JG

20095515

Bruce M. Brusavich, State Bar No. 93578
Terry S. Schneier, State Bar No. 118322
AGNEW BRUSAVICH
A Professional Corporation
20355 Hawthorne Boulevard
Second Floor
Torrance, California 90503
(310) 793-1400

Andrew N. Chang, State Bar No. 84544
ESNER, CHANG & BOYER
234 East Colorado Boulevard
Suite 975
Pasadena, CA 91101
(626) 535-9860

Attorneys for Plaintiffs

FILED
ALAMEDA COUNTY
JUN 29 2017
CLERK OF THE SUPERIOR COURT
By _____ Deputy

SUPERIOR COURT OF CALIFORNIA

IN AND 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 of Oakland); MILTON McMATH, a nominal defendant, and DOES 1 THROUGH 100,

Defendants.

Case No. RG15760730 FAX FILE

ASSIGNED FOR ALL PURPOSES TO:
JUDGE STEPHEN PULIDO
DEPARTMENT 16

DECLARATION OF ANDREW N. CHANG IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION OF JAHI MCMATH'S FIRST CAUSE OF ACTION FOR PERSONAL INJURIES

Reservation #: R-1838158

Date: July 13, 2017
Time: 3:00 p.m.
Dept: 16

Complaint Filed: March 3, 2015
Trial Date: None Set

DECLARATION OF ANDREW N. CHANG

I, Andrew N. Chang, declare as follows:

1. I am an attorney licensed to practice law in the State of California and a partner for Esner, Chang & Boyer, which along with Agnew Brusavich which represent Plaintiffs in the action before this court.

2. I have personal knowledge of the facts set forth in this declaration and if called upon to do so I could and would competently testify thereto.

3. Attached hereto as Exhibit 1 is a true and correct copy of Plaintiffs' Preliminary Opposition filed in *UCSF Benioff Children's Hospital Oakland, et al v. The Superior Court of Alameda County (Winkfield)*, Case No. A147989.

4. Attached hereto as Exhibit 2 is Plaintiffs' Exhibits in support of said opposition filed in said writ proceeding.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on June 28, 2017, at Walnut Creek, California.

Andrew N. Chang

EXHIBIT 1

A147989

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND and FREDERICK S. ROSEN, M.D.,
Petitioners and Defendants,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ALAMEDA,
Respondent,

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; MILTON McMATH; and JAHI McMATH, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD,
Real Parties in Interest and Plaintiffs.

ALAMEDA COUNTY SUPERIOR COURT
HON. ROBERT B. FREEDMAN, JUDGE
HON. STEPHEN M. PULIDO, JUDGE
CASE NO. RG15760730

PLAINTIFFS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

AGNEW & BRUSAVICH
Bruce M. Brusavich, SBN 93578
Terry S. Schneier, SBN 118322
20355 Hawthorne Blvd., 2nd Floor
Torrance, California 90503
Telephone: (310) 793-1400
Email: brusavich@agnewbrusavich.com

ESNER, CHANG & BOYER
Andrew N. Chang, SBN 84544
Joseph S. Persoff, SBN 307986
234 East Colorado Boulevard, Suite 750
Pasadena, California 91101
Telephone: (626) 535-9860
Email: achang@ecbappeal.com
jpersoff@ecbappeal.com

Attorneys for Real Parties in Interest and Plaintiffs

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION One	Court of Appeal Case Number: A147989
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Andrew N. Chang, SBN 84544 Esner, Chang & Boyer 234 E. Colorado Boulevard, Suite 750 Pasadena, CA 91101 TELEPHONE NO.: 626-535-9860 FAX NO. (Optional): 626-535-9859 E-MAIL ADDRESS (Optional): achang@ecbappeal.com ATTORNEY FOR (Name): Latasha Nailah Spears Winkfield, et al.	Superior Court Case Number: FOR COURT USE ONLY
APPELLANT/PETITIONER: UCSF Benioff Children's Hospital Oakland, et al. RESPONDENT/REAL PARTY IN INTEREST: Latasha Nailah Spears Winkfield, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Latasha Nailah Spears Winkfield, et al.

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 16, 2016

Andrew N. Chang
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTRODUCTION: WRIT RELIEF SHOULD BE DENIED

15 ½ year-old Jahi McMath is – in the opinion of a UCLA triple board-certified pediatric neurologist – "an extremely disabled but very much alive teenage girl." As Dr. Alan Shewmon, along with several other medical experts who share his opinions, has testified:

> Time has proven that Jahi McMath has not followed the trajectory of imminent total body deterioration and collapse that was predicted categorically back in December, 2013 on the basis of the diagnosis of brain death. Her brain is clearly not "dead" in a neuropathological sense (i.e., necrotic). She unequivocally does not fulfill California's statutory definition of death, which requires the irreversible absence of all brain functions, because she exhibits hypothalamic function and intermittent responsiveness to verbal command. She does not fulfill the pediatric or adult diagnostic criteria for brain death on the grounds of intermittent responsiveness. That Jahi McMath is currently not brain dead means that she never was truly brain dead, despite initially fulfilling the standard diagnostic criteria for brain death, because by definition brain death is the "irreversible cessation of all functions of the entire brain." Much less is she dead in the ordinary sense of the term. She is an extremely disabled but very much alive teenage girl.

Today, 18 months after Dr. Shewmon expressed these opinions, Jahi's condition continues to improve. She has shown several objective signs of brain activity, including brain wave activity on an EEG, cerebral blood flow, intact brain matter, an ability to respond to her mother's voice and commands as demonstrated by an increase in her heart rate and the increasing ability to respond to her mother's request to move specific parts of her body. As Dr. Shewmon (along with other medical experts) opines, this is

corroborated by an MRI scan taken in fall 2014 "nearly 10 months after her tragic anoxic-ischemic event and December 2013 diagnosis of brain death, which does not even vaguely resemble those chronic brain death scans. Rather, it showed vast areas of structurally relatively preserved brain, particularly the cerebral cortex, basal ganglia and cerebellum. . . . . [T]he relative integrity of the cerebral hemispheres (although by no means normal) could possibly provide a structural basis for her apparent intermittent ability to understand language and to make voluntary motor responses."

Jahi is currently living in New Jersey with her mother where she has been able to receive necessary care for the past 2 ½ years, while her mother has continued her exhaustive, nonstop efforts to move back home to California, the place of Jahi's birth, and into the bosom of her family. She is also claiming the right to recover damages for the catastrophic brain injuries she suffered as a result of a routine surgery gone horribly wrong over 2 ½ years ago at Children's Hospital in Oakland ("CHO").

Jahi and her mother were forced to move to New Jersey within weeks after the tragic events in December 2013, because in an expedited, one-day proceeding, CHO's doctors and one independent physician declared Jahi "brain dead" under California Health and Safety Code Sections 7180 and 7181 so that CHO could obtain permission to disconnect Jahi's ventilator. Section 7181 states in relevant part: "(a) An individual who has sustained . . . ***irreversible cessation of all functions of the entire brain, including the brain stem***, is dead." Jahi's condition today – based on expert, scientific evidence – unequivocally does not meet the definition of brain death. To the contrary, as several

medical experts attest, she has increasing neurological function in many portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the pituitary region; and the brainstem. These functions are presented through increasing, intermittent purposeful movements, the ability of her nervous system to regulate her temperature and heart rate, reactions to the presence and voice of her mother, and the onset of puberty and menstruation.

In this personal injury action, the trial court has allowed Jahi to allege and prove, with expert, scientific evidence, that today Jahi does not meet California's definition of brain death, no matter what her condition was in December 2013. Thus, the question in this personal injury action is not whether Jahi McMath met the definition of brain death in December of 2013. The question before this court is should she be allowed to prove that she does not meet that definition *now*. The evidence showing recovery of substantial brain function simply did not exist in December of 2013. It first came to light in the fall of 2014, when medical evidence showed that Jahi has not sustained irreversible cessation of all functions of the entire brain, including the brain stem. Instead, now – a full 2 ½ years after she was quickly declared brain dead so that CHO could disconnect her ventilator and Jahi could be moved to New Jersey where she could continue to receive the support she required – Jahi's brain functions have improved and allowed her to become progressively able to respond to her mother's voice and words.

In their petition to this Court, Defendants cling to their unsuccessful argument below that Jahi and her family should not be allowed to claim that Jahi is in fact alive

based solely on the doctrine of collateral estoppel, but for the reasons detailed below, Defendants' arguments are meritless and were properly rejected by the trial court below, including:

(1) Defendants have the burden to show collateral estoppel applies, and must meet that burden with certainty; (2) As both Judge Grillo and Judge Freedman below recognize, collateral estoppel is not applied where there are new or changed facts occurring after the prior adjudication; (3) Collateral estoppel is not applied where in the first proceeding, the party against whom preclusion is sought did not have a full and fair opportunity to litigate the issue, including an opportunity to conduct full discovery and present witness testimony; and (4) Collateral estoppel is not applied "if injustice would result or if the public interest requires that relitigation not be foreclosed."

Defendants' characterizations of the parties' legal proceedings that have occurred since Jahi's injuries are misleading. They fail to portray the actual expedited and cursory nature of the emergency proceedings conducted in the immediate wake of the failed surgery. Within days of Jahi's injuries, a number of legal steps were quickly taken to keep CHO from disconnecting Jahi from life support. Brain death is binary under § 7180. If there is any neurological activity, which Jahi currently exhibits, a person is not brain dead. All Jahi and her family sought in December 2013 and into early 2014, was a TRO preventing CHO from removing Jahi from life support. Plaintiffs, with the help of a Magistrate Judge, reached a settlement where Jahi could be removed from CHO. And days later, she was. This rendered the issue moot, and recovery of Jahi's brain function

was never briefed or argued. Nor did the facts exist at that time or until the fall of 2014 to demonstrate recovery of brain function.

But when such evidence of Jahi's recovery of brain function started to appear, in September 2014, Jahi and her family filed a request for a writ of error coram nobis in the Superior Court with Judge Grillo. Judge Grillo expressly acknowledged that "[t]he 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.)." Jahi and her family withdrew their writ petition and sought to resolve the matter through administrative means, and then when that was stonewalled, filed an action in federal court seeking *inter alia* a determination that the death certificate is invalid.

Neither the death certificate – which bears no signature of a physician certifying death and whose issuance was expedited to allow Jahi's family to transport Jahi out of CHO and into New Jersey in order to continue her life support – nor the court's expedited ruling allowing CHO to disconnect life support – indisputably refutes Jahi's claim that she is alive and has been continuously receiving medical care a full 2 ½ years after Defendants' physicians declared that she had sustained "irreversible cessation of all

functions of the entire brain." The trial court correctly ruled that res judicata and collateral estoppel will not be applied where time and changed circumstances prove that Jahi has not suffered the deterioration that was predicted categorically back in December 2013.

Defendants contend that the trial court's ruling is contrary to public policy, arguing that the public has a strong interest in precluding persons from claiming changes in their condition allow them to collaterally challenge a determination of brain death. But what fundamental human and legal right, much less public policy, deserves more recognition than the unalienable right of life? Where Jahi can prove with scientific, expert evidence that she has not suffered the irreversible cessation of all functions of the entire brain that physicians declared 2 ½ years ago, and in fact continues to improve neurologically, what possible reason exists in the law or humanity that would preclude her from doing so?

At the hearing on Defendants' first round of demurrers almost a year ago, the trial court posed hypothetically, if "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 [of] issue preclusion. . . I don't ask this question in any mirthful way. It's a serious question as to what the preclusive effects [are] of both the death certificate and Judge Grillo's order." Jahi's intermittent responsiveness to her mother's voice commands is her way of communicating to her mother, the world, and to the courts, that she "**is** here," i.e., she does not, as Dr. Shewmon opines, meet the diagnosis of brain death, since "the very first of the 'three cardinal findings in brain death, . . . is unresponsiveness."

Jahi and her family respectfully urge this Court not to disturb the lower court's ruling allowing her to proceed with and prove her claim for personal injuries.

