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SUPERIOR COURT OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD;  
MARVIN WINKFIELD; SANDRA  
CHATMAN; and JAHl 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

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY  
ADJUDICATION OF JAHl 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

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1 **INTRODUCTION**

2 16 ½ year-old Jahi McMath is – in the opinion of a UCLA triple board-certified pediatric  
3 neurologist – “a living, severely disabled young lady, who currently fulfills neither the standard  
4 diagnostic Guidelines for brain death nor California's statutory definition of death. At the very  
5 least, in a matter of life versus death, the compelling evidence of responsiveness to commands and  
6 of puberty warrants giving life the benefit of the doubt.” As Dr. Shewmon has testified in this  
7 case:

8 Time has proven that Jahi McMath has not followed the trajectory of imminent total  
9 body deterioration and collapse that was predicted categorically back in December,  
10 2013 on the basis of the diagnosis of brain death. Her brain is clearly not "dead" in a  
11 neuropathological sense (i.e., necrotic). She unequivocally does not fulfill California's  
12 statutory definition of death, which requires the irreversible absence of all brain  
13 functions, because she exhibits hypothalamic function and intermittent  
14 responsiveness to verbal command. She does not fulfill the pediatric or adult  
15 diagnostic criteria for brain death on the grounds of intermittent responsiveness. That  
16 Jahi McMath is currently not brain dead means that she never was truly brain dead,  
17 despite initially fulfilling the standard diagnostic criteria for brain death, because by  
18 definition brain death is the "irreversible cessation of all functions of the entire brain."  
19 Much less is she dead in the ordinary sense of the term. She is an extremely disabled  
20 but very much alive teenage girl.

21 Today, more than 3 ½ years after she was injured by Defendants’ negligence, Jahi's condition  
22 continues to improve, as attested to by her treating doctor, treating nurse, and Dr .Shewmon. She  
23 has shown several objective signs of brain activity, including brain wave activity on an EEG,  
24 cerebral blood flow, intact brain matter, an ability to respond to her mother's voice and commands  
25 as demonstrated by an increase in her heart rate and the increasing ability to respond to her  
26 mother's request to move specific parts of her body. As Dr. Shewmon and other medical experts  
27 have opined throughout this litigation, this is corroborated in part by an MRI scan taken in fall  
28 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 3 ½ years, while her mother has continued her exhaustive, nonstop

1 efforts to move back home to California, the place of Jahi's birth, and into the bosom of her  
2 family. She is also claiming the right to recover damages for the catastrophic brain injuries she  
3 suffered as a result of a routine surgery gone tragically wrong over 3 ½ years ago at Oakland's  
4 Children's Hospital ("CHO").

5 Jahi and her mother were forced to move to New Jersey within weeks after the tragic  
6 events in December 2013, because in an expedited, one-day proceeding, CHO's doctors and one  
7 independent physician declared Jahi "brain dead" under California Health and Safety Code  
8 Sections 7180 and 7181 so that CHO could obtain permission to disconnect Jahi's ventilator.  
9 Section 7181 states in relevant part: "(a) An individual who has sustained . . . irreversible  
10 cessation of all functions of the entire brain, including the brain stem, is dead." More than 3 ½  
11 years later, Jahi's present condition – based on expert, scientific evidence – unequivocally does not  
12 meet the definition of brain death. To the contrary, as several medical experts attest, she has  
13 increasing neurological function in many portions of her brain, including the motor cortex; the  
14 auditory cortex; the hypothalamus; the pituitary region; and the brainstem. These functions are  
15 presented through increasing, intermittent purposeful movements, the ability of her nervous  
16 system to regulate her temperature and heart rate, reactions to the presence and voice of her  
17 mother, and the onset of puberty and menstruation.

