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FILED
ALAMEDA COUNTY

MAR 17 2016

CLERK OF THE SUPERIOR COURT
By *[Signature]*

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA

AGNEW BRUSAVICH
LAWYERS

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

19 Plaintiffs,

20 vs.

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

24 Defendants.

CASE NO. RG 15760730

ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN - DEPT.
"20"

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO BIFURCATE TRIAL;
MEMORANDUM OF POINTS AND
AUTHORITIES AND DECLARATION OF
BRUCE M. BRUSAVICH IN SUPPORT**

DATE: April 15, 2016
TIME: 11:00 a.m.,
DEPT: "20"

Reservation No: 1721136

Date Action Filed: 03/03/15

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26 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

27 PLEASE TAKE NOTICE that on April 15, 2016 at 11:00 a.m. or as soon thereafter
28 as the matter may be heard in Department "20" of the above-entitled Court

1 located at 1221 Oak St., Third Floor, Oakland, CA 94612, Plaintiffs Latasha Naila
2 Spears Winkfield, Marvin Winkfield, Sandra Chatman and Jahi McMath, a minor by
3 and through her Guardian ad Litem Latasha Nailah Spears Winkfield will move this
4 Court for an order that bifurcates the issues of liability and death/damages during
5 the trial phase of this matter pursuant to *Code of Civil Procedure* §§598 and 1048.
6 Plaintiffs further request that the death/damages phase take place several months
7 after the liability phase to permit extensive discovery to go forward in the interim.

8 This motion is made on the grounds that bifurcating the issues of liability and
9 damages will promote the convenience of witnesses and the efficiency, justice, fair
10 handling of litigation as follows:

11 1. The presentation of witnesses and evidence related to whether or not
12 Defendants committed medical malpractice during and after the surgery of
13 December 9, 2013 will require, at most, a 7-10 day trial. Plaintiffs anticipate that
14 issues related to whether or not Jahi is brain dead or alive, the status of her death
15 certificate and, if found to be alive, her injuries and damages will consume months
16 of discovery, including depositions of the New Jersey physicians who have treated
17 Jahi, and experts including one in Cuba and several in Los Angeles, CA, followed
18 by weeks of trial. Plaintiffs and Defendants both will rely on testimony from a host
19 of treating physicians and medical and ethical experts to establish "life" or "brain
20 death", and ultimately to establish the nature, extent, severity and prognosis for her
21 injuries attributable to medical malpractice; and

22 2. The economic and efficient handling of the trial will be greatly enhanced
23 by requiring that the issue of liability for medical malpractice be tried prior to, and
24 separate from, any issues pertaining to brain death and damages. Namely, the
25 Court may save witnesses, jurors, court staff, attorneys and parties several weeks of
26 trial in a case where Plaintiffs may not prevail on the issue of liability;

27 3. There is a Federal action pending which may resolve the issue of whether
28 Jahi is legally dead or alive;


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4. Any testimony in this action regarding whether or not Jahi is brain dead or alive, and her damages if she is found to be alive, will be emotionally charged and potentially inflame the jurors' emotions. There is, therefore, a substantial danger of under prejudice to the parties in this action. *Evidence Code* §§350, 352.

This motion will be based upon this Notice of Motion, the Memorandum of Points and Authorities contained here, the Declaration of Bruce M. Brusavich, the pleadings and records in this action, and on whatever oral or documentary evidence may be presented at the hearing of this matter.

Dated: March 15, 2016

AGNEWBrusavich
A Professional Corporation

By: 
Bruce M. Brusavich
Attorneys for Plaintiffs

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3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 I. **STATEMENT OF FACTS.**

5 On December 9, 2013, Defendant Frederick S. Rosen, M.D. ("Rosen")
6 operated on Plaintiff Jahi McMath ("Jahi") at Children's Hospital & Research Center
7 at Oakland ("CHO") for sleep apnea. Defendant Rosen elected to perform a
8 complex and risky surgery for sleep apnea which included the removal of her
9 tonsils and adenoids (an adenoidtonsilectomy), the removal of the soft pallet and
10 uvula (UPPP) and a submucous resection of her bilateral turbinates. Jahi had never
11 been subject to a continuous positive airway pressure (CPAP) machine to treat her
12 sleep apnea despite the fact that such a trial is usually recommended before such
13 a drastic surgery, especially in children. Furthermore, before a UPPP is performed
14 on a child, it is usually recommended that the surgeon start with removing the
15 tonsils and the adenoids only, to see if that more modest procedure would cure the
16 sleep apnea.