BACKGROUND[1]

STATEMENT OF THE CASE

The operative complaint alleges the following facts which are accepted as true on demurrer:

A. The Negligence of CHO and Dr. Rosen.

In 2013, Dr. Rosen diagnosed Jahi with sleep apnea and recommended that he perform a surgery that was unreasonably complex and risky which included the removal of her tonsils and adenoids, soft pallet and uvula, and a submucous resection of her bilateral turbinates. On December 9, 2013, Dr. Rosen took Jahi to the operating room at CHO to perform this extensive surgery. Although Dr. Rosen noted that Jahi had an anatomical anomaly in that her right carotid artery was more to the center and close to the surgical site, which raised a serious issue as to this extensive surgical procedure, he didn't

---

[1]Because this Court asked only for opposition, plaintiffs summarize the facts in this "Background" section rather than providing a formal Return.

note this in any of his orders for any of the other health care practitioners who would be following Jahi post-op. (Vol. 1 of Petition Exhibits ("1 PE") 40-41.)

Just hours after surgery, Jahi began coughing up blood. The nurses assured the Winkfields the bleeding was "normal" but Jahi continued to cough up blood. Jahi's mother pleaded again and again with the nurses to call a doctor to Jahi's bedside, to no avail. The nurses continued to contradict one another and give Jahi's mother conflicting instructions. Jahi's grandmother Ms. Chatman, an experienced hospital nurse, arrived and also insisted that the nurses contact doctors to come to Jahi's aid, to no avail. (1 PE 41-43.)

At 12:30 a.m., Ms. Chatman observed on the monitors a serious and significant desaturation of Jahi's oxygenation level of her blood and precipitous drop in Jahi's heart rate. Ms. Chatman called out for the nursing and medical staff to institute an emergency code. Five minutes later, the code was called, and a doctor finally came to Jahi's side, stating "Shit, her heart stopped." The cardiopulmonary arrest and code lasted 2 hours and 33 minutes, during which the doctors and nurses failed to timely establish an airway for Jahi and did not perform an emergency tracheotomy even after it became apparent that endotracheal intubation attempts were not resulting in prompt and adequate oxygenation of Jahi in a timely manner. During the resuscitation efforts, two liters of blood were pumped out of Jahi's lungs. (1 PE 43-44.)

During the code, a nurse approached Ms. Chatman to console her, telling her "I knew this would happen." In nursing notes added to the chart several days later, a nurse

noted that she had repeatedly advised the doctors in the PICU of Jahi's deteriorating condition and blood loss and charted: "This writer was informed there would be no immediate intervention from ENT or Surgery." Another nurse also noted in the chart 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. (1 PE 44.)

B. CHO Moves Quickly to Terminate Life Support and Push for Organ Donation.

On December 11, 2013, Jahi's family was advised that EEG brain testing indicated that Jahi had sustained significant brain damage. On December 12, 2013, only two days after Jahi had entered cardiac arrest, the family was advised that a repeat EEG also revealed that Jahi had suffered severe brain damage. They were advised that Jahi had been put on the 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, the family made inquiries as to what happened. Nobody at CHO explained what happened. (1 PE 44-45.)

Rather than provide the family 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. (1 PE 45.)

C. Defendants Breached the Standard of Care.

Dr. Rosen was negligent in (a) not recommending, prior to deciding to perform the complex and risky surgery, less intrusive and risky procedures be undertaken, including providing Jahi with a CPAP machine, and only removing Jahi's tonsils and adenoids to see if her sleep apnea improved; (b) during the surgery, Dr. Rosen discovered that Jahi might have a medialized right carotid artery but failed to mention this condition in any of his postoperative orders thus failing to provide the medical staff at CHO with important medical information; and (c) in failing to respond post-op to Jahi. (1 PE 48-49.)

The CHO nurses and physicians were negligent in (a) allowing Jahi to bleed for hours without the presence and input of any physician, including Dr. Rosen; and (b) failing, in the face of the doctors' evidence refusal to respond, 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. (1 PE 48-49.)

D. The Brief and Expeditious Proceeding Over Whether CHO Could Terminate Life Support.

After going into cardiac arrest and lapsing into a coma in the early morning hours of December 10, Jahi was maintained on a ventilator at CHO. Soon thereafter, two physicians chosen by CHO declared Jahi brain dead and notified her mother that they intended to remove Jahi from the ventilator, thereby causing her certain cardio-pulmonary death within minutes. In order to prevent this removal of necessary life support, on Friday, December 20, 2013, Jahi's mother sought and obtained a temporary restraining order in the Probate Department of the court below. This enjoined CHO from withdrawing ventilator support to Jahi. Once this immediate threat to her daughter's life was removed, Jahi's mother turned her attention to transporting Jahi to the state of New Jersey, one state which recognizes a religious belief component in its codification of the Uniform Determination of Death Act. (1 PE 45-46.)

Probate Judge Grillo endeavored to complete the proceeding in a "reasonably brief period" in accordance with Health and Safety Code section 1254.4 ["A general acute care hospital shall adopt a policy for providing family or next of kin with a reasonable brief period of accommodation" from the time the patient is declared brain dead through discontinuation of cariopulmonary support]. The next court day, Monday December 23, CHO provided some records to the family, the Court appointed an independent physician, Dr. Paul Fisher, and on Tuesday, December 24, Dr. Fisher and a CHO physician testified

before Judge Grillo, and that afternoon, the Court denied the family's petition and dissolved the TRO effective 5 p.m. December 30. (2 PE 347-349.)

E. Jahi's Mother's Efforts To Allow Her To Remove Jahi From Children's Hospital of Oakland.

On December 30, 2013, Jahi's mother filed a complaint in the U.S. District Court for the Northern District of California (case number 4:13-cv-05993-SBA), seeking a TRO to enjoin CHO from ending life support to give the family more time to move Jahi. (4 PE 737-780.)[2] The same day the Alameda County Superior Court extended its TRO requiring CHO to maintain treatment to Jahi. (4 PE 739.) The federal court appointed a magistrate to attempt an informal resolution, and on January 3, 2014, the parties reached agreement under which Jahi was transferred to the family who on January 5 transported Jahi to New Jersey. (4 PE 781-782.) Jahi's mother dismissed the federal action voluntarily and without prejudice, and before any answer or dispositive motion was filed. (4 PE 789.) No evidence was ever considered by the court in that federal proceeding.

Before CHO would release Jahi's body, the Alameda County Coroner issued a

---

[2]On December 30, Jahi's family also filed an emergency petition for mandate in this Court (No. A140590). (4 PE 669-732.) That same day this Court stayed for 24 hours Judge Grillo's order dissolving his TRO. The next day, Judge Grillo extended its TRO to January 7, and when this Court was advised on January 6 that the family had moved Jahi out of CHO, this Court denied the petition as moot. (3 PE 670-671.)

death certificate, simply to comply with formalities then required by CHO to allow Jahi to be moved and receive the care she required (CHO had stopped providing nutrition and curative care on December 12, 2013). In order to allow Jahi to be removed before she suffered cardiopulmonary death, Plaintiff, under protest, sought a "Disposition Permit" from the coroner. To obtain a Disposition Permit Jahi's mother had to obtain a death certificate, which she did, under protest. That Death Certificate was never finalized. It was never signed by an attesting physician and is clearly marked "Pending Investigation" under the cause of death. (1 PE 45-46, 191.)

After the disposition permit was obtained, and pursuant to the settlement agreement, Jahi was removed from CHO and was transported to New Jersey where she could receive such care. Soon thereafter, the initial Superior Court proceeding was closed. A judgment in that matter was entered on January 17, 2014, after Jahi had left the state, without the presentation of any additional evidence. (2 PE 369-372.)

F. In Fall 2014 When Jahi Shows Signs Of Neurological Improvement, A Team Of Medical Experts Confirms Significant Brain Function, And Other Evidence Unequivocally Establishes Jahi Does Not Suffer Irreversible Cessation of All Functions of Her Entire Brain Pursuant To The Applicable Guidelines, Her Mother Files A Petition for Writ Of Error Coram Nobis.

By the fall of 2014, Jahi had shown signs of improving neurological function in many portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the pituitary region; and the brainstem. These signs included intermittent purposeful movements, the ability of her nervous system to regulate her temperature and heart rate, reactions to the presence and voice of her mother, and the onset of menstruation.

A team of medical experts from around the world gathered to observe, test and analyze Jahi's unprecedented progress, including Dr. Allen Shewmon, Former Chief of the Neurology Department of Olive-UCLA Medical Center, Dr. Charles Prestigiacomo, Chair, Department of Neurological Surgery Rutgers New Jersey Medical School, Philip DeFina, Ph.D., Chief Scientific Officer for the International Brain Research Foundation (IBRF), Dr. Calixto Machado, Chair of the Department of Clinical Neurophysiology from the Institute of Neurology and Neurosurgery in Havana Cuba, and Elena Labkovsky PhD., expert in Clinical Electroencephalography and QEEG and currently a Research Associate, Department of Psychology, Institute for Neuroscience, Northwestern

University. These medical experts observed, reviewed and analyzed Jahi McMath's diagnostic MRI, EEG and BIS testing in the fall of 2014 and saw evidence of brain activity. They observed the brain activity increase and become "readily identifiable and profound" when Jahi's mother spoke to Jahi. The experts had previously observed video of Jahi moving on command, but the electrical brain activity was especially significant as it registered that Jahi had a change in her brain function in response to her mother's commands.

The team of experts also conducted a long and thorough MRI in which they "unequivocally saw the presence of brain structure including the evidence of ribbons in the brain. This is critical as it showed that the brain, although damaged, was there structurally." After nine months since Jahi was declared brain dead, the experts "would have expected to see her brain had liquefied. It clearly was not." Additionally, the experts looked for evidence of blood flow. "Blood flow was clearly evident. This does not happen if a patient is brain dead." (1 PE 109-151.)

Citing this and other evidence of Jahi's neurological condition, Jahi's mother filed a petition for writ of error coram nobis. (*Ibid.*) In its case management conference order on October 1, 2014, Judge Grillo expressly stated:

> 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.)

(2 PE 386.)

Once Jahi's mother filed the petition, Dr. Fisher was reappointed as the court's expert, and Jahi's mother's attorney attempted to contact Dr. Fisher, in order to arrange an opportunity for the court's expert to discuss Jahi's condition with the numerous physicians who had examined Jahi during the nine months which had elapsed since Dr. Fisher's pronouncement in December 2013 that Jahi had suffered "irreversible cessation of function of the entire brain." When this initial attempt at communication failed, Jahi's mother filed a motion to continue the proceedings in order to allow Dr. Fisher "an opportunity for a frank and unscripted dialogue with the experts who are opining that the newly obtained evidence supports a finding that Jahi is not brain dead." (3 PE 611-613.) Later that same day, Plaintiffs withdrew the petition when the attempts at an informal dialogue between experts reached a final impasse. (3 PE 620-621.)

G. Having Observed Continued Improvement In Jahi's Condition, Jahi's Mother Seeks Administrative Review of Jahi's Facially Defective Death Certificate, In Order To Allow Her To Move Back To California.

As Jahi continued to show neurological improvement, Jahi's mother, with the assistance of counsel, also sought the rescission through administrative means of Jahi's

death certificate so that they could rejoin their family in California. As described in detail in the federal Complaint (4 PE 872-901), Plaintiffs' counsel then embarked on an administrative odyssey to try and have Jahi's death certificate corrected.

On May 22, 2015, Plaintiffs' Counsel submitted an extensive written request that the DOH correct Jahi's death certificate. (4 PE 884.) This request was rejected, the DOH indicating that Plaintiffs' request required the signature of the Alameda County Coroner. (4 PE 891-892.) Plaintiffs then submitted their request to the Alameda County Medical Examiner's office on June 18, 2015. (4 PE 894.) As described in detail in the federal complaint (4 PE 893-896), the Coroner never responded to Plaintiffs' request. (4 PE 894.)