18 In this personal injury action, this Court and the Court of Appeal have allowed Jahi to  
19 allege and prove, with expert evidence, that today Jahi does not meet California's definition of  
20 brain death, no matter what her condition was in December 2013. Defendants again seek to  
21 overturn those decisions prior to a trial on the merits, where the parties can produce live testimony  
22 from expert medical witnesses and others who can provide this Court with the thorough  
23 proceeding and examination necessary to decide these important issues of brain life and brain  
24 death. Thus, once again Plaintiffs must underscore that the question in this personal injury action  
25 is not whether Jahi McMath met the definition of brain death in December of 2013. The question  
26 before this court posed by the Defendants' motion for summary adjudication is whether there is a  
27 triable issue of fact whether she does or does not meet that definition now. The evidence showing  
28 recovery of substantial brain function simply did not exist in December of 2013 during that

1 expedited, urgent proceeding. It first came to a bright light in the fall of 2014, when medical  
2 evidence showed that Jahi in fact had not sustained irreversible cessation of all functions of the  
3 entire brain, including the brain stem. Instead, now – a full 3 ½ years after she was quickly  
4 declared brain dead so that CHO could disconnect her ventilator and Jahi could be moved to New  
5 Jersey where she could continue to receive the support she required – Jahi's brain functions have  
6 improved and allowed her to become progressively able to respond to her mother's voice and  
7 words, as Jahi's treating doctor, nurse and medical experts and video evidence all attest.

8 Defendants' motion rises or falls on their reliance on opinions by two physicians who  
9 claim as a matter of law: (1) in December 2013 Jahi's condition met the statutory definition of  
10 brain death, and (2) in December 2013 physicians applied medically accepted guidelines for  
11 whether Jahi met the statutory definition of brain death. This argument is the same argument  
12 raised previously in this court and in the Court of Appeal. The only difference is that Defendants  
13 now submit the opinions of two physicians to attempt to confirm the decision of physicians back  
14 in December 2013 and to attempt to preemptively dismiss any medical opinion that is contrary to  
15 theirs. Defendants' motion fails because they cannot establish as a matter of law either contention.  
16 First, Jahi does not currently fulfill the accepted medical standards for brain death. Second, Jahi  
17 does not currently meet California's statutory definition of death by neurologic criteria on  
18 additional grounds. These conclusions are based on the expert opinion of Dr. Shewmon, a world  
19 renowned pediatric neurologist and clinical neurophysiologist, who opines that Jahi today  
20 unquestionably no longer fulfills the pediatric guidelines for determining brain death.

21 Based upon his personal examination and observations of Jahi, and based strictly on the  
22 statutory definition of brain death and not on any philosophical view of brain life and death, Dr.  
23 Shewmon unequivocally concludes first and foremost that the first of the "three cardinal findings  
24 in brain death" -- coma, absence of brainstem reflexes, and apnea -- is not fulfilled. Rather, Jahi is  
25 intermittently responsive, placing her in the category of "minimally conscious state." Also, video  
26 evidence indicates beyond any reasonable doubt, Dr. Shewmon concludes, that at the times the  
27 videos were made, Jahi was in a responsive state, capable of understanding a verbal command and  
28 barely capable of executing a simple motor response. The aforementioned MRI scan taken 9

1 months after Defendants pronounced Jahi brain dead showed that Jahi's brain had and still has a  
2 surprising amount of preserved structure for a brain that was supposedly totally destroyed. That  
3 MRI revealed a surprising extent of relatively preserved brain tissue indicating that in December  
4 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather  
5 than absent blood flow – low enough to abolish neuronal function but not low enough to cause  
6 necrosis (tissue destruction) in much of the brain. Moreover, since much viable, though damaged,  
7 brain tissue remains, even if all elements of the standard diagnostic Guidelines will be fulfilled,  
8 there is still the potential for recovery of function because the brain tissue is still viable; therefore,  
9 the critical element of irreversibility in the statutory definition of death is not fulfilled.

