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Attorneys for Defendant
UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION

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. RG15760730

The Honorable Robert B. Freedman

REPLY IN SUPPORT OF UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND'S DEMURRER AND MOTION TO STRIKE

Date: July 30, 2015
Time: 2:00 p.m.
Dept: 20
Date Complaint Filed: March 3, 2015
Trial: N/A

Reservation No. R – 1640359

REPLY IN SUPPORT OF UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND'S DEMURRER AND MOTION TO STRIKE

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I.

THE NEW JERSEY ELIGIBILITY LETTERS ARE NOT PROOF THAT JAHI DOES NOT MEET THE CRITERIA FOR BRAIN DEATH, NOR ARE THEY RELEVANT TO THIS ACTION

Plaintiffs submit letters from New Jersey's Department of Human Services indicating that Jahi McMath is eligible for nursing care coverage under New Jersey's Medicaid program, and ask the Court to conclude from this that Jahi is not brain dead, and to take judicial notice of this "fact."

First, even if this fact could be judicially noticed, eligibility for nursing care under New Jersey's Medicaid program does not establish that Jahi is not brain dead. These letters say nothing about brain death, let alone, declare that Jahi is not brain dead. Nor can this be inferred from the letters.

New Jersey, like most states, recognizes brain death as a basis for the determination of death. N.J.S. 26:6A-3. But New Jersey is one of two states that recognize a religious exemption from the Uniform Determination of Death Act:

> The death of an individual shall not be declared upon the basis of neurological criteria pursuant to sections 3 and 4 of this act when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual's available medical records, or information provided by a member of the individual's family or any other person knowledgeable about the individual's personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria pursuant to section 2 of this act.

N.J.S. 26:6A-5. Because of the exemption, a person in New Jersey can be brain dead *and* alive under state law, so even assuming Jahi is considered alive by the State of New Jersey, it does not follow that she is not brain dead.

California law does not have a similar exemption permitting families to opt out of state law establishing brain death as a basis for determining death. Whatever Jahi's status may be under New Jersey law is not relevant here.

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II.

THE COURT CAN TAKE JUDICIAL NOTICE OF THE FACT THAT THE DEATH ISSUE HAS BEEN FULLY LITIGATED AND FINALLY DETERMINED

Even assuming arguendo that the Court cannot take judicial notice of the fact of death or brain death, the issuance of the Death Certificate and the Court records do permit the Court to take judicial notice of the fact that the issues of brain death and death have been fully litigated and finally determined.

The Death Certificate At the very least, issuance of a Death Certificate permits the Court to take judicial notice of the fact that a determination of death was made, that it was considered final, and that in California Jahi is considered legally dead. Moreover, none of the cases cited by plaintiff preclude taking judicial notice of the *fact of death* established by the issuance of a death certificate, they relate only to the time and date of death, and cause of death.

Court Records At the very least, the Court's records establish and permit the Court to take judicial notice of the fact that the issue of death has been fully litigated and finally determined.

III.

COLLATERAL ESTOPPEL DOES APPLY HERE

A. THE ISSUE IN BOTH PROCEEDINGS IS IDENTICAL

Plaintiffs claim that the issue defendants want to preclude in this action is whether Jahi is entitled to claim personal injury damages, and that the issue in the prior proceeding was whether to withdraw life support. However, the Hospital is asserting issue preclusion, not claim preclusion. The *issue* to be barred in this action is whether Jahi is legally dead, and that is the same issue that was actually litigated, necessarily decided, and finally determined on the merits in the prior action. Amended Order Denying the Petition For Medical Treatment, Exhibit A; Final Judgment, Exhibit B.

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B. PLAINTIFFS CITE NO AUTHORITY PERMITTING THE ISSUE OF DEATH TO BE RE-LITAGATED IN THIS ACTION

Even assuming, as plaintiffs argue, that the principles of collateral estoppel would permit the re-litigation of an issue upon new facts when circumstances change, the defense has found no authority, and the plaintiffs have cited to no authority, applying this exception to a determination of death.

The two child abuse cases cited by plaintiffs are not analogous. They do not pertain to death. Death and the determination of death are unique. They are, by nature and by statute, final. The policies and principles that apply to the determination of death must reflect that finality, and collateral estoppel should apply to bar further litigation.

IV.

THE INTERESTS OF FUNDAMENTAL FAIRNESS HAVE BEEN SERVED

Plaintiffs point out that collateral estoppel serves to preserve the integrity of the judicial system, to promote judicial economy, and to protect litigants from harassment by vexatious litigation. Applying the doctrine here serves all these interests.