17 In Defendant Rosen's Operative Report of this procedure, he noted that he
18 found a "suspicion of medialized carotid on right." This meant that Jahi probably
19 had an anatomical anomaly and her right carotid artery was more to the center
20 and closer to the surgical site. Although this congenital and asymptomatic
21 anomaly would otherwise have had no impact on Jahi's life, it raised a serious issue
22 as to this extensive surgical procedure as it posed an increased risk factor for serious
23 hemorrhaging during or after the surgery. Defendant Rosen failed to note in any of
24 his orders for the nurses, doctors, and other health care practitioners who would be
25 following Jahi postoperatively that put these individuals on notice that Jahi had this
26 congenital abnormality that put her at higher risk of postoperative bleeding.

27 After the surgery, at approximately 7:00 pm, Jahi was taken first to the post-
28 anesthesia care unit ("PACU") and then to the pediatric intensive care unit
("PICU"). From the first moment that her family was given permission to see her, Jahi

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1 was coughing up blood. Jahi's mother and stepfather were told that this bleeding
2 was "normal" and they were given paper towels to mop it up. Jahi's mother,
3 LATASHA, received instruction from a nurse as to how to use a suction wand to
4 suction the blood out of Jahi's mouth. Latasha suctioned the blood for
5 approximately 60 minutes when another nurse told her to stop suctioning because
6 it would remove blood clots that were vital for her healing. Latasha stopped
7 suctioning, but Jahi continued to cough up blood, and now the bandages and
8 packing in Jahi's nose were also becoming bloody. Latasha pleaded with the
9 nurses to call a doctor to Jahi's bedside, but no doctor came.

10 Concerned about the amount of bleeding and the lack of response to it by
11 the nurses and the failure of any doctor to attend to Jahi, LATASHA contacted her
12 mother and Jahi's grandmother, SANDRA CHATMAN ("CHATMAN") a nurse, who
13 arrived at CHO at approximately 10:00 pm. CHATMAN spoke with the CHO nurses
14 and insisted that they contact a physician.

15 CHO Nurses added late entry notes to Jahi's medical chart on December
16 15, 2013 but failed to take steps necessary to ensure that a physician attended to
17 Jahi. Mariko M. Holland, R.N., wrote in her initial note on 12/9/13: "MDs notified
18 several times over course of shift that pt has large frank blood from nose and
19 mouth..." In an Addendum written on 12/15/13 as a late entry, Ms. Holland wrote:
20 "Team notified B. Segerstrom (resident) and A Herrera (fellow) multiple times of
21 increasing frank blood output" and "A Herrera and J Howard (attending) notified
22 face to face." Kathleen L. Hartman, RN wrote in an Addendum to her note: "This
23 writer was informed there would be no immediate intervention from ENT or Surgery"
24 and "Dr. Herrera, Dr. Howard (attending) were aware of this post op bleeding."
25 These nurses failed to go up their chain of command to ensure that a physician
26 attended Jahi as she was bleeding.

27 At approximately 12:30 am, CHATMAN, while watching the monitors, noticed
28 that there was a serious and significant desaturation of the oxygenation level of

1 Jahi's blood, along with a precipitous drop in her heart rate. CHATMAN called out
2 for the nursing staff and medical staff to institute a Code, and the Code was called
3 at 12:35 am on the morning of December 10, 2013. CHATMAN observed a physician
4 who finally came to Jahi's bedside say: "Shit, her heart stopped." The
5 cardiopulmonary arrest and Code was documented as lasting until 3:08 a.m., or a
6 total of 2 hours and 33 minutes. At no time during this Code did the doctors and
7 nurses establish an airway, nor was consideration ever given to performing an
8 emergency tracheotomy. During this Code, approximately two liters of blood were
9 pumped out of Jahi's lungs.