On September 4, 2015, three and a half months after contacting Alameda County as they had been directed, Plaintiffs finally received a response from the County's representative, which directed Plaintiffs' counsel to contact another attorney in the Alameda County Counsel's office, which he did. (4 PE 894-895.) Plaintiffs received no response until October 9, 2015, when Plaintiffs were informed that Alameda County found "no basis to make any changes to and/or nullify or rescind the death certificate of Ms. McMath." (4 PE 895.)

Thus, having had their administrative request rejected at both the state and county levels, Plaintiffs were forced to seek redress for the violation of their federal rights in federal court. In that action, Plaintiffs request that the federal court for the first time consider the overwhelming scientific evidence that for the past two years, Jahi has

exhibited function of numerous portions of her brain and therefore is a living person, per § 7180. (4 PE 880-890.) To reiterate, no court has yet heard any evidence of Jahi's neurological function subsequent to the December 26, 2013, determination that Jahi then satisfied §7180's criteria for "brain death."

H. Jahi's Present Condition.

Plaintiffs' operative complaint includes the following additional allegations:

> 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 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.

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.

(1 PE 46-48.)

The operative complaint alleges three causes of action: (1) for personal injuries on behalf of Jahi; (2) for negligent infliction of emotional distress against CHO on behalf of Jahi's mother and grandmother; and (3) alternatively, for wrongful death "in the event that it is determined Jahi McMath succumbed to the injuries caused by the negligence of the defendants." (1 PE 50-53.)

I. The Trial Court's Order Overruling Defendants' Demurrers.

1. No collateral estoppel preclusion at this stage of the action.

In a thorough, well-reasoned ruling, the trial court issued its order overruling Defendants' demurrer to the first amended complaint.[3] The court rejected Defendants' reliance on the grounds of collateral estoppel, concluding in pertinent part:

> [T]he court is not persuaded that it would be appropriate to determine the collateral estoppel effect of the amended order and judgment in Case No. RP13-707598 at the pleading stage, based solely on the allegations in the FAC and the matters of which judicial notice is taken. 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.) There are at least some aspects of the collateral estoppel determination that may require a more developed factual record. 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." (Restid 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. In addition, even where the traditional elements of collateral estoppel (privity. finality and necessary determination of identical issue in prior adjudication) are met, there is also an "equitable nature of collateral estoppel" such that the doctrine is to be applied "only where such application comports with fairness and sound public policy." (Smith v.

---

[3]A first round of demurrers by CHO and Dr. Rosen to the initial complaint was sustained with leave to amend. (Opposition Exhibits "OE" 3-249.)

Exxon Mobil Oil Corp. (2007) 153 Cal.App.4th 1407, 1414.) The court believes it would be premature to determine and apply such considerations based solely on the allegations and matters of judicial notice before it, without a more fully developed factual record. Further, as both sides recognize (and as Judge Grillo noted in his Order Following Case Management Conference issued on October 1. 2014), 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 Ca1.4th 962, 966-967.) The court is hesitant to determine that, at the pleading stage. there is no factual issue as to whether the facts have changed or new facts have occurred.

(5 PE 1106.)

2. No finality otherwise particularly where Plaintiffs are not, by way of this action, expressly seeking any redetermination or reversal of the matters in the prior probate proceeding or seeking to apply standards other than those set forth in the UDDA.

As to the finality otherwise of a determination of death under sections 7180 and 7181, the court rejected "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." The court ruled:

> In the absence of other authority addressing this assertion, the court declines to make a final determination in this regard at the pleading stage. The court is not persuaded by CHO's argument that Plaintiffs are "improperly asking this court or a jury to reject the accepted medical standards used to determine irreversible brain death." Plaintiffs are not, by way of this action, expressly seeking any redetermination or reversal of the matters in the prior probate proceeding or seeking to apply standards other than those set forth in the UDDA. Instead, they have brought a civil action independent of the prior proceeding, which includes a cause of action asserted on Jahi's behalf. CHO. as the party moving for dismissal of that cause of action, bears the burden of showing that it is insufficient or barred as a matter of law, and the court determines that CHO has not met this burden at the pleading stage, based solely on the allegations and matters of which the court takes judicial notice.

(5 PE 1106-1107.)

3. The death certificate does not have preclusive effect as a matter of law.

As to the death certificate, the court ruled:

> [W]hile the court can and will take judicial notice of it, the court cannot take judicial notice of the truth of factual conclusions in it. (See, e.g., Rohrer v. County of San Diego (1980) 104 Cal.App 3d 155. 164.) By statute, a death certificate is prima facie evidence of the facts stated therein but is subject to rebuttal and explanation. (See Health & Safety Code § 103550; In re Estate of Lenseh (2009) 177 Cal.App.4th 667, 677 n. 3.) The FAC includes new allegations to the effect that the death certificate is invalid and has been the subject of requests or petitions to rescind, cancel, void or amend it, but that such efforts have been unsuccessful. (FAC, 27-29.) Further, it appears that, Jahi and her mother Latasha Nailah Spears Winkfield ("Winkfield") filed a complaint in federal court seeking declaratory and injunctive relief, including a determination that the death certificate is invalid. (Reply Decl. of G. Patrick Galloway, Exh. A.) The court is not persuaded that the death certificate itself - which is subject to

rebuttal and explanation and is the subject of a pending challenge in federal court - establishes the fact of Jahi's death as a matter of law (at the pleading stage) so as to preclude her from bringing the first cause of action.

(5 PE 1105-1106.)

The trial court granted in part Defendants' request for certification under Code of Civil Procedure section 166.1 regarding the following two issues only:

> (1) Whether an order and judgment in a probate proceeding in which the court denied a guardian's petition for continuation of medical treatment for her daughter (Jahi), after a hearing at which the court considered declarations of Jahi's examining physicians and a physician appointed by the court to provide a second, independent opinion pursuant to Health and Safety Code section 7181, is entitled to collateral estoppel effect as to the determination "that Jahi had suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181," in the context of a cause of action brought by Jahi in a civil action alleging that she remains alive and seeking damages for alleged negligence in medical treatment. Is this a determination the court should make at the pleading stage, despite the differences in the procedural context as between the probate petition brought by the guardian seeking continuation of medical treatment for Jahi and the civil action brought by Jahi, and despite allegations in the amended complaint in the civil action such as that Jahi has had additional pubertal development since the determination was made (including "Tanner Stage 3 breast development" and an "ovulation cycle") and purported "intermittent responsiveness to verbal commands."
>
> (2) Where a court has denied a guardian's petition for continuation of medical treatment for an individual in a comatose state, after a hearing in which the court considered declarations of examining physicians and a physician appointed by the court to provide a second, independent opinion pursuant to Health and Safety Code section 7181, based on a finding that the individual "suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181," is this a determination that should be accorded finality for all purposes pertaining to the individual's asserted "brain death" status unless the determination is set aside on appeal or otherwise, including for purposes of determining whether the individual has standing to bring a cause of action in a civil lawsuit alleging that she remains alive?

(5 PE 1115.)

ARGUMENT

I. AS BOTH JUDGE FREEDMAN AND JUDGE GRILLO RECOGNIZED, RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY HERE WHERE PLAINTIFFS ALLEGE NEW FACTS HAVE OCCURRED SINCE THE PRIOR PROCEEDING WHICH ALTER THE LEGAL RIGHTS OF THE PARTIES.

In its order overruling Defendants' demurrers, the court (Hon. Robert Freedman) properly rejected Defendants' arguments that collateral estoppel precluded Jahi from alleging that she has not suffered irreversible cessation of all functions of the entire brain and has standing to bring her action for personal injury against Defendants. (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230 [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"]; accord, *Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179-182; *Evans v. Celotex Corp.* (1987) 194 Cal.App.3d

741, 748; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 616; *Hurd v. Albert* (1931) 214 Cal. 15, 26; 7 Witkin, Cal. Proc. 5th (2008) Judgm, § 434, p. 1087.) Further, as noted above, Judge Grillo recognized and cited this very same principle.

Thus, century-old precedent holds that neither res judicata nor collateral estoppel were ever intended to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which have altered the legal rights or relations of the litigants. As the Court in *Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179-182, held, relying on our Supreme Court's decision in *Hurd v. Albert* (1931) 214 Cal. 15, 26:

> Collateral estoppel does not bar a later claim if new facts or changed circumstances have occurred since the prior decision. *(Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 730, 115 Cal.Rptr. 409.) Neither res judicata nor collateral estoppel were ever " 'intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which have altered the legal rights or relations of the litigants.' " (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748, 238 Cal.Rptr. 259 (Evans).) "Collateral estoppel does not apply where there are changed conditions or new facts which did not exist at the time of the prior judgment...." (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 616, 81 Cal.Rptr.2d 708.) . . . . In the second trial, the court 'may and should consider all the facts that exist, both prior and subsequent to the first action, so as to determine properly what effect all of the facts, as they exist at the time of the second trial, have on the rights of the parties.'"

(See also 7 Witkin, Cal. Proc. 5th (2008) Judgm, § 434, p. 1087.) In *Wimsatt v. Beverly*

Hills Weight Etc. Internat., Inc. (1995) 32 Cal.App.4th 1511, 1516-1517, the Court held:

> It is clear that if facts and circumstances change after the first case is final, they are no longer 'identical' by the time the second case rolls along. '[T]he estoppel effect of a judgment extends only to the facts in issue as they existed at the time the prior judgment was rendered.' (*People v. Carmony* (2002) 99 Cal.App.4th 317, 322, 120 Cal.Rptr.2d 896.) 'Some issues are not static, that is, they are not fixed and permanent in their nature. When a fact, condition, status, right, or title is not fixed and permanent in nature, then an adjudication is conclusive as to the issue at the time of its rendition, but is not conclusive as to that issue at some later time.'" (*Ibid.*, citing *Lunt v. Boris* (1948) 87 Cal.App.2d 694, 695.)

Res judicata and Collateral estoppel are affirmative defenses as to which the defendants have the burden of proof. (See, e.g., *Vella v. Hudgins* (1977) 20 Ca1.3d 251, 257.) Moreover, because the law does not favor estoppels, the party invoking collateral estoppel must establish the requirements for collateral estoppel with certainty. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1482.) Defendants fail to meet their burden, particularly at this pleading stage. As set forth above, the first amended complaint alleges changed facts and circumstances that preclude the application of collateral estoppel on demurrer, for both legal and equitable reasons, to-wit: Since Judge Grillo's December 2013 ruling in the expedited proceeding, Jahi has been examined by a global team of medical experts including a renowned pediatric neurologist with triple Board Certifications in Pediatrics, Neurology (particularly Child Neurology), and Electroencephalography, with a subspecialty in brain death, and who has published and lectured extensively on the topic around the world. Based on his personal examination of Jahi, review of her medical records, studies and videotapes performed

after December 2013, Dr. Shewmon opines that the September 2014 MRI scan 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. Moreover, the MR angiogram performed on September 26, 2014, nearly 10 months after Jahi's anoxic-ischemic event and Judge Grillo's ruling, demonstrates intracranial blood flow, consistent with the integrity of the MRI and inconsistent with brain death. (1 PE 46-47.) And, as noted, Dr. Shewmon is just one of a team of worldwide medical experts on the subject of brain death who have observed, reviewed and analyzed Jahi and several critical test results taken well after Jahi was initially declared brain dead in December 2013, and all of whom echo Dr. Shewmon's opinions. (1 PE 125-151.)

As the operative complaint alleges, Jahi's medical records 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, and Jahi has gradually developed breasts and as of early December 2014, the physician found her to have a Tanner Stage 3 breast development. The expert explains that the menstrual cycle involves hormonal interaction between the brain's hypothalamus, the pituitary gland and ovaries. Other aspects of pubertal development require hypothalamic function. Corpses do not menstruate or undergo sexual maturation. There is no medical precedent of a brain dead body developing onset of menarche and thelarche.