10 Defendants contend again that what they decided 3 ½ years ago cannot now be challenged  
11 based on Jahi's current condition, arguing that the public has a strong interest in precluding  
12 persons from claiming changes in their condition allow them to collaterally challenge a  
13 determination of brain death. But what fundamental human and legal right, much less public  
14 policy, deserves more recognition than the unalienable right of life? Where Jahi can prove with  
15 scientific, expert evidence that she has not suffered the irreversible cessation of all functions of the  
16 entire brain (required unequivocally by law) that physicians declared 3 ½ years ago, and in fact  
17 continues to improve neurologically, what possible reason exists in the law or humanity that  
18 would preclude her from doing so? Jahi's intermittent responsiveness to her mother's voice  
19 commands is her way of communicating to her mother, the world, and to the courts, that she "is  
20 here," i.e., she does not, as Dr. Shewmon opines, meet the diagnosis of brain death, since *inter alia*  
21 "the very first of the 'three cardinal findings in brain death, . . . is unresponsiveness."

22 Jahi and her family respectfully urge this Court to deny Defendants' motion for summary  
23 adjudication and allow her to proceed to trial and prove her claim for personal injuries.

#### 24 STATEMENT OF THE CASE

##### 25 A. The Negligence of CHO and Dr. Rosen.

26 The operative complaint alleges that in 2013, Dr. Rosen diagnosed Jahi with sleep apnea  
27 and recommended that he perform a surgery that was unreasonably complex and risky which  
28 included the removal of her tonsils and adenoids, soft pallet and uvula, and a submucous resection

1 of her bilateral turbinates. On December 9, 2013, Dr. Rosen took Jahi to the operating room at  
2 CHO to perform this extensive surgery. Although Dr. Rosen noted that Jahi had an anatomical  
3 anomaly in that her right carotid artery was more to the center and close to the surgical site, which  
4 raised a serious issue as to this extensive surgical procedure, he didn't note this in any of his orders  
5 for any of the other health care practitioners who would be following Jahi post-op. Just hours  
6 after surgery, Jahi began coughing up blood. The nurses assured the Winkfields the bleeding was  
7 "normal" but Jahi continued to cough up blood. Jahi's mother pleaded again and again with the  
8 nurses to call a doctor to Jahi's bedside, to no avail. The nurses continued to contradict one  
9 another and give Jahi's mother conflicting instructions. Jahi's grandmother Ms. Chatman, an  
10 experienced hospital nurse, arrived and also insisted that the nurses contact doctors to come to  
11 Jahi's aid, to no avail. (Exhibit 2 to Chang Declaration, pp. 150-2.)

12 At 12:30 a.m., Ms. Chatman observed on the monitors a serious and significant  
13 desaturation of Jahi's oxygenation level of her blood and precipitous drop in Jahi's heart rate. Ms.  
14 Chatman called out for the nursing and medical staff to institute an emergency code. Five minutes  
15 later, the code was called, and a doctor finally came to Jahi's side, stating "Shit, her heart stopped."  
16 The cardiopulmonary arrest and code lasted 2 hours and 33 minutes, during which the doctors and  
17 nurses failed to timely establish an airway for Jahi and did not perform an emergency tracheotomy  
18 even after it became apparent that endotracheal intubation attempts were not resulting in prompt  
19 and adequate oxygenation of Jahi in a timely manner. During the resuscitation efforts, two liters  
20 of blood were pumped out of Jahi's lungs. (Exhibit 2 to Chang Declaration, p. 152.)

21 During the code, a nurse approached Ms. Chatman to console her, telling her "I knew this  
22 would happen." In nursing notes added to the chart several days later, a nurse noted that she had  
23 repeatedly advised the doctors in the PICU of Jahi's deteriorating condition and blood loss and  
24 charted: "This writer was informed there would be no immediate intervention from ENT or  
25 Surgery." Another nurse also noted in the chart that despite her repeated notification and  
26 documentation of Jahi's post surgical hemorrhaging and critical vital signs to the doctors in the  
27 PICU, no physicians would respond to intervene on behalf of Jahi. (Exhibit 2 to Chang  
28 Declaration, pp. 152-153.)



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

3           On December 11, 2013, Jahi's family was advised that EEG brain testing indicated that  
4 Jahi had sustained significant brain damage. On December 12, 2013, only two days after Jahi had  
5 entered cardiac arrest, the family was advised that a repeat EEG also revealed that Jahi had  
6 suffered severe brain damage. They were advised that Jahi had been put on the organ donor list  
7 and that they would be terminating her life support the next morning. Upset that the hospital  
8 administration was pushing them to donate Jahi's organs and terminate life support without  
9 explaining what had happened to their daughter, the family made inquiries as to what happened.  
10 Nobody at CHO explained what happened. (Exhibit 2 to Chang Declaration, p. 153.)