10 Jahi survived the Code but the immediate response from CHO and from her
11 physicians was to declare her brain dead. Brain death was declared on December
12 14, 2014. CHO Administration pressured the family to donate her organs and
13 disconnect her from life support. At one point, David J. Duran, M.D., the Chief of
14 Pediatrics, began slamming his fist on the table and said: "What is it you don't
15 understand? She is dead, dead, dead, dead!"

16 What has followed is a process by which Jahi's family has continued to
17 believe Jahi is alive and Defendants have taken the position that she is dead. The
18 WINKFIELD'S obtained a restraining order preventing CHO from terminating Jahi's
19 life support. Eventually, an agreement was reached whereby Jahi was released to
20 the WINKFIELDS. Recent evaluations by doctors, including a board certified
21 pediatric neurologist, confirm that Jahi does not meet the definition of brain death.
22 Alameda County has issued a Death Certificate and counsel for Plaintiffs, in
23 separate actions, have sought to rescind it.

24 The issue of whether or not Jahi is legally dead, separate and apart from the
25 issue of medical malpractice, will require extensive litigation. Additionally, the Court
26 has granted Defendants' CHO and Rosen's Request for Question Certification
27 Under Code of Civil Procedure section 166.1 for appellate hearing on two
28 questions related to this issue.

1 Through this motion, Plaintiffs seek to bifurcate the issue of medical
2 malpractice from this issue, along with the issue of damages in the event Jahi is
3 found to be dead or alive, as there is no need for this complex and extended
4 litigation if no medical malpractice is found by the jury.

5 Defendants have each submitted CMC Statements stating that they have
6 committed no medical negligence and intend to bring motions for summary
7 judgment on the issue of liability. Bifurcation would allow a swift and efficient
8 process for addressing the liability issue and determine if additional litigation is
9 necessary.

10 **II. THE COURT SHOULD ORDER BIFURCATION OF LIABILITY AND DAMAGES TO**
11 **MINIMIZE POTENTIAL PREJUDICE AND SERVE THE INTERESTS OF JUDICIAL**
12 **ECONOMY.**

13 The Court may order separate trials of any cause of action or issue pursuant
14 to *Code of Civil Procedure* §§1048(b) and 598. *Code of Civil Procedure* §1048(b)
15 states:

16 'The Court, in furtherance of convenience or to avoid prejudice, or
17 when separate trials will be conducive to expedition and economy,
18 may order a separate trial of any cause of action, including a cause
19 of action asserted in a cross-complaint, or any separate issue or any
20 number of causes of action or issues, preserving the right of trial by
21 jury required by the Constitution or a statute of this State of the
22 United States.'

23 *Code of Civil Procedure* §598 also grants the court the power to bifurcate this
24 action. This section states in part:

25 "The court may, when the convenience of witnesses, the ends of
26 justice, or the economy and efficiency of handling the litigation
27 would be promoted thereby, on motion of a party, after notice and
28 hearing, make an order...that the trial of any issue or any part thereof

1 shall precede the trial of any other issue or any part thereof in
2 the case..."

3 Trial courts are authorized to order bifurcation of a "liability trial" and then, if
4 necessary, a "damages trial". *Horton v. Jones* (1972) 26 Cal. App. 3d 952, 953-954,
5 957. A trial court may *sua sponte* order bifurcation at any time, including after the
6 point when the trial has commenced. *Code of Civil Procedure* §598; *Buran Equip.*
7 *Co. v. H&C Invest. Co.*, (1983) 142 Cal. App. 3d 338, 342. Alternatively, a trial court
8 may regulate the order of proof in a single trial. *Evidence Code* §320. The Supreme
9 Court stated the rationale for separating liability and damages issues over forty years
10 ago in *Foreman v. Clark Corp.* (1971) 3 Cal.;. 3d 875, 888, fn 8:

11 [A] separate trial of the liability issue was considered desirable to
12 avoid wasting court time in cases where the plaintiff loses on the
13 liability issue, to promote settlements where the plaintiff wins on the
14 liability issue, and to afford a more logical presentation of the
15 evidence, thus simplifying the issues for the jury."

