992) 4 Cal.App.4th 89, 97 ["because of the drastic nature of the measure, success requires a strong showing by the moving party."]) Among other things, the "affidavits of the moving party are 'strictly construed' while those of the opponent are 'liberally construed.'" (Id., quoting Molko v. Holy Spirit Ass'n (1988) 46 Cal.3d 1092, 1107.) Any doubts as to the propriety of summary judgment are resolved against the moving party. (Id.; Rickel v. Schwinn Bicycle Co. (1983) 144 Cal.App.3d 648, 653.)

E. Evidentiary Objections

On Defendants' Objections to Plaintiffs' Evidence, filed on July 6, 2017, and numbered 1-14, the court rules as follows:

(a) Objections to Declaration of D. Alan Shewmon, M.D.

No. 1 (as to ¶¶ 1-71) - OVERRULED except as stated below. Defendants object to the entire declaration on numerous grounds, including that "Dr. Shewmon failed to apply the appropriate legal and medical standards for determining brain death under California's Uniform Determination of Death Act ('CUDDA')," that "[t]here is no substitute to the accepted medical standards for determining brain death that are set forth in the Guidelines," that "[v]ideo recordings, the onset of puberty, observation and select imaging studies are not a substitute for the accepted medical standards for determining brain death," that "[t]he matters relied upon by Dr. Shewmon are not the proper basis for forming an opinion on brain death under the CUDDA" and that "McMath has not undergone a brain death evaluation pursuant to the accepted medical standards in the Guidelines since December 2013." First, even to the extent some of these objections had merit, they would not warrant wholesale exclusion of the entire declaration, which contains a substantial amount of testimony beyond Dr. Shewmon's ultimate opinion

as to whether McMath is brain dead pursuant to Health & Safety Code § 7180(a)(2).

Second, as Dr. Shewmon attests, his opinions, and the matters on which he bases them (including MRI scans), are not introduced either to "determine brain death" or to "substitute for the accepted medical standards," or even to attempt to challenge the brain death assessments that were made in December 2013. (Shewmon Decl., ¶¶ 6, 28-35.) Instead, they are offered as evidence of circumstances and subsequent tests that have been performed on McMath, including to "evaluate, out of interest, the structure and electrophysiological functioning of Jahi's brain 9 months after" the determination in December 2013. (Id., ¶ 29.) As discussed above, despite the fact that Dr. Shewmon has not performed a formal determination of brain death as addressed in the Guidelines, Defendants have not cited authority that his opinions are of no weight or admissibility in addressing the changed circumstances alleged in the First Cause of Action.

Third, though Dr. Shewmon acknowledges that the Guidelines state that "MRI-MR angiography, and perfusion MRI imaging have not been studied sufficiently nor validated in infants and children and cannot be recommended as ancillary studies to assist with the termination of brain death in children at this time," this does not mean that such tests are without any significance whatsoever. (Shewmon Decl., ¶ 29.) Further, Dr. Shewmon attests that, while the Guidelines are generally accepted medically, there is some "discrepancy between what the Guidelines diagnose and what the statutory definition of death specifies," which "has been pointed out by many commentators." (Shewmon Decl., ¶ 47; see also In re Guardianship of Hailu (Nev. 2015) 361 P.3d 524, 531, cited in McMath's Opp. at p. 17 ["whatever their medical acceptance generally, the briefing and testimony do not establish whether the [American Association of Neurology] guidelines adequately measure the extraordinarily broad standard laid out by" Nevada UDDA statute with same language as Health & Safety Code § 7180(a)(2).])