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

18           **C.     The Brief Proceeding Over Whether CHO Could Terminate Life Support.**

19           After going into cardiac arrest and lapsing into a coma in the early morning hours of  
20 December 10, Jahi was maintained on a ventilator at CHO. Soon thereafter, two physicians  
21 chosen by CHO declared Jahi brain dead and notified her mother that they intended to remove Jahi  
22 from the ventilator, thereby causing her certain cardio-pulmonary death within minutes. In order to  
23 prevent this removal of necessary life support, on Friday, December 20, 2013, Jahi's mother  
24 sought and obtained a temporary restraining order in the Probate Department of the court below.  
25 This enjoined CHO from withdrawing ventilator support to Jahi. Once this immediate threat to  
26 her daughter's life was removed, Jahi's mother turned her attention to transporting Jahi to the state  
27  
28

1 of New Jersey, one state which recognizes a religious belief component in its codification of the  
2 Uniform Determination of Death Act. (Exhibit 2 to Chang Declaration, pp. 154.)

3 Probate Judge Grillo endeavored to complete the proceeding in a "reasonably brief period"  
4 and the next court day, Monday December 23, CHO provided some records to the family, the  
5 Court appointed an independent physician, Dr. Paul Fisher, and on Tuesday, December 24, Dr.  
6 Fisher and a CHO physician testified before Judge Grillo, and that afternoon, the Court denied the  
7 family's petition and dissolved the TRO effective 5 p.m. December 30. (Defendants' Separate  
8 Statement, No. 37.)

9 **D. Jahi's Mother's Efforts To Try To Remove Jahi From CHO.**

10 On January 3, 2014, the parties reached agreement under which Jahi was transferred to the  
11 family who on January 5 transported Jahi to New Jersey, where since August 2014 she resides  
12 with her mother in an apartment and receives 24 hour home nursing care. (Defendants' Separate  
13 Statement, No. 50.)

14 **E. In Fall 2014, Medical Experts Confirm Significant Brain Function And Jahi  
Has Not Suffered Irreversible Cessation of All Functions of Her Entire Brain.**

15 By the fall of 2014, Jahi had shown signs of improving neurological function in many  
16 portions of her brain, including the motor cortex; the auditory cortex; the hypothalamus; the  
17 pituitary region; and the brainstem. These signs included intermittent purposeful movements, the  
18 ability of her nervous system to regulate her temperature and heart rate, reactions to the presence  
19 and voice of her mother, and the onset of menstruation. A team of medical experts from around  
20 the world gathered to observe, test and analyze Jahi's unprecedented progress, including the  
21 aforementioned Dr. Shewmon, , Dr. Charles Prestigiaco, Chair, Department of Neurological  
22 Surgery Rutgers New Jersey Medical School, Philip DeFina, Ph.D., Chief Scientific Officer for  
23 the International Brain Research Foundation (IBRF), Dr. Calixto Machado, Chair of the  
24 Department of Clinical Neurophysiology from the Institute of Neurology and Neurosurgery in  
25 Havana Cuba, and Elena Labkovsky PhD., expert in Clinical Electroencephalography and QEEG  
26 and currently a Research Associate, Department of Psychology, Institute for Neuroscience,  
27 Northwestern University. These medical experts observed, reviewed and analyzed Jahi McMath's  
28 diagnostic MRI, EEG and BIS testing in the fall of 2014 and saw evidence of brain activity. They

1 observed the brain activity increase and become "readily identifiable and profound" when Jahi's  
2 mother spoke to Jahi. The experts had previously observed video of Jahi moving on command,  
3 but the electrical brain activity was especially significant as it registered that Jahi had a change in  
4 her brain function in response to her mother's commands.