Based upon the expert's evaluation of Jahi, she no longer fulfills standard brain

death criteria, due to her ability to specifically respond to stimuli. The distinction between random cord-originating movements and true responses to command is crucial to diagnosis of brain death. Jahi is capable of intermittently responding intentionally to a verbal command. (1 PE 46-48.)

Additionally, as noted above, the international team of medical experts who gathered to observe, test and analyze Jahi's unprecedented progress in the fall of 2014 saw evidence of brain activity in the EEG. They observed the brain activity increase and become "readily identifiable and profound" when Jahi's mother spoke to Jahi. A long and thorough MRI was conducted in which they "unequivocally saw the presence of brain structure including the evidence of ribbons in the brain. This is critical as it showed that the brain, although damaged, was there structurally." After nine months since Jahi was declared brain dead, the experts "would have expected to see her brain had liquefied. It clearly was not." Additionally, the experts looked for evidence of blood flow. "Blood flow was clearly evident. This does not happen if a patient is brain dead." (1 PE 109-151.)

In summary, the opinions of the experts who have examined Jahi, spent hours with her, and reviewed numerous videotapes of her, is that time has proven that Jahi has not followed the trajectory of imminent total body deterioration and collapse 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 present, 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 responsiveness to verbal commands. (1 PE 48.)

As they did below, Defendants (Petition, 55-56) pay lip service to this fundamental principle that collateral estoppel will not be applied where there are new facts and changed circumstances and simply repeat their argument that this principle does not apply because once physicians opined in December 2013 that Jahi was brain dead for the purpose of removing life support, her death became static, fixed and permanent, and Jahi is absolutely precluded from alleging and proving that she is, in fact, alive. But Jahi's condition is far from static, fixed or permanent. As detailed above and in her operative complaint, she has alleged and will prove that her condition has changed dramatically since Judge Grillo's ruling in December 2013 – that there are vast areas of structurally and relatively preserved brain, that tests demonstrate intracranial blood flow consistent with the integrity of the MRI and inconsistent with brain death, and that Jahi underwent menarche (her first ovulation cycle) and began breast development.

Despite that Defendants have the burden to prove with certainty that collateral estoppel applies, Defendants do not dispute that these changes in Jahi's condition have occurred since December 2013; they merely argue these changes cannot constitute new or changed circumstances preventing estoppel, yet Defendants still cite no authority that would prevent the changed circumstances principle from applying here, whereas the great weight of authority discussed above does support Jahi's effort to prove that she is alive.

Nor is it true, as Defendants doth protest too much, that they "must not be forced

to face litigation every time McMath's body – which is being artificially maintained by mechanical ventilation – is perceived to exhibit some physical change. . . ." (Petition, 56.) Defendants are facing litigation for their negligence in causing harm to Jahi, who does not meet the definition of brain death pursuant to the plain meaning of the law, and is simply claiming that she is entitled to compensation for injuries to her person as any living person who has been injured by the fault of another.

One of Defendants' recurring themes is that it is unfair and burdensome to require them to defend against a personal injury claim brought by a dead person. But Plaintiffs' complaint alleges wrongful death in the alternative, so Defendants are not required to expend significant additional resources to defend a general personal injury action – Defendants are going to have to defend against Plaintiffs' claim either way. Moreover, this case does not involve some routine issue where burden to a defendant might be an overriding concern. The issue here is whether someone is alive or dead; no interest or stake could be more fundamental and compelling.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN OF FULFILLING THE THRESHOLD REQUIREMENTS FOR THE APPLICATION OF RES JUDICATA OR COLLATERAL ESTOPPEL.

" 'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.' [Citation.] The doctrine applies 'only if several threshold requirements are

fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements.' " (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Further, because the law does not favor estoppels, the party invoking collateral estoppel must establish these requirements with certainty. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1482.)

Element no. 1 is missing. That first element turns on whether the issues that were determined in the first proceeding were identical to any of the issues that were to be determined in the second proceeding. A party's claim of changed facts and circumstances after the first proceeding in turn is a claim that the issue sought to be precluded from relitigation is not identical to that decided in the former proceeding. (See *Union Pacific, supra*, 231 Cal.App.4th at 179-180.) Therefore, the very first element of issue preclusion does not apply, because of the changed circumstances doctrine, and consequently Defendants' collateral estoppel defense was properly rejected by the trial court. (*Ibid.*) Defendants did not meet their burden, particularly on the limited record at this stage of the proceedings. (See *Santa Clara Valley Transportation Authority v. Rea* (2006) 140

Cal.App.4th 1303, 1311–1312 [if the record is incomplete, and the court cannot determine whether one or more of the elements of collateral estoppel is present, the court cannot apply it].)

III. THE PRECLUSION DOCTRINES DO NOT APPLY WHERE APPLICATION WOULD NOT SERVE THEIR UNDERLYING FUNDAMENTAL PRINCIPLES.

In any event, even assuming threshold requirements were satisfied, application of collateral estoppel is not appropriate where such an application would defeat public policy and the fundamental principles underlying the doctrine. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342–343 [holding that even assuming all threshold requirements are met, courts must "look to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting"].) "It must be remembered that '[c]ollateral estoppel' is an equitable concept based on fundamental principles of fairness. [Citation.]" (*White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763.) "[T]he public policies underlying collateral estoppel – preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation – strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy. [Citation.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d

335, 342–343; see also *People v. Sims* (1982) 32 Cal.3d 468, 488–489.) Here, application of collateral estoppel would result in injustice when the earlier proceeding was an informal, expedited hearing with limited opportunity to fully explore the issue of brain death. The application of collateral estoppel would also be inappropriate where the relief sought in the earlier proceeding (requiring the continuation of life support) is so disparate from the relief sought in the present proceeding (compensation for harm caused by negligence).

The purpose of issue preclusion is "to prevent a party from repeatedly litigating an issue in order to secure a different result" when it had a full and fair opportunity to do so previously. (*Direct Shopping Network, LLC v. James* (2012) 206 Cal.App.4th 1551, 1562–1563; accord, *Union Pacific, supra*, 231 Cal.App.4th at 179.) In *Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414, the First District Court of Appeal reversed a judgment of the trial court which had held that the defendant oil company's liability had been "established by application of the doctrine of collateral estoppel [based on] findings of liability in an earlier personal injury action against it. . . ." (*Smith, supra*, 153 Cal.App.4th at p. 1410.) The Court of Appeal reversed because, in the earlier action, the defendant "was unable to present a full defense" and that use of collateral estoppel in such circumstances was "inappropriate" (id. at 1417-1418) and "unfair and must be set aside." (Id. at 1420.) "[E]ven where the technical requirements [of collateral estoppel] are all met, the doctrine is to be applied 'only where such application comports with fairness and sound public policy.' " (*Id.* at 1414.) In *Smith*, a defense expert was unable

to testify in the prior trial due to a tragedy. Since the prior trial did not provide a full and fair opportunity to present a defense, the Court held it would be unfair to apply collateral estoppel. (*Id.* at 1420.)

The Court in *Smith* relied on United States Supreme Court authority. (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (*Parklane*).) In *Parklane*, the United States Supreme Court discussed the factors that may have prevented a defendant from enjoying a full and fair opportunity to litigate a claim at a prior trial in Parklane, including the situation in which the second action afforded the defendant procedural opportunities unavailable in the first action that could readily cause a different result, as where "the defendant in the first action was forced to defend in an inconvenient forum and therefore was *unable to engage in full scale discovery or call witnesses*." (*Parklane*, at p. 331, fn. 15, 99 S.Ct. 645, italics added; see also *Roos v. Red* (2005) 130 Cal.App.4th 870, 880, fn. omitted ["application of collateral estoppel is unfair where the second action 'affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result'"].)

In addition, courts have consistently emphasized the equitable nature of collateral estoppel and that even where the technical requirements are all met, the doctrine is to be applied "only where such application comports with fairness and sound public policy." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 835; *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941.) Further, in *Consumers Lobby Against Monopolies v. Public*

Utilities Com. (1979) 25 Cal.3d 891, 902, our Supreme Court held that collateral estoppel will not be applied "if injustice would result or if the public interest requires that relitigation not be foreclosed." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343, and *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230.)

Finally, the Restatement of Judgments, section 28 provides a further basis for declining to apply collateral estoppel in the compelling circumstances present here:

> [R]elitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . (3) 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; or (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or © because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

All of the above authority, and the fundamental principles which they embody, fully apply here – Jahi and her family should not be collaterally estopped from contesting the pronouncement that Jahi is dead after an expedited and abbreviated proceeding, conducted without any discovery and without testimony from live witnesses, that was conducted solely for the purpose of making the exigent determination whether CHO

would be allowed to terminate life support, and where new evidence, facts and changed circumstances subsequent to the December 2013 expedited proceeding and ruling supports a different result. Where the fact of death is alleged and denied, and there is new evidence supporting the denial, to say that an aggrieved patient is collaterally estopped from contesting her "brain death" in her action for medical negligence is to make the antecedent finding of "brain death" dispositive, based on a prior finding made under extreme time pressures and with great urgency necessary to decide the heartbreaking question whether to withdraw life support.

While not directly on point, analogous cases prohibit issue preclusion. In *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1754, the Court pointed out that collateral estoppel should not be applied when certain findings are made under extreme but necessary time pressures, courts and counsel do not have enough time to fully explore issues, and evidence is likely to be unavailable, inadmissible or nonexistent at the time the findings are made:

> [A] parent was not collaterally estopped from contesting molestation charge at review hearing, where he had denied the charge throughout the proceedings, and new evidence (a psychologist's report) supported his denial. The Court held: collateral estoppel effect should not be given, at a 12 or 18–month review, to a prior finding of child molestation made at a jurisdictional hearing when the accused parents continue to deny that any molestation ever occurred and *there is new evidence* supporting their denial. . . . In cases where child molestation is alleged and denied, and there is new evidence supporting the denial, to say that a parent is collaterally estopped from contesting the molestation itself at a 12 or 18–month review hearing is to make the "antecedent" jurisdictional finding virtually dispositive in terminating parental rights—and dispositive based on a prior finding made under a preponderance standard. To limit the evidence at the hearing to just

> the issue of a parent's propensity to commit molestation in the future is, under circumstances when there is new evidence that no molestation ever happened in the first place, not only grossly unfair, but also contrary to the logic of *Cynthia D.* The remedy for a factually erroneous molestation finding made at a jurisdictional hearing is, in the words of *Carmaleta B.*, to allow it to be reviewed in light of subsequent events. Our conclusion is also buttressed by the realities of our overcrowded juvenile dependency courts. We have emphasized the need for accurate and reliable findings of fact where child molestation is at issue. *But we also know that jurisdictional findings are made under extreme time pressures, and with a certain degree of urgency necessary to protect children. The hard truth is that all too often (the facts in the case before us demonstrate the point as much as any other) juvenile courts and counsel do not have enough time to fully explore molestation issues in jurisdictional hearings, and psychological evidence about a parent's propensity to commit molestation is likely to be unavailable, inadmissible or nonexistent.*

Italics added; see also *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1038, [collateral estoppel did not prevent a second dependency proceeding on sexual abuse allegations, even though court in earlier proceeding had rejected different allegations of sexual abuse, where new disclosures of child abuse, substantively different from previous disclosures, constituted new evidence].) The rationale of these cases and other cases that recognize the unfairness of applying collateral estoppel effect to expedited, exigent proceedings to preclude critical changed circumstances applies with full force here – Jahi and her family should not be collaterally estopped from contesting the pronouncement that Jahi is dead where they denied this throughout the expedited proceeding to sustain her life support and where new evidence months, even years, later supports their denial. Where the fact of death is alleged and denied, and there is new evidence supporting the denial, to say that an aggrieved patient is collaterally estopped from contesting her "brain death" in her

action for medical negligence is to make the antecedent finding of "brain death" dispositive based on a prior finding made under extreme time pressures and with great urgency necessary to decide the heartbreaking question whether to withdraw life support.[4] The trial court properly declined to apply collateral estoppel, particularly at this early, pleading stage of the litigation.