16 An order granting bifurcation of liability and death/damages would not only
17 minimize potential prejudice, but it would also serve the interests of judicial
18 economy. Bifurcating trial on this issue would save the Court's time, the jury's time,
19 and the parties' time if the jury determines that Defendants are not liable for
20 medical malpractice. It will reduce the complexity of the case by eliminating the
21 need for further litigation on the issue of Jahi's status as alive or dead, and will
22 reduce the risk of unfair prejudice by ensuring that the jury bases its decision on
23 reason rather than passion, sympathy, or the politics of Jahi's status.

24 It is well established that courts "have fundamental inherent equity,
25 supervisory, and administrative powers, as well as the inherent power to control
26 litigation before them. *Cottle v. Superior Court* (1992) 3 Cal. App. 4th 1367, 1377.
27 Furthermore, this "inherent power entitles trial courts to exercise reasonable control
28 over all proceedings connected with pending litigation in order to ensure the orderly

1 administration of justice." *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 967
2 citing *Hays v. Superior Court* (1940) 16 Cal. 2d 260, 264-265.

3 As noted by California appellate courts; in case after case, separation of
4 liability and damages issues often shortens and focuses trial, inasmuch as a verdict
5 on liability "could be dispositive of the entire case." *Bly-Magee v. Budget Rent-A-Car*
6 *Corp.* (1994) 24 Cal. App. 4th 318; *Plaza Tulare v. Tradewell Stores, Inc.* (1989) 207 Cal.
7 App. 3d 522, 524.

8 **A. The Interests of Judicial Economy Require a Bifurcated Trial Given the**
9 **Significant Time Required to Try the Issues of Damages and Death**
10 **and Defendants Assertion That they are Not Liable for Medical**
11 **Malpractice.**

12 This case is ideally suited to benefit from a bifurcated trial. It is anticipated that
13 there will be an extensive proceeding, with numerous experts, regarding whether
14 or not Jahi is alive or dead. Experts from Cuba, throughout the United States and
15 New Jersey, where Jahi is currently residing and where she is being treated, will have
16 to be deposed. Depending upon the outcome of that proceeding, a jury will be
17 required to determine damages, either for wrongful death or for future medical care
18 and treatment. None of this will be necessary if the jury fails to find Defendants liable
19 for medical malpractice.

20 **B. Due to the Emotional Nature of Jahi's Status and Injuries, a Joint Trial of**
21 **Liability and Death/Damages is Prejudicial to the Parties.**

22 A joint trial of liability and death/damages in this matter would be prejudicial
23 to the parties under *Evidence Code* §352. Jahi is a young girl who suffered very
24 serious injuries (and Defendants' argue death) from bleeding following surgery at
25 CHO. Since that time, Jahi's family has fought battles in both state and federal
26 courts to keep her on life support, and have taken her out of state for that purpose.
27 There is litigation to rescind the Alameda County Death Certificate.

28 Trial of these issues will be emotional and potentially incite both sympathy and

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negative feelings such that it would be impossible for a jury to fairly focus on the threshold issue of liability. The avoidance of prejudice is also a goal set forth in Code of Civil Procedure §1048(b) which would be served by an order bifurcating this trial, in that neither the plaintiffs nor the defense would be unduly prejudiced by the solicitation of jury sympathy or antipathy for Plaintiff if only liability issues were first decided by the jury.

III. CONCLUSION.

For all the foregoing reasons, Plaintiffs respectfully request that this trial be bifurcated so that liability can be tried first. in the event the jury finds Defendants liable for medical malpractice, the parties respectfully request that the Court give them several months to do necessary discovery so that a second trial on the issues of death/damages can take place several months later.

Dated: March 15, 2016

AGNEWBrusavich
A Professional Corporation

By: 
Bruce M. Brusavich
Attorneys for Plaintiffs

**Declaration of
Bruce M. Brusavich**

DECLARATION OF BRUCE M. BRUSAVICH

I Bruce M. Brusavich, declare:

1. I am an attorney licensed to practice law before all of the Courts of the State of California, and am a principal in AGNEWBrusavich, counsel of record for Plaintiffs in the matter. I have personal knowledge of the facts stated here, and if called as a witness, I would and could testify competently to them.