5 The team of experts also conducted a long and thorough MRI in which they  
6 "unequivocally saw the presence of brain structure including the evidence of ribbons in the brain.  
7 This is critical as it showed that the brain, although damaged, was there structurally." After nine  
8 months since Jahi was declared brain dead, the experts "would have expected to see her brain had  
9 liquefied. It clearly was not." Additionally, the experts looked for evidence of blood flow. "Blood  
10 flow was clearly evident. This does not happen if a patient is brain dead." Citing this and other  
11 evidence of Jahi's neurological condition, Jahi's mother filed a petition for writ of error coram

12 nobis. In its case management conference order on October 1, 2014, Judge Grillo expressly stated:

13 The fact that this court made a finding of brain death based on the evidence  
14 presented in December 2013 would not appear to prevent this court, or some other  
15 court, or the California Department of Public Health from reaching a different  
16 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.)

17 Once Jahi's mother filed the petition, Dr. Fisher was reappointed as the court's expert, and  
18 Jahi's mother's attorney attempted to contact Dr. Fisher, in order to arrange an opportunity for the  
19 court's expert to discuss Jahi's condition with the numerous physicians who had examined Jahi  
20 during the nine months which had elapsed since Dr. Fisher's pronouncement in December 2013  
21 that Jahi had suffered "irreversible cessation of function of the entire brain." When this initial  
22 attempt at communication failed, Jahi's mother filed a motion to continue the proceedings in order  
23 to allow Dr. Fisher "an opportunity for a frank and unscripted dialogue with the experts who are  
24 opining that the newly obtained evidence supports a finding that Jahi is not brain dead." Later that  
25 same day, Plaintiffs withdrew the petition when the attempts at an informal dialogue between  
26 experts reached a final impasse. (Exhibit 1 to Chang Declaration, pp. 22-23.) Today, as Jahi's  
27 treating doctor and nurse over the past three years also attest, Jahi continues to exhibit signs of  
28 brain function and responsiveness, evidence she does not meet the law's brain death definition.

1  
2 **ARGUMENT**

3 **I. RELEVANT STANDARDS ON SUMMARY ADJUDICATION**

4 If a witness is shown to have “special” knowledge of the subject, it is an abuse of  
5 discretion to refuse to permit him or her to testify as an expert: “If a witness has passed this  
6 threshold, the question of the degree of expertise or knowledge goes to the weight of the testimony  
7 rather than to its admissibility.” (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d  
8 1432, 1443-1444; *Miller v. Silver* (1986) 181 Cal.App.3d 652, 660; *People ex rel. Dept. of Transp.*  
9 *v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1085-1086.) Any perceived lack of  
10 specificity in the expert's testimony affects the weight of the testimony, not its admissibility.  
11 (*People ex rel. Dept. of Transp. v. Clauser/Wells Partnership, supra*, 95 Cal.App.4th at 1085-  
12 1086.) Thus, courts allow persons to testify as expert witnesses with even minimum credentials.  
13 Opposing parties have adequate measures to protect their interests: e.g., cross-examination,  
14 producing conflicting testimony from other witnesses, and requesting appropriate jury instructions  
15 on the weight to be given the expert's testimony. (*Jeffer, supra*, 234 Cal.App.3d at 1442-1443;  
16 *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37-38.) Thus, the determination that a witness is  
17 qualified as an expert on a particular subject establishes the admissibility of the expert's opinion,  
18 and the weight of that opinion is left to the jury. (*People v. Jones* (2012) 54 Cal.4th 1, 59.)

19 This case presents a classic battle of expert opinions on the question of whether Jahi is  
20 brain death under the statutory definition and guidelines that adequately measure all functions of  
21 the entire brain, including the brain stem, under that statutory definition. “In summary judgment or  
22 adjudication motions, conflicting declarations from experts on opposing sides usually establish a  
23 triable issue of fact.” (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 539; see also *Kelley*  
24 *v. Trunk* (1998) 66 Cal.App.4th 519, 524; *Munro v. Regents of University of California* (1989)  
25 215 Cal.App.3d 977, 984-985.) Thus, competing, conflicting evidence presented by experts can  
26 “foreclose” the grant of summary adjudication. (*Kasparian v. AvalonBay Communities, Inc.*  
27 (2007) 156 Cal.App.4th 11, 30; see also *Kelley, supra*, 66 Cal.App.4th at 524.)