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."** Jahi's allegations of significant changes and developments since Judge Grillo's decision which demonstrate that her condition is one in which Jahi does have brain function and is indeed a living person are presumed true on demurrer. Section 7180 contemplates judicial review of the prior diagnosis of brain death when it is reasonably probable there was a mistake made in that diagnosis. (*Dority v. Superior Court* (1983) 145 Cal.App.3d 273, 276.) This has particular application to an expedited diagnosis of brain death for the purpose of determining whether to withdraw life support – it should be subject to rebuttal when it is reasonably probable that the diagnosis is also rebutted by subsequent changes in one's condition.

---

[4]See also *Vandenberg, supra*, 21 Cal.4th at 834-835 [arbitration's benefits of an informal and expeditious forum for disputes barred the assertion of collateral estoppel].)

IV. AS THE TRIAL COURT CORRECTLY RULED, THE DEATH CERTIFICATE DOES NOT AS A MATTER OF LAW PRECLUDE JAHI FROM PROVING THAT SHE HAS STANDING TO BRING A CLAIM FOR PERSONAL INJURY.

In its order granting plaintiffs leave to amend, the trial court rejected Defendants' argument in its demurrer to the original complaint that the death certificate precluded Jahi from having standing to bring her action, ruling:

> 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.

As the court further explained in its ruling:

> 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, CHO has not submitted authority that this is a prerequisite in order for Jahi to have standing.

The trial court's order overruling Defendants' demurrer again rejected Defendants' argument based on the death certificate, adding:

> The FAC includes new allegations to the effect that the death certificate is invalid and has been the subject of requests or petitions to rescind, cancel, void or amend it, but that such efforts have been unsuccessful. (FAC, 27-29.) Further, it appears that, Jahi and her mother Latasha Nailah Spears Winkfield ("Winkfield") filed a complaint in federal court seeking declaratory and injunctive relief, including a determination that the death certificate is invalid. (Reply Decl. of G. Patrick Galloway, Exh. A.) The court is not persuaded that the death certificate itself - which is subject to rebuttal and explanation and is the subject of a pending challenge in federal court - establishes the fact of Jahi's death as a matter of law (at the pleading stage) so as to preclude her from bringing the first cause of action.

The court's ruling is correct and well-supported in the law. (See also *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 164-65 [death certificates may be admitted as prima facie evidence of the facts stated therein, but it is improper to take judicial notice of the facts stated in the death certificate as part of ruling on a demurrer where the demurring party sought to indisputably establish cause of death]; *People v. Holder* (1964) 230 Cal.App.2d 50, 56 [similar]; *Estate of Scott* (1942) 55 Cal.App.2d 780, 782–783 [party may correct a statement in a death certificate by calling as a witness the person who made the death certificate].)

While the court may take notice of the existence of findings of fact made in the other action, but may not accept them as true on issues in dispute in the present case. Thus, the other court's findings are not indisputably true. Otherwise, the judge in the other case would be made "infallible" on all matters. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145–148.)

Specifically, the Court in *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 164-65 held that death certificates may be admitted as prima facie evidence of the facts stated therein, but it is improper to take judicial notice of the facts stated in the death certificate as part of ruling on a demurrer where the demurring party sought to indisputably establish cause of death. This is underscored by Health and Safety Code section 103550, which provides that a certified copy of a death certificate is merely "prima facie evidence in all courts and places of the facts stated therein." Thus, the Court in *In re Estate of Lensch* (2009) 177 Cal.App.4th 667, 676-677, discussing section 103550, held that the date and time of death stated on a death certificate was subject to rebuttal and explanation: "Of course, a death certificate is 'subject to rebuttal and to explanation.' (*Morris v. Noguchi* (1983) 141 Cal.App.3d 520, 523, fn. 1, 190 Cal.Rptr. 347; see also *People v. Holder* (1964) 230 Cal.App.2d 50, 56, 40 Cal.Rptr. 655.) And a party may correct a statement in a death certificate by calling as a witness the person who made the death certificate. (See *Estate of Scott* (1942) 55 Cal.App.2d 780, 782–783, 131 P.2d 613.)"

Defendants argue these cases are distinguishable because they did not involve a dispute over the *fact* of death, but they concede there is no authority for their attempt at such a distinction. Moreover, there is no logical reason for, on one hand, allowing one to rebut the contents of a death certificate stating the cause, date, time, or other statement on a death certificate but, on the other hand, not allowing one to rebut the fact of death, with evidence that in fact, death has not occurred (for instance, the appearance of a missing person presumed or found to be dead).[5]

Accordingly, the unsigned death certificate does not preclude Jahi from alleging a cause of action for personal injury.

---

[5]In essence, the trial court posed a similar hypothetical in the hearing on the first round of demurrers, asking if "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 [of] issue preclusion. . . I don't ask this question in any mirthful way. It's a serious question as to what the preclusive effects [are] of both the death certificate and Judge Grillo's order." (OE 203-204.)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny writ relief to Defendants.

Dated: May 16, 2016

AGNEW & BRUSAVICH

ESNER, CHANG & BOYER

By: /s/ Andrew N. Chang

Attorneys for Real Parties in Interest and Plaintiffs

CERTIFICATE OF WORD COUNT

This Plaintiff's Opposition to Petition for Writ of Mandate contains 11,744 words per a computer generated word count.

/s/ Andrew N. Chang

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 234 East Colorado Boulevard, Suite 750, Pasadena, California 91101.

I am readily familiar with the practice of Esner, Chang & Boyer for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Date Served: May 16, 2016

Document Served: Plaintiff's Opposition to Petition for Writ of Mandate

Parties Served: See attached Service List

(By Electronic Service) Electronically served through the Court's TrueFiling system.

Executed on May 16, 2016, at Pasadena, California.

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

/s/ Carol Miyake

SERVICE LIST

Hon. Robert B. Freedman
Hon. Stephen M. Pulido
Alameda County Superior Court
1225 Fallon Street, Dept. 16
Oakland, CA 94612

(Respondent, Trial Court
Via U.S. Mail)

G. Patrick Galloway, Esq.
Joseph E. Finkel, Esq.
Galloway, Lucchese, Everson & Picchi
2300 Contra Costa Blvd., Suite 350
Pleasant Hill, CA 94523-2398
T: (925) 930-9090
F: (925) 930-9035
E: pgalloway@glattys.com
jfinkel@glattys.com

(Attorneys for Petitioner and
Defendant UCSF Benioff Children's
Hospital Oakland)

Kenneth R. Pedroza, Esq.
Dana L. Stenvick, Esq.
Cole Pedroza LLP
2670 Mission Street, Suite 200
Pasadena, CA 91108
T: (626) 431-2787
F: (626) 431-2799
E: kpedroza@colepedroza.com
dstenvick@colepedroza.com

(Attorneys for Petitioners and
Defendants UCSF Benioff Children's
Hospital Oakland Frederick S. Rosen,
M.D.)

Thomas E. Still, Esq.
Jennifer Still, Esq.
Hinshaw, Marsh, Still & Hinshaw
12901 Saratoga Avenue
Saratoga, CA 95070
T: (408) 861-6500
F: (408) 257-6645
E: tstill@hinshaw-law.com
jstill@hinshaw-law.com

(Attorneys for Petitioner and
Defendant Frederick S. Rosen, M.D.)

Robert W. Hodges, Esq.
McNamara, Ney, Beatty, Slattery,
Borges & Ambacher, LLP
1211 Newell Avenue
Walnut Creek, CA 94596-5331
T: (925) 939-5330
F: (925) 939-0203
E: robert.hodges@mcnamaralaw.com

(Attorneys for Defendant Robert M. Wesman, M.D.)

Thomas J. Doyle, Esq.
Schuering, Zimmerman & Doyle, LLP
400 University Avenue
Sacramento, CA 95825-6502
T: (916) 567-0400
F: (916) 568-0400
E: tjd@szs.com

(Attorneys for Defendant Alicia Herrera, M.D.)

Scott E. Murray, Esq.
Vanessa L. Efremsky, Esq.
Donnelly Nelson Depolo & Murray
201 North Civil Drive, Suite 239
Walnut Creek, CA 94596-3879
T: (925) 287-8181
F: (925) 287-8188
E: smurray@dndmlawyers.com
Vefremsky@dndmlawyers.com

(Attorneys for Defendant James Patrick Howard, M.D., Ph.D.)

John L. Burris, Esq.
Benjamin Nisenbaum, Esq.
James Cook, Esq.
Law Offices of John L. Burris
7677 Oakport Street, Suite 1120
Oakland, CA 94621
T: (510) 839-5200
F: (510) 839-3882
E: john.burris@johnburrislaw.com
Bnisenbaum@hotmail.com
James.cook@johnburrislaw.com

(Attorneys for Real Party in Interest, Plaintiff and Nominal Defendant Milton McMath)

Bruce M. Brusavich, Esq.
Terry S. Schneier, Esq.
Agnew & Brusavich
20355 Hawthorne Blvd., 2nd Floor
Torrance, CA 90503
T: (310) 793-1400
F: (310) 793-1499
E: brusavich@agnewbrusavich.com
ellis@agnewbrusavich.com

(Attorneys for Real Parties in Interest and 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)

EXHIBIT 2

A147989

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND and FREDERICK S. ROSEN, M.D.,
Petitioners and Defendants,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ALAMEDA,
Respondent,

LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINKFIELD; SANDRA CHATMAN; MILTON McMATH; and JAHI McMATH, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD,
Real Parties in Interest and Plaintiffs.

ALAMEDA COUNTY SUPERIOR COURT
HON. ROBERT B. FREEDMAN, JUDGE
HON. STEPHEN M. PULIDO, JUDGE
CASE NO. RG15760730

EXHIBITS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO PETITION FOR WRIT OF MANDATE

AGNEW & BRUSAVICH
Bruce M. Brusavich, SBN 93578
Terry S. Schneier, SBN 118322
20355 Hawthorne Blvd., 2nd Floor
Torrance, California 90503
Telephone: (310) 793-1400
Email: brusavich@agnewbrusavich.com

ESNER, CHANG & BOYER
Andrew N. Chang, SBN 84544
Joseph S. Persoff, SBN 307986
234 East Colorado Boulevard, Suite 750
Pasadena, California 91101
Telephone: (626) 535-9860
Email: achang@ecbappeal.com
Jpersoff@ecbappeal.com

Attorneys for Real Parties in Interest and Plaintiffs

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE

THOMAS E. STILL, ESQ. - State Bar No. 127065
JENNIFER STILL, ESQ. - State Bar No. 138347
LAW OFFICES OF
HINSHAW, MARSH, STILL & HINSHAW, LLP
12901 SARATOGA AVENUE
SARATOGA, CALIFORNIA 95070
(408) 861-8500
FAX (408) 257-6645

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

SUPERIOR COURT OF CALIFORNIA, 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 of Oakland); MILTON McMATH, a nominal defendant, and DOES 1 THROUGH 100, Defendants.	No. RG15760730 ASSIGNED FOR ALL PURPOSES TO: JUDGE ROBERT R. FREEDMAN DEPARTMENT 20 **NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.** **Reservation #: R - 1640356** **Date: July 30, 2015** **Time: 2:00 p.m.** **Dept: 20, Hon. Robert B. Freedman** Complaint Filed: March 3, 2015

NOTICE OF DEMURRER TO COMPLAINT

TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on July 30, 2015, at 2:00 p.m., or as soon as the matter may be heard in Department 20 of the above-entitled court located at Administration Building, Fourth Floor, 1221 Oak Street, Oakland, CA 94612, defendant Frederick S. Rosen, will and hereby does demur to plaintiffs' Complaint for Damages for Medical Malpractice.

This demurrer is brought pursuant to Section 430.10 subdivision (f) of the Code of Civil Procedure.