Plaintiffs also argue that it would be fundamentally unfair to apply collateral estoppel here because the relief sought in the two proceedings differed, and because the earlier proceeding was an informal, expedited hearing with limited opportunity to fully explore the issue of brain death. They contend that the court in Dority v. Superior Court (1983) 145 Cal. App. 3d 273, 276, recognizes that an expedited determination of brain death for the purposes of withdrawing life support is subject to rebuttal when it becomes reasonably probable that the diagnosis was mistaken. Also citing Vandenberg v. Superior Court (1999) 21 Cal. 4th 820, 834-835, plaintiffs point out that issue preclusion does not apply to arbitration because of its informal nature.

Dority Like Jahi, the child in Dority had been declared brain dead. But contrary to plaintiffs' contention, court was not concerned about the "expedited determination of the

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brain death." Rather the court ruled that the court's jurisdiction can be invoked when there is *disagreement* over the brain death determination and it is reasonably probable that a mistake was made. Dority v. Superior Court (1983) 145 Cal. App. 3d 273, 280.

In the present case, there was a disagreement over the brain death determination. This Court did exercise its jurisdiction and made a final determination that Jahi was brain dead. Nothing in Dority suggests that plaintiffs have a jury trial on this issue or a right to otherwise litigate this matter again.

Disparate Relief Sought In the previous proceeding, plaintiffs sought to continue life support for Jahi. In their opposition, plaintiffs themselves refer to this as "the heartbreaking question of whether to withdraw life support." Opposition at 11:7. The interest at stake was of the highest order. This was literally a matter of life and death. Arguably no other interest would be more likely to motivate the court and the parties to fully, fairly, and finally determine whether Jahi was dead.

It is apparent from plaintiffs' opposition that Jahi is being continued on life support, and nothing in this action or in the Uniform Determination of Death Act would deny plaintiffs the right to continue life support. This action is ultimately about damages.

The Prior Proceeding The prior proceeding was not informal. Motions and Petitions were filed, opposition briefs were submitted, an independent expert was appointed by the Court, hearings were held, medical records were admitted, the doctors who made the brain death determinations submitted declarations and testified before the Court, the law was analyzed and applied, objections were made and ruled on, and formal orders and a final judgment were issued. 1/2/2014 Amended Order Denying the Petition For Medical Treatment at 2:7-21, Exhibit A; 1/17/2014 Final Judgment Denying Petition for Medical Treatment, Exhibit B. Although appeal was not taken, appellate review was available. The court in Vandenberg v. Superior Court (1999) 21 Cal. 4th 820, 831-832, characterized arbitration as an informal process because it is not strictly bound by evidence or law, and is not subject to judicial oversight and review. However, the

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prior proceeding in the present matter was a judicial proceeding, bound by law and evidence, and subject to review.

The proceeding in Dority appears even more "expedited" than the one here, but was nonetheless approved by the court. Dority v. Superior Court (1983) 145 Cal. App. 3d 273, 276. A proceeding to determine whether life support should be continued must, by its nature, be expedited, but a determination of death must also be a final determination.

Neither Dority nor anything in the law that governs the determination of death in California would entitle plaintiff to a jury trial on the issue of whether Jahi is brain dead.

V.

DEATH IS FINAL AND CANNOT BE RE-LITIGATED

A. THE DETERMINATION OF DEATH IS INTENDED TO BE FINAL

As the Hospital previously pointed out, the determination of death permits medical treatment to be withdrawn, organs to be removed for transplant, wills to be probated, insurance proceeds to be distributed, and it permits families to move on. The determination must, therefore, be final. It is unclear what, if any, meaning or use a reversible declaration of death would have.

To be meaningful at all, a determination of death must be final. The finality of a determination of death under Uniform Determination of Death Act (Health and Safety Code §7180) is reflected in the provisions requiring a finding of the *irreversible* cessation of cardiorespiratory or brain functions. The UDDA brain death provision is premised on the irreversible nature of brain death, and the ability of accepted medical standards to determine whether the lack of brain function has become irreversible.

When death is determined under the brain death provisions of the UDDA, it is by definition a determination of *irreversible* brain death, that is, a determination that all brain function is permanently and irreversibly lost, and it is intended to be final. Nothing

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in the law conditions the determination of death on the continued monitoring for signs of brain function, or contemplates challenges based on events occurring months or years later.

It is still not entirely clear what plaintiffs intend to allege and prove if given the opportunity. If they are arguing that Jahi is not currently brain dead, and that she was therefore never brain dead because brain death is by definition irreversible, they would in effect be arguing that Dr. Fisher's December 2013 findings were wrong, and they suggest that the evidence of brain death at the time of his examination was due to a temporary, reversible swelling of the brain which he presumably failed to rule out. Opposition 1:23-25, 9:20-23.

But the validity of Dr. Fisher's 2013 determination of irreversible brain death was fully litigated and finally decided, and plaintiffs' counsel stipulated that his examination and his diagnosis were made according to accepted medical standards. 1/2/2014 Amended Order Denying the Petition For Medical Treatment at 2:7-21, Exhibit A; 1/17/2014 Final Judgment Denying Petition for Medical Treatment, Exhibit B. The re-litigation of the issue is barred by the principles of collateral estoppel, and the final nature of the death determination.