2. This action arises out of the purported medical malpractice of Defendants on December 9 and 10, 2013 in relation to surgery performed on the minor plaintiff, Jahi McMath. and her follow-up care, or lack of care, resulting in excessive bleeding and cardiac arrest. Defendants have taken the position that Jahi is brain dead and therefore this case is, at most, a wrongful death case. Plaintiffs are taking the position that Jahi is alive and she is suing, through her Guardian ad Litem, for damages that will compensate her for the damages caused by the malpractice.

3. I anticipate that the liability phase of this trial may be completed in 7-10 days. The death/damages phase is anticipated to consume weeks of trial time and will require extensive depositions of numerous experts, a host of non-retained treating medical personnel and the various family members and friends of Jahi. These medical witnesses include numerous medical personnel in New Jersey who have been involved in Jahi's care and treatment, as well as medical witnesses in Cuba and Los Angeles, CA.

4. This litigation can be handled more economically and efficiently if the issue of liability is bifurcated and tried first. If Defendants prevail in the bifurcated liability phase, the court and the parties will avoid the necessity of a lengthy trial on the issue of brain death and damages. If Plaintiffs prevail in the bifurcated liability phase, the likelihood of settling the action will increase dramatically, and a trial on the issues of death and damages may also be avoided. At the very least, time could allow a decision in the related Federal Court action or action by our Court of Appeal on the certified questions pursuant to Code of Civil Procedure § 166.1, which

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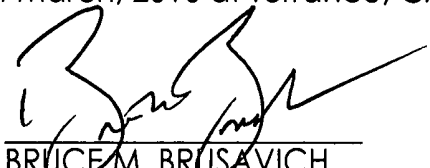
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may resolve any damages phase issues and help to clarify the issues to be tried.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of March, 2016 at Torrance, CA.


BRUCE M. BRUSAVICH
Declarant

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **AGNEWBRUSAVICH**, 20355 Hawthorne Blvd., 2nd Floor, Torrance, California. On March 15, 2016, I served the within document **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO BIFURCATE TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF BRUCE M. BRUSAVICH IN SUPPORT**

- 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:

<p>Andrew N. Chang ESNER, CHANG & BOYER Southern California Office 234 East Colorado Boulevard Suite 750 Pasadena, CA 91101 achang@ecbappeal.com</p>	<p>ASSOCIATE ATTORNEY FOR PLAINTIFFS LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINIKFIELD; SANDREA CHATMANH; and JAHl McMATH, a minor, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD</p> <p>(626) 535-9860 FAX (626) 535-9859</p>
<p>Thomas E. Still HINSHAW, MARSH, STILL & HINSHAW 12901 Saratoga Avenue Saratoga, CA 95070-9998 tstill@hinshaw-law.com</p>	<p>ATTORNEYS FOR FREDERICK S. ROSEN, M.D.</p> <p>(408) 861-6500 FAX (408) 257-6645</p>
<p>G. Patrick Galloway GALLOWAY, LUCCHESI, EVERSON & PICCHI 2300 Contra Costa Boulevard Suite 350 Pleasant Hill, CA 94523-2398 pgalloway@glattys.com</p>	<p>ATTORNEYS FOR DEFENDANT UCSF BENOIFF CHILDREN'S HOSPITAL</p> <p>(925) 930-9090 FAX (925) 930-9035</p>
<p>Scott E. Murray Vanessa L. Efremsky DONNELLY NELSON DEPOLO & MURRAY A Professional Corporation</p>	<p>ATTORNEYS FOR DEFENDANT JAMES PATRICK HOWARD, M.D., Ph.D.</p>

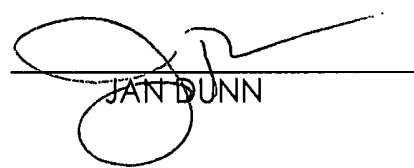
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I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course 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 15th day of March, 2016 at Torrance, California.



 JAN DUNN