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-8500

The demurrer will be based upon this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities, the Request for Judicial Notice and appended Exhibits, the Alameda County Superior Court's files in the probate 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, and all papers filed and records in this action, and all appropriate evidence received at or before the hearing.

DEMURRER TO COMPLAINT

1. Jahi McMath's First Cause of Action for Personal Injuries fails to state a cause of action. (C.C.P. § 430.10(f).) Jahi McMath is deceased. She does not have standing to allege a personal injury claim. Any claim for monetary damages arising from injuries allegedly sustained by the decedent due to professional negligence, passed to her successor in interest no than December 24, 2013, the date Judge Grillo determined that Jahi had suffered brain death. Any cause of action the decedent may have had must be brought by her "personal representative or, if none, by the decedent's successor in interest" in a survival action. (Code Civ. Proc., § 377.30.) Plaintiffs have not alleged the identity of a "successor in interest" or a "personal representative," therefore, they have not alleged a survivor action. Standing is an essential element to a survivor claim.

2. Plaintiffs Latasha Nailah Spears Winkfield and Sandra Chapman's Second Cause of Action for "Bystander" Negligent Infliction of Emotional Distress ("NIED") fails to state a claim for relief. (C.C.P. § 430.10(f).) Plaintiffs' claim for NIED arises out of the alleged negligent care provided while Jahi was in the PICU. There are no allegations that plaintiffs were told, or otherwise contemporaneously aware, that Dr. Rosen was in the hospital, on-call, or was expected to check on Jahi that evening while she was in the PICU, that he was contacted and informed of Jahi's condition, and, that he failed to come to her aid. In as much as these facts have not and cannot truthfully be pled, the second cause of action for NIED as to Dr. Rosen fails to state a claim for relief.

3. Marvin Winkfield's Third Cause of Action for Wrongful Death fails to state a claim for relief since as a step-parent, he is not an heir under the laws of intestate succession. (C.C.P. § 430.10(f).)

///

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 851-6500

Dated: June 18, 2015

HINSHAW, MARSH, STILL & HINSHAW

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

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6500

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 DEMURRER AND DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.

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:

Bruce M. Brusavich, Esq.
Puneet K. Toor, Esq.
AGNEW & BRUSAVICH
20355 Hawthorne Blvd., 2nd Floor
Torrance, CA 90503

G. Patrick Galloway, Esq.
Karen Sparks, Esq.
Galloway, Lucchese, Everson & Picchi
1676 California Boulevard, Suite 500
Walnut Creek, CA 94596

///

///

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 June 19, 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.

THOMAS E. STILL, ESQ. - State Bar No. 127065
JENNIFER STILL, ESQ. - State Bar No. 138347
LAW OFFICES OF
HINSHAW, MARSH, STILL & HINSHAW, LLP
12901 SARATOGA AVENUE
SARATOGA, CALIFORNIA 95070
(408) 861-6500
FAX (408) 257-6645

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

SUPERIOR COURT OF CALIFORNIA, 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,	No. RG15760730 ASSIGNED FOR ALL PURPOSES TO: JUDGE ROBERT R. FREEDMAN DEPARTMENT 20
Plaintiffs,	**Reservation #: R - 1640356**
vs.	**Date: July 30, 2015** **Time: 2:00 p.m.** **Dept: 20, Hon. Robert B. Freedman**
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,	Complaint Filed: March 3, 2015
Defendants.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

H:\McMath\plead\PA.TOC.TOA.wpd

THOMAS E. STILL, ESQ. - State Bar No. 127065
JENNIFER STILL, ESQ. - State Bar No. 138347
LAW OFFICES OF
HINSHAW, MARSH, STILL & HINSHAW, LLP
12901 SARATOGA AVENUE
SARATOGA, CALIFORNIA 95070
(408) 861-6500
FAX (408) 257-6645

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

SUPERIOR COURT OF CALIFORNIA, 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 of Oakland); MILTON McMATH, a nominal defendant, and DOES 1 THROUGH 100,

Defendants.

_____/

No. RG15760730
ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT R. FREEDMAN
DEPARTMENT 20

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.

Reservation #: R - 1640356

Date: July 30, 2015
Time: 2:00 p.m.
Dept: 20, Hon. Robert B. Freedman

Complaint Filed: March 3, 2015

I. INTRODUCTION

The action arises out of the medical care and treatment provided to the decedent, Jahi McMath ("Jahi"), a minor, at UCSF Benioff Children's Hospital Oakland ("CHO") on December 9 and 10, 2013. Plaintiffs allege that defendant Frederick S. Rosen, M.D., performed throat surgery on Jahi on December 9, 2013. It is alleged that several hours after surgery, while in the PICU, Jahi suffered bleeding from her mouth and nose and was not properly attended to. Dr. Rosen was unaware of Jahi's post-operative bleeding. Approximately five and one-half hours after Jahi's surgery, a code was called. Resuscitative efforts allegedly lasted 2 hours and 33 minutes. On December 11 and 12,

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP 12901 Saratoga Avenue Saratoga, CA 95070 (408) 861-6500

2013, Jahi's mother, plaintiff Latasha Nailah Spears Winkfield, and step-father, plaintiff Marvin Winkfield, were allegedly advised that brain testing indicated that Jahi has sustained significant and severe brain damage. Two physicians examined Jahi and concluded that she had suffered brain death under accepted medical standards and that Jahi was legally dead.

On December 20, 2013, Mrs. Winkfield filed a petition in this Superior Court seeking to compel CHO to provide medical treatment to her daughter, *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 Grillo accepted jurisdiction pursuant to the California Uniform Determination of Death Act, specifically Health and Safety Code sections 7180[1] and 7181[2].

The parties agreed to a Health and Safety Code section 7181 examination by Paul Fisher, M.D., the Chief of Child Neurology at Stanford University School of Medicine, to provide an independent opinion on the question of whether Jahi was brain dead. Dr. Fisher was the third physician to diagnose that Jahi has suffered brain death.

On January 17, 2014, Judge Grillo entered final Judgment on his determination that clear and convincing medical evidence established the fact that Jahi had suffered brain death and was deceased, as defined by Health and Safety Code sections 7180 and 7181. Judge Grillo declared Jahi to be legally dead based on competent medical evidence that she suffered *irreversible* cessation of all functions of her brain. Judge Grillo's Judgment and finding of death is not subject to reversal, reconsideration, re-opening or collateral attack. Jahi's brain death is, tragically, final and irreversible.

On January 3, 2014, Jahi's body was released to the Alameda County Coroner. The Alameda County Coroner issued a death certificate for Jahi on January 3, 2014. On or about January 5, 2014, Jahi's body was removed from CHO and released to the Winkfields.

---

1. Section 7180 subsection (a) provides: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) **irreversible cessation of all functions of the entire brain, including the brain stem, is dead**. A determination of death must be made in accordance with accepted medical standards." (Emphasis added.)

2. Section 7181 provides: "When an individual is pronounced dead by determining that the individual has sustained an irreversible cessation of all functions of the entire brain, including the brain stem, there shall be independent confirmation by another physician."

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP 12901 Saratoga Avenue Saratoga, CA 95070 (408) 861-6500

In the instant action, plaintiffs allege three causes of action. The first cause of action for personal injuries is brought on behalf of Jahi–*as if she were still alive*. Jahi, through her alleged guardian ad litem Mrs. Winkfield, seeks personal injury damages, including general damages for Jahi's alleged ongoing pain and suffering as well as her past and future medical expenses. In the second cause of action for negligent infliction of emotional distress ("NIED"), Mrs. Winkfield and her mother, plaintiff Sandra Chapman, who were both allegedly present in the PICU and alleged to have witnessed Jahi's ongoing bleeding, seek damages for their emotional distress. In the third cause of action for wrongful death, plaintiffs admit Jahi is deceased.

Jahi's family insists that she is alive, and that the question of her brain death should be revisited in a medical malpractice action. However, there is no legal mechanism or precedent that permits this court review and reverse Judge Grillo's Judgment. Death, by statutory definition, medical wisdom and sound judgment, is irreversible. The doctrines of res judicata and collateral estoppel preclude litigation of Judge Grillo's finding and final Judgment of brain death. Public policy dictates that there be finality to a medical and legal determination of death. This court must give conclusive effect to Judge Grillo's final Judgment and should not entertain plaintiffs' claim that Jahi is no longer dead.

Since Jahi has been medically diagnosed and legally adjudicated as irreversibly brain dead and deceased, plaintiffs' claims are strictly defined by statute. (Code Civ. Proc. § 377.10 et seq.) A dead person cannot pursue a personal injury claim, which is what plaintiffs are improperly attempting to do in their first cause of action. Any potential claim that Jahi had passed to her personal representative upon her death. This is known as a survival claim. In order to plead a survival claim, plaintiffs must allege the claim is brought by Jahi's designated "personal representative" or "successor in interest."

Defendant Frederick Rosen, M.D., demurs to the first cause of action for personal injuries on the grounds that Jahi McMath, through her guardian ad litem, does not have standing to maintain a cause of action for personal injuries. Jahi McMath is deceased, therefore, her potential claim is governed by the survival statutes. Since plaintiffs have failed to allege the identity of the Jahi's "personal representative" or "successor in interest," plaintiffs have failed to state a survival claim.

Law Offices of
MANSHAW, MARSH,
STILL & MANSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6500

Dr. Rosen demurs to the second cause of action for NIED on the grounds that plaintiffs have not alleged any facts showing they were contemporaneously aware of any wrongdoing by Dr. Rosen. Finally, Dr. Rosen demurs to Mr. Winkfield's cause of action for wrongful death on the grounds that step-parents do not have standing to seek wrongful death damages.

II. FACTUAL STATEMENT

A. Alleged Medical Care and Treatment Giving Rise to Suit

In 2013, Dr. Rosen, an otolaryngologist (ear, nose and throat surgeon), allegedly diagnosed Jahi with sleep apnea and recommended surgery that included removal of her tonsils, adenoids, soft pallet and uvula. (Complaint, ¶¶ 6 and 10.) Surgery was performed by Dr. Rosen on December 9, 2013 at CHO. Dr. Rosen allegedly noted a "suspicion of medialized carotid on right." Plaintiffs allege that this finding "probably" meant that Jahi had an anatomical anomaly that posed an increased risk for hemorrhaging during or after surgery. Plaintiffs allege that Dr. Rosen failed to note in his post-operative instructions that Jahi was at higher risk of post-operative bleeding. (*Id.*, at ¶ 11.)

Dr. Rosen disputes and contests plaintiffs' allegations that he was in any way negligent. Dr. Rosen will establish that he at all times complied with the standard of care, including his pre-operative work-up, surgery, and post-operative care.

After surgery, Jahi was taken to the post-anesthesia care unit, and then later to the PICU. When Mr. and Mrs. Winkfield entered the PICU to visit Jahi they allegedly found her coughing up blood. (*Id.*, at ¶ 12.) The nurses allegedly told the Winkfields the bleeding was "normal." (*Id.*, at ¶ 13.) Mrs. Winkfield allegedly suctioned the blood from Jahi's mouth for approximately 60 minutes per a nurse's directions. When Mrs. Winkfield noticed that the bandages and packing in Jahi's nose were also becoming bloody, she allegedly asked the nursing staff to call a physician. The nursing staff allegedly ignored her repeated requests that a doctor examine Jahi. No physicians allegedly came to attend to Jahi. (*Id.*, at ¶¶ 14-16.)

Concerned about the amount of bleeding, Mrs. Winkfield contacted her mother, plaintiff Sandra Chatman, who is allegedly an experience hospital nurse. Ms. Chatman allegedly arrived at Jahi's bedside at approximately 10:00 p.m. Ms. Chatman allegedly became immediately alarmed by the amount of blood she saw and advised the nurses that this was an excessive amount of bleeding

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP 12901 Saratoga Avenue Saratoga, CA 95070 (408) 861-6500

for the procedure. Ms. Chatman allegedly also insisted that the nurses contact the doctors. (*Id.*, at ¶ 17.)