Plaintiffs, however, would like to challenge the December 2013 determination of irreversible brain death with evidence of events occurring months or years later. Such challenges are not contemplated by the law, and if permitted, they would render the determination of death on the basis of brain death unacceptably conditional and indeterminate, and essentially render the UDDA's brain death provision useless as a basis for determining death.

B. THIS TORT ACTION IS NOT THE PROPER FORUM FOR ADDRESSING PLAINTIFFS CONCERNS ABOUT THE BRAIN DEATH PROVISIONS OF THE UNIFORM DETERMINATION OF DEATH ACT

If plaintiffs plan to argue, for example, that 1) there is no such thing as brain death, 2) they have evidence to prove that what appears to be irreversible brain death

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at one point will eventually prove to be reversible, 3) it is impossible to determine when the lack of brain function becomes irreversible, 4) the medical standards now used are incapable of determining if the loss of brain function is irreversible, or if they plan to otherwise challenge the use of brain death as a basis for determining death, they will in effect be improperly asking this Court or the jury in this case to reject the brain death provisions of the Uniform Determination of Death Act (Health and Safety Code §7180).

The Uniform Determination of Death Act was drafted by both legal and medical authorities, it reflects accepted biomedical practice, it has the approval of both the ABA and AMA, and it has been adopted by over 30 jurisdictions. National Conference of Commissioners on Uniform State Law, 12A U.L.A. (Masters Ed., 2008) Determination of Death Act pp. 777-779, Exhibit E. The UDDA establishes irreversible loss of brain function as a means of determining death, and is premised on the irreversible nature of the loss, and the ability of accepted medical standards to determine whether the lack of brain function has become irreversible. It is not up to this Court or a jury in this case to reweigh the facts and findings underlying the Uniform Determination of Death Act or to decide whether brain death can or should be used as a basis for determining death. see Schabarum v. California Legislature (1998) 60 Cal.App.4th 1205, 1219; C.C.P. §1858.

Any concerns the plaintiff's may have about the efficacy of brain death as a basis for determining death should be addressed to those who drafted the law and the legislatures that enacted it, not the Court or the jury in this case. Similarly, courts and lay juries may have occasion to determine what the accepted medical standards are, and whether or not they have been properly applied, but *they* cannot determine what the medical standards for determining death *should* be.

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VI.

THE HOSPITAL'S MOTION TO STRIKE SHOULD BE GRANTED AND THE DEMURRER SUSTAINED

Motion to Strike Jahi has been declared legally dead and this issue cannot be re-litigated in this action. The future damages should therefore be stricken from the first cause of action. The language in the wrongful death cause of action contemplating the re-litigation of the death issue should also be stricken.

Demurrer The first cause of action is pled as a personal injury claim on behalf of Jahi McMath. But Jahi has been declared dead. Personal injury causes of action belonging to a decedent at the time of her death can only be maintained by a personal representative, or if none, a successor in interest (C.C.P. §§377.30), and it does not appear that Mrs. Winkfield is proceeding in either capacity. She does not therefore have standing to commence this cause of action, and the Hospital's demurrer must be sustained. *California Practice Guide, Civil Procedure Before Trial* ¶ 2.77 (complaint filed by person without standing to sue subject to general demurrer).

VII.

THE DEMURRER TO MARVIN WINKFIELD'S CAUSE OF ACTION IS UNOPPOSED AND SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND

Stepfathers do not have standing to sue for the wrongful death of a stepchild. C.C.P. §377.60, Probate Code § 6402(b), Probate Code §6564 and accompanying Law Revision Commission Comment. Plaintiffs do not address or oppose the Hospital's demurrer to Mr. Winkfield's wrongful death cause of action, and the demurrer should be sustained without leave to amend.

Dated: July 23, 2015

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By: _____
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PROOF OF SERVICE

I declare under penalty of perjury that:

I am a citizen of the United States and am employed in the County of Contra Costa. I am over the age of eighteen years and not a party to the within action. My business address is 1676 North California Boulevard, Suite 500, Walnut Creek, CA 94596-4183.

On the date set forth below, I caused the attached **Reply in Support of USCF Benioff Children's Hospital Oakland's Demurrer and Motion to Strike** to be served on the parties to this action as follows:

¶

[x] **BY MAIL.**

I placed a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California, addressed to the parties as set forth on the attached service list. C.C.P. §§1013(a), 2015.5.

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[x] **BY UNITED PARCEL SERVICE.**

I retained **UNITED PARCEL SERVICE** to serve by overnight delivery a true copy thereof on the parties as set forth on the attached service list. C.C.P. §§1013(c), 2015.5.

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Executed on July 23, 2015 at Walnut Creek, California.

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