28 “ ‘It is sufficient, if an expert declaration establishes the matters relied upon in expressing  
the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for

1 the opinion.’ ” (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.) Furthermore, “when  
2 considering the declarations of the parties' experts, [courts] liberally construe the declarations for  
3 the plaintiff's experts and resolve any doubts as to the propriety of granting the motion in favor of  
4 the plaintiff. [Citation.]” (*Id.* at pp. 125–126.) Further still, the explanation of the grounds for the  
5 expert's opinion in the opposing expert's declaration “need not be as detailed or extensive as that  
6 required in expert testimony presented in support of a summary judgment motion or at trial.”  
7 (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 187-189.)

8 Moreover, the parties are entitled to have the issue of brain death decided by the trier of  
9 fact. (See *People v. Mitchell* (1982) 132 Cal.App.3d 389, 398-399.) In *Mitchell*, the criminal  
10 defendant on trial for murder of his 4 year-old nephew argued the pathologist who did the autopsy  
11 was not an expert in brain death and his testimony should not have been admitted over his  
12 objection. The pathologist testified hospital records showed the boy had classic symptoms of brain  
13 death, but that he, personally, was vague on the brain death standard in California. The Court of  
14 Appeal, affirming the conviction for murder, first noted the prosecution must prove brain death as  
15 defined in the Health and Safety Code occurred by proof beyond a reasonable doubt, and then  
16 rejected the defendant's argument, holding (132 Cal.App.3d at 398):

17 Dr. Fukomoto was not testifying as an expert on brain death, he was testifying as a  
18 pathologist, gave his medical opinion about the victim's status at the time the life-  
19 support systems were removed and the facts underlying his opinion. The victim's  
20 poor prognosis for brain function was also established by Dr. Worcester's  
21 testimony. *The facts established sufficient evidence for the trier of fact to determine  
22 the issue of death occurring beyond a reasonable doubt.* Mitchell could have cross-  
23 examined both doctors and presented his own experts on the issue if he desired.

24 Here, where there is no exigency in deciding whether to declare a person brain dead under the  
25 Health and Safety Code, and where there is starkly conflicting expert medical evidence and  
26 opinions on the issue, it is even more important that the trier of fact decide, on full, live and  
27 thorough examination of witnesses and evidence, these critical issues of life and death. Clearly,  
28 just the mere conflict in medical opinions as to a party's medical condition entitles a party to a trial  
to resolve that conflict. (See, e.g., *People v. Superior Court* (2011) 192 Cal.App.4th 1352, 1359  
[“the People are entitled to a jury trial to resolve these conflicts” in medical opinions as to a  
party's condition], citing *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 329.)

1 **II. THE EVIDENCE, PARTICULARLY THE MEDICAL TESTIMONY OF DRs.**  
2 **SHEWMON AND ECK AND NURSE BANGURA, DEMONSTRATES THE**  
3 **EXISTENCE OF NUMEROUS TRIABLE ISSUES OF FACT PRECLUDING**  
4 **SUMMARY ADJUDICATION OF THE ISSUE OF WHETHER JAHİ HAS**  
5 **SUFFERED THE IRREVERSIBLE CESSATION OF ALL FUNCTIONS OF HER**  
6 **ENTIRE BRAIN.**

7 **A. Dr. Shewmon's Expert Medical Testimony In His Declarations In This Case**  
8 **Raise Issues Of Triable Fact Of Jahi's Condition That Preclude A Summary**  
9 **Ruling By This Court On This Current Record That Jahi Meets The Statutory**  
10 **Definition Of Brain Death.**

11 Defendants' first argument in its motion is that Plaintiffs are not entitled to a second  
12 judicial review of the expeditious brain death proceedings 3 ½ years ago. But as this Court knows  
13 from the numerous pleading challenges unsuccessfully mounted against Plaintiff's