Ms. Chatman allegedly advised Mrs. Winkfield that Jahi' bleeding was excessive and she was at risk of having serious medical complications due to the loss of blood and lack of medical care. Ms. Chapman and Mrs. Winkfield allegedly watched Jahi continue to bleed and deteriorate from alleged medical neglect and the alleged failure of any physician to attend to Jahi. (*Id.*, at ¶ 18.)

Plaintiffs do not allege any facts showing they were contemporaneously aware of any wrongdoing by Dr. Rosen. Nor can they because Dr. Rosen was unaware of Jahi's bleeding in the PICU. Plaintiffs have not alleged, and cannot prove, that Dr. Rosen was contacted and informed of Jahi's bleeding.

At approximately 12:30 a.m., on the morning of December 10, 2013, Ms. Chatman was allegedly watching the monitors and noted that there was a desaturation of Jahi's oxygenation level of her blood and a drop in her heart rate. Ms. Chatman allegedly called out for the staff to institute a code. At 12:35 a.m., the code was allegedly called. The cardiopulmonary arrest and code was documented to last until 3:08 a.m., or 2 hours and 33 minutes. During this time, the doctors and nurses were allegedly unable to establish an airway or provide adequate oxygenation. (*Id.*, at ¶ 19.)

On December 11 and 12, 2013, the Winkfields were advised that EEG brain testing indicated that Jahi had sustained significant and severe brain damage. (*Id.*, at ¶ 23.)

Plaintiffs allege that several days later, on December 15 and 16, 2013, nursing staff noted in Jahi's medical chart that the doctors in the PICU had been advised of Jahi's deteriorating condition, blood loss and critical vital signs, but no physician responded to intervene. (*Id.*, at ¶ 22.) There is no allegation that Dr. Rosen was in the PICU.

B. On December 24, 2013, Jahi McMath Was Conclusively Determined to Have Suffered Brain Death by Clear and Convincing Medical Evidence

On December 20, 2013, Mrs. Winkfield filed a verified petition and ex parte application in the Alameda County Superior Court pursuant to Probate Code sections 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 to prohibit respondent CHO from withholding life support from Jahi.

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP 12901 Saratoga Avenue Saratoga, CA 95070 (408) 861-6500

(Amended Order, dated January 2, 2014, Appended as Exhibit A to Request for Judicial Notice, 2:7-12.)[3]

Counsel for CHO submitted opposition papers. Citing the Uniform Determination of Death Act (Health and Safety Code sections 7180 et seq.) and Probate Code sections 3200 or 4600 et seq., CHO argued that it had no duty to continue mechanical ventilation or any other medical intervention because Jahi was deceased as a result of the irreversible cessation of all functions of her brain. (*Id.*, 2:17-21.) CHO submitted the declarations of two examining physicians (Drs. Heidersbach and Shanahan) who both diagnosed Jahi as having suffered irreversible brain death.

Judge Grillo interpreted the physicians' declarations to unequivocally state 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 plainly, "Jahi was legally dead as defined by Health and Safety Code sections 7180 and 7181 and neither Probate Code sections 3200 or 4600 et seq. authorized medical treatment of legally dead persons." (*Id,* 2:21-3:9.) In his footnote to this sentence, Judge Grillo explained:

> It would 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 ad litem to make health care decisions on behalf of a deceased person, i.e., a person for whom additional medical treatment would be futile. .... (*Id.*, page 3, fn. 2.)

Judge Grillo reported that Mrs. Winkfield provided "anecdotal evidence" that Jahi was responsive to her touch. (*Id.*, 3:10-12.)

During oral argument on December 20, 2013, Judge Grillo determined that, because the two physicians who submitted declarations had staff privileges at CHO, they did not meet the requirement of section 7181 that there be confirmation of brain death by an "independent physician." Judge Grillo further determined that the independent opinion required by section 7181 should be

---

3. Defendant has filed a request that the court take Judicial Notice of this court's records in the probate 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, filed Mrs. Winkfield on December 20, 2013, and adjudicated by the Honorable Evelio Grillo.

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP 12901 Saratoga Avenue Saratoga, CA 95070 (408) 861-8500

provided by a physician who had no affiliation with CHO. (*Id.*, 3:13-4:12.)

Therefore, on December 23, 2013, the court reconvened the hearing and, by order dated December 23, 2013, Judge Grillo appointed Paul Fisher, M.D., the Chief of Child Neurology at Stanford University School of Medicine, as the independent section 7181 physician. (*Id.*, 5:9-21. The court continued the hearing to December 24, 2013 in order to receive Dr. Fisher's report and testimony as well as testimony of Dr. Shanahan, the physician who determined that Jahi was brain dead as of December 11, 2013. (*Id.*, 5:24-6:1.)

Dr. Fisher examined Jahi during the afternoon on December 23, 2013. (*Id.*, 5:23-24.)

An evidentiary hearing was conducted On December 24, 2013. Judge Grillo received testimony from Dr. Shanahan and Dr. Fisher, and entered into evidence Dr. Shanahan's and Dr. Fisher's examination notes as well as the applicable standards for determining brain death. (*Id.*, 6:16.) Dr. Fisher opined that Jahi was brain dead under accepted medical standards. (*Id.*, 7:2.) Dr. Shanahan also testified that Jahi was brain death as of December 11, 2013, under accepted medical standards. (*Id.*, 7:20-21.)

Mrs. Winkfield's attorney had the opportunity to cross examine Dr. Fisher and Dr. Shanahan. (*Id.*, 6:16-17.) At the conclusion of Dr. Fisher's cross-examination, Mrs. Winkfield's attorney stipulated that Dr. Fisher made his brain death diagnosis pursuant to the accepted medical standards. (*Id.*, 6:22-7:1.) Judge Grillo overruled counsel for Mrs. Winkfield's objection to Dr. Shanahan's testimony. (*Id.*, 7:9-10.)

After a brief recess, Judge Grillo denied Mrs. Winkfield's petition. (*Id.*, 7:23-24.) The court found there was *clear and convincing evidence*[4] that Jahi had suffered brain death and was deceased as defined by Health and Safety Code sections 7180 and 7181. (*Id.*, at 16:20-22.) CHO could not be compelled to provide medical interventions to Jahi's body.

On December 26, 2013, the court issued it written Order that denied the petition for medical treatment. Judge Grillo issued an amended on January 2, 2014, to correct typographical errors and

---

4. In addressing the burden of proof, Judge Grillo ruled that "when a court is called on to determine whether a person has suffered brain death and is now dead under the law... the court must make that finding by clear and convincing evidence." (*Id.*, 16:6-8.)

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12601 Saratoga Avenue
Saratoga, CA 95070
(408) 861-8500

address several factual corrections requested by counsel. There were no substantive changes. (Amended Order, 1/2/14, Exhibit A to Request for Judicial Notice, page 1.)

In his nineteen page decision, Judge Grillo initially addressed a CHO's argument that the court did not have jurisdiction to review the physicians' determination of brain death. Regarding the jurisdiction issue, at page 8, Judge Grillo noted that:

> 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 judicial review. (*Dority v. Superior Court* 91983) 145 Cal.App.3d 273, 278.)

Judge Grillo concluded that the facts were sufficient to invoke the jurisdiction of the court to review whether the diagnosis was made by an independent physician in accord with medical standards. (*Id.*, 10:7-9.)

The court next addressed Mrs. Winkfield's concerns that she was not provided a full and fair opportunity to present evidence whether Jahi had suffered brain death. Her attorney had requested additional time to access Jahi's complete medical records, prepare for cross-examination and present a competing physician. The court noted that there is no statute or case law that provides guidance regarding the nature of the proceeding. The court found that a proceeding that permitted limited discovery and presentation of the evidence in order to complete the proceeding in a "reasonably brief period" was most consistent with the legislature's intent and the case law and accounted for Mrs. Winkfield's due process concerns. Judge Grillo noted that Mrs. Winkfield's attorney withdrew his request that Paul A. Byrne, M.D., be permitted to examine Jahi and provide a second section 7181 opinion. (*Id.*, 14:3-4.) Mrs. Winkfield had almost two weeks to obtain a counter medical opinion, however, she failed to present competent medical evidence showing Jahi was not brain dead.

Approximately ten days later, on January 3, 2014, Mrs. Winkfield renewed her request for a court order ordering either that CHO insert a feeding tube and a tracheal tube into the person of Jahi or that CHO allow Mrs. Winkfield to have a physician perform the medical intervention. Judge Grillo denied the motions on the grounds that Jahi was indisputably brain dead and that such procedures would be medically ineffective, contrary to accepted health care standards, or in violation of medical or ethical norms. (Order, 1/3/14, Ex. B to request for Judicial Notice.)

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6500

On January 17, 2014, the court entered its "Final Judgment Denying Petition for Medical Treatment." (Judgment, 1/17/14, Ex. C to Request for Judicial Notice.)

C. The Certificate of Death Was Issued on January 3, 2014

On January 3, 2014, Jahi's body was released to the Alameda County Coroner. The Alameda County Coroner issued a death certificate for Jahi on January 3, 2014. (Death Certificate, Ex. D to Request for Judicial Notice.)

On or about January 5, 2014, Jahi's body was removed from CHO and released to the Winkfields. Mrs. Winkfield accepted sole care and responsibility for the care of Jahi's body. (Status Report dated 1/8/14, Ex. E to Request for Judicial Notice.)

III. LEGAL STANDARD

A demurrer tests the sufficiency of a complaint. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.) A demurrer lies when the plaintiff's complaint fails to state facts sufficient to constitute a cause of action or if the complaint is uncertain, ambiguous or unintelligible. (C.C.P. § 430.10(e) and (f).) A demurrer may be taken to the entire complaint, or to any of the causes of action stated in the complaint. (C.C.P. § 430.50(a).) A demurrer may rely on the facts as pleaded in the complaint as well as judicially-noticed facts. (Code Civ. Proc. § 430.30.) When a demurrer is sustained, the plaintiff must be allowed leave to amend only if there is a reasonable possibility that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 319.) The burden is on plaintiff to prove that a reasonable possibility exists. (*Id.*)

IV. ARGUMENT

A. The Judgment of Brain Death is Final and Irreversible

Plaintiffs are preserving Jahi's body from its natural post-mortem course. Machines are being used to keep the heart beating artificially. Nutrition is provided via a tube in the stomach. The lungs are inflated by a ventilator. These costly efforts keep Jahi's body from decaying. In their first cause of action for personal injuries, plaintiffs seek to hold defendants liable for these expensive medical interventions, which they claim could go on indefinitely. (Complaint, ¶ 36.) They also claim that Jahi should be compensated for the injuries, pain and suffering she has allegedly endured, both before and after her death. (*Id.*, ¶ 35.)

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6500

Defendant submits that there no medical or legal precedent for reversing a determination of brain death and Jahi's cause of action for personal injuries violates the Uniform Determination of Death Act, as well as medical and ethical norms. California's Uniform Determination of Death Act follows the Uniform Determination of Death Act, drafted in 1980 by the National Conference of Commissioners on Uniform State Laws to provide a "comprehensive bases for determining death in all situations." (Ex. F to Request for Judicial Notice.) Included in the definition of "legally dead" are individuals who have sustained "**irreversible** cessation of all functions of the entire brain, including the brain stem." (Health and Safety Code § 7180(a)(2).) (Emphasis added.) Brain death must be determined by the judgment of two independent physicians, in accordance with accepted medical standards. (*Id.*, § 7181.) (Emphasis added.) Thus, by statutory definition, brain death is irreversible.

Since there is no medical possibility of reversing brain death, this court should not entertain plaintiffs' request that the question of brain death be reopened and decided by the trier of fact in a medical malpractice case. The medical evidence of Jahi's brain death was reviewed and adjudicated by Judge Grillo under the clear and convincing standard following an evidentiary hearing. Plaintiffs stipulated that independent neurologist Paul Fisher, M.D., made his brain death diagnosis pursuant to the accepted medical standards. Plaintiffs did not challenge Judge Grillo's findings or final Judgment via an appeal, a motion for new trial, or a motion to vacate judgment. They did not seek relief from judgment on grounds of extrinsic fraud, mistake or duress. Defendant submits that this court cannot reconsider Judge Grillo's findings and Judgment.