Fourth, the court has considered Defendants' objection that the video recordings upon which Dr. Shewmon bases some aspects of his opinions have not themselves been introduced into evidence or authenticated. While the court SUSTAINS this objection to the extent Dr. Shewmon's discussion of what is depicted in the videos is proffered for the truth of those matters, the court overrules the objections to the extent directed to Dr. Shewmon's opinions based thereon. (See, e.g., Garibay v. Hemmat (2008) 161 Cal.App.4th 735, 742-743 ["Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact"], quoting Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1524-1525; Evid. Code § 801(b).) As to the opinions based on the videos, the court exercises its discretion to admit them. (See, e.g., Evid. Code § 801(b) [an expert can testify in the form of an opinion if it pertains to a subject "sufficiently beyond common experience" that it would assist a trier of fact and is "[b]ased on matter (including his special knowledge, skill, experience, training, and education) ... known ... or made known to him ... whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion...."]; People v. Catlin (2001) 26 Cal.4th 81, 137.) Among other things, there is a foundation (albeit disputed in part) that the videos upon which the opinions were based were provided to Defendants in discovery and have been subjected to expert forensic video analysis. (See McMath's Supp. Brief Re: Defendants' Evidentiary Objections, p. 3.)

With the exception of the portion of the objection sustained above, the court finds that Dr. Shewmon has set forth a sufficient foundation that his opinions are based on matters of a type on which an expert may reasonably rely, are based on reasons supported by such material, and are not unduly speculative so as to be entirely inadmissible. (See Sargon Enterprises, Inc. v. University of Southern Cal. (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803.)

No. 2 (¶¶ 6, 25, 29, 38, 55, 56, 57) - OVERRULED except as discussed above.

No. 3 (¶¶ 6, 18, 19, 20, 21, 22, 23, 24, 25, 38, 40 and 56) - OVERRULED except as discussed above.

No. 4 (Dr. Shewmon's reliance on McMath's family members' impressions of McMath's responsiveness, at ¶¶ 7, 8 and 9) - SUSTAINED.

No. 5 (Dr. Shewmon's reliance on 49 video recordings of McMath, at ¶¶ 10-27) - SUSTAINED to the same extent discussed in No. 1 above but otherwise OVERRULED.

No. 6 (Dr. Shewmon's reliance on the imaging studies and other testing performed on McMath at University Hospital on September 26, 2014, at ¶¶ 30-37) - OVERRULED.

Nos. 7 and 8 (Dr. Shewmon's reliance on McMath's alleged onset of puberty, at ¶ 50, and McMath's continued biological functions, at ¶¶ 51-54) - OVERRULED. Dr. Shewmon attests that he personally examined McMath on December 2, 2014, and also bases his opinion on physician progress notes and other medical records (on which Defendants' experts also base their opinions in part). (Shewmon Decl., ¶¶ 9, 50-54.)

No. 9 (portion of ¶ 57) - OVERRULED.

No. 10 (portions of ¶¶ 42, 46 and 47) - OVERRULED.

No. 11 (Dr. Shewmon's reliance on peer review articles and other materials that have not been authenticated or submitted to the court, at ¶¶ 43-49 and 60-71) - SUSTAINED as to the truth of the matters asserted in the articles but OVERRULED otherwise.

No. 12 (portions of ¶¶ 58-71) - OVERRULED. This primarily goes to weight rather than admissibility. See also discussion in No. 1, above.

(b) Objections to Declaration of Alieta Eck, M.D.

No. 13 - OVERRULED. Dr. Eck's testimony is based on her physical examination of McMath and Dr. Eck has set forth a sufficient foundation to testify as to her opinions based thereon. See also discussion in No. 1, above.

(c) Objections to Declaration of Sharleen Bangura, R.N.

No. 14 - SUSTAINED as to references to McMath's being "alert" on certain days but otherwise overruled. Nurse Bangura's testimony is based on her personal observations of McMath and she has set forth a sufficient foundation. The court considers the testimony to be in the nature of percipient testimony rather than expert testimony, and the objections primarily go to weight.

F. Requests for Judicial Notice

Defendants' Request for Judicial Notice, filed on March 23, 2017, and McMath's Request for Judicial Notice, filed on June 29, 2017, are GRANTED as to the specified exhibits but not as to the truth of the matters asserted therein.

Dated: 09/05/2017

facsimile

Judge Stephen Pulido

SHORT TITLE:	CASE NUMBER:
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