The doctrines of res judicata and collateral estoppel preclude relitigation of Jahi's brain death. The purpose of res judicata is to preserve the integrity of the judicial system and prevent subsequent litigation of issues that were adjudicated in the original suit. (See *Torrey v. Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821.) Jahi was declared legally brain dead following an evidentiary hearing where two physicians testified that Jahi was legally brain dead. Mrs. Winkfield was given the opportunity to present counter-evidence on the question of Jahi's brain death. She failed to do so. The December 24, 2013 finding of brain death, and the final Judgment entered on January 17, 2014, are conclusive determinations that are not open to medical debate or legal challenge.

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 851-6500

Our society, acting through the legislature, has deemed that there is a social, ethical and moral value in defining the finality of life. There is consensus as to the medical standards that define death. Although we live in an age where medical technology can keep a body intact, it is agreed that it is unethical to require medical professionals to treat a corpse. (Probate Code section 4735.) Judge Grillo, in his wisdom, ruled that conducting medical interventions on Jahi's body would be futile, medically ineffective, contrary to generally accepted health care standards, and could violate medical or ethical norms. For the same reasons, it would be against public policy to hold health care professionals liable for the costs of the futile medical interventions performed on a dead person.

For each of the above reasons, the court should give conclusive effect to Judge Grillo's final Judgment and deem that Jahi is deceased for purposes of this litigation.

B. The First Cause of Action for Personal Injuries Fails to State a Claim for Relief Since Plaintiffs Have Not Properly Alleged Standing to State a "Survival Claim"

Jahi McMath is deceased. Once the patient has died, the right to pursue damages sustained by Jahi, if any, is strictly defined by the "survival claim" statutes. (Code Civ. Proc sections 377.20 et seq; *Adams v. Superior Court* (2011) 196 Cal.App.4th 71.) At common law there was no remedy for injuries causing death. (*Reyna v. San Francisco* (1977) 69 Cal.App.3d 876, 882.)

Survival actions are permitted by sections 377.20 and 377.30, which provide that a cause of action that survives the death of a person passes to the decedent's successor in interest and is enforceable by the "decedent's personal representative or, if none, by the decedent's successor in interest." (Code Civ. Proc., § 377.30.) "Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event. [Citation.]" (*Quiroz Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264.) Accordingly, upon Jahi's death, her personal injury cause of action passed to her successor in interest, i.e., her mother.

The distinction between a survival action and a claim for personal injuries is significant because of the differences in the damages that are recoverable. A survival action does not represent the right of action or compensable damages which the deceased would have had if he or she had

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 691-8500

survived the injury. (*Reyna v. San Francisco* (1977) 69 Cal.App.3d 876, 882.) Rather, the damages recoverable by a personal representative or successor in interest on a decedent's cause of action are limited by statute to "the loss or damage that the decedent sustained or incurred before death ... and do not include damages for pain, suffering, or disfigurement." (Code Civ. Proc., § 377.34.)

Standing is an essential element to a survival claim. (Code Civ. Proc., § 377.30; See *Myers v. Philip Morris, Inc.* (2003, ED Cal) 2003 US Dist LEXIS 13031.) Plaintiffs' first cause of action fails to state a claim for relief because there is no allegation that anyone is acting as the decedent's "personal representative" or "successor in interest." The court should sustain the demurrer to Jahi McMath's first cause of action for personal injuries. Defendant has no objection to Mrs. Winkfield amending her complaint to allege a proper survival claim that limits the damages to those recoverable under section 377.34.

C. Plaintiffs' Second Cause of Action for NIED Fails to State a Claim for Relief

Mrs. Winkfield and Ms. Chapmans' second cause of action for NIED solely addresses the alleged negligent post-operative care provided to Jahi in the PICU, several hours after Dr. Rosen's surgery. Plaintiffs allege that they were present in the PICU and observed Jahi excessively bleeding. Plaintiffs allege that they pleaded with nursing staff to contact the medical staff to come to her aid, to no avail. Plaintiffs were present when a code blue was called.

Plaintiffs NIED claim as to Dr. Rosen is defective because *there are no allegations that plaintiffs were told, or were otherwise contemporaneously aware*, that (1) Dr. Rosen was in the hospital, on-call, or was expected to check on Jahi while she was in the PICU, (2) that he was contacted and informed of Jahi's condition, and (3) that he failed to come to her aid. Plaintiffs have not pled these essential facts, nor can they. Dr. Rosen was unaware of Jahi's condition in the PICU.

1. The "contemporaneous awareness" element requires that plaintiffs allege facts showing they aware that Dr. Rosen knew about Jahi's dire medical condition in the PICU and that he failed to attend to her

A plaintiff may seek recovery for NIED based upon the "bystander" observation of an injury to a third person if each of the following three elements are satisfied: (1) The plaintiff is closely related to the injury victim; (2) The plaintiff is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) As a result, the plaintiff

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-4500

suffers serious emotional distress beyond that which is anticipated from an uninterested witness. (*Thing v. LaChusa* (1989) 48 Cal.3d 644, 667-668.)

In *Bird v. Saenz* (2002) 28 Cal.4th 910, 917-919, 921, the Supreme Court expressed that, except in the most obvious and extreme circumstances, an alleged failure by a health care provider to properly diagnosis or treat a victim is beyond the awareness of lay bystanders and, therefore, cannot support a claim for bystander NIED. In *Bird,* two events were identified by the court as potential injury producing events: (1) the negligent transection of the artery during surgery, and (2) the subsequent negligence in failing to diagnose and treat the damaged artery. The court ruled that the plaintiffs could not recover for bystander NIED for either event. The plaintiffs were not present at, and did not observe, the negligent transection during surgery. With respect to the post-operative failure to diagnose and treat the damaged artery, the court found that the plaintiffs did not, and could not, have perceived the defendants' negligence because misdiagnosis is generally beyond the awareness of bystanders. However, *Bird* did not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. The court stated that an NIED claim may arise when, as in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, the caregivers fail **"to respond significantly to symptoms obviously requiring immediate medical attention."** (*Bird, supra*, 28 Cal.4th at pp. 919–920.) (Emphasis added.)

Recently, in *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, the First Appellate District applied the *Ochoa* exception. At trial the plaintiffs presented evidence that they were present when their loved one had difficulty breathing following thyroid surgery. Plaintiffs felt there was no sense of urgency among the staff to determine the cause of the breathing problems. Plaintiffs called for help from the respiratory therapist, directing him to suction her throat. They also asked hospital staff to call the surgeon to return to the patient's bedside to treat her breathing difficulties. The surgeon was called and informed about the breathing. The patient stopped breathing shortly after the surgeon arrived at bedside and a code blue was called. The patient suffered brain death and life support was withdrawn. The First District held that plaintiffs' NIED claims were supported by substantial evidence in that plaintiffs were contemporaneously aware of both the patient's injury (i.e., the acute respiratory distress) and the hospital staff's inadequate response to her

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 861-6300

distress. The plaintiffs were witnesses to the lack of urgency in the response of the nursing and medical staff.

Here, plaintiffs allege no facts– nor can they truthfully allege facts–showing they were contemporaneously aware that Dr. Rosen was informed of Jahi's bleeding. Plaintiffs did not witness, nor were they aware of, any malfeasance by Dr. Rosen.

2. Plaintiffs cannot show they were contemporaneous aware of any wrongdoing by Dr. Rosen

The alleged negligence underlying plaintiffs' NIED claim is the failure to diagnose and treat Jahi's post-operative bleeding in the PICU. Plaintiffs have alleged that they were contemporaneously aware of Jahi's excessive post-operative bleeding and the inadequate treatment by the nursing staff and the failure of physicians to attend to her. Fatally absent are any allegations that plaintiffs were told by nursing staff that Dr. Rosen had been informed of Jahi's bleeding and failed to respond.

Plaintiffs have attempted to get around this fatal flaw by alleging that the standard of care required that Dr. Rosen follow up on Jahi in the PICU because he allegedly suspected, during surgery, that she had a possible medialized right carotid artery. (Complaint, Para. 31.) However, this allegation cannot save plaintiffs' NIED claim because plaintiffs were not contemporaneously aware of this alleged surgical finding that allegedly required Dr. Rosen to examine Jahi that evening in the PICU. In other words, plaintiffs had no expectation that Dr. Rosen would be returning to see Jahi in the PICU that evening. There must be "contemporaneous awareness that the defendant's conduct or lack thereof is causing harm." (*Bird v. Saenz, supra,* 28 Cal.4th at p. 919.)

Plaintiffs' NIED allegations as to Dr. Rosen fall far short of the rigorous criteria for the pursuance of bystander NIED liability. The demurrer to the second cause of action for NIED should be sustained without leave to amend.

D. Mr. Winkfield Does Not Have Standing to Seek Damages for Wrongful Death

In California, wrongful death actions are statutory in origin and exist " 'only so far and in favor of such person as the legislative power may declare.' " (*Justus v. Atchison* (1977) 19 Cal.3d 564, 575.) Since an action for wrongful death is governed solely by statute, the right to bring the action is

Law Offices of HINSHAW, MARSH, STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 651-6500

limited only to those persons described by the Legislature in Code Civ. Proc., § 377.60. The category of persons eligible to bring wrongful death actions is strictly construed. (*Phraner v. Cote Mark, Inc.* (1997) 55 Cal.App. 4th 166.) Mr. Winkfield, a step-parent, does not have standing to bring a wrongful death action. Jahi's heirs for purposes of intestate succession are her parents, Mrs. Winkfield and Mr. McMath, named herein as a nominal defendant. (Probate Code section 6402(b).) The demurrer to Mr. Winkfield's cause of action for wrongful death should be sustained without leave to amend.

V. CONCLUSION

Defendant Frederick Rosen, M.D. requests the court sustain the demurrer to Jahi McMath's first cause of action for personal injuries. Any claim for monetary damages arising from injuries allegedly sustained by the decedent due to professional negligence passed to her successor in interest no than December 24, 2013, the date Judge Grillo determined that she suffered brain death. Any cause of action she may have had must be brought by her "personal representative or, if none, by the decedent's successor in interest" in a survival action. Mrs. Winkfield has not properly alleged she has standing to pursue a survivor claim, therefore, the first cause of action fails to state a claim for relief.

Dr. Rosen further requests the court sustain the second cause of action for negligent infliction of emotional distress. Plaintiffs' claim for NIED arises out of the alleged negligent care provided while Jahi was in the PICU. There are no allegations that plaintiffs were told, or otherwise contemporaneously aware, that Dr. Rosen was in the hospital, on-call, or was expected to check on Jahi that evening while she was in the PICU, that he was contacted and informed of Jahi's condition, and, that he failed to come to her aid. In as much as these facts have not and cannot truthfully be pled, the second cause of action for NIED as to Dr. Rosen fails to state a claim for relief.

Finally, Mr. Winkfield cannot state a claim for wrongful death since he is not an heir under the laws of intestate succession.

Dated: June 18, 2015

HINSHAW, MARSH, STILL & HINSHAW

By: _____

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

Law Offices of
HINSHAW, MARSH,
STILL & HINSHAW, LLP
12901 Saratoga Avenue
Saratoga, CA 95070
(408) 661-6500

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.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT BY DEFENDANT FREDERICK S. ROSEN, M.D.

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:

Bruce M. Brusavich, Esq.
Puneet K. Toor, Esq.
AGNEW & BRUSAVICH
20355 Hawthorne Blvd., 2nd Floor
Torrance, CA 90503

G. Patrick Galloway, Esq.
Karen Sparks, Esq.
Galloway, Lucchese, Everson & Picchi
1676 California Boulevard, Suite 500
Walnut Creek, CA 94596

///

///

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 June 19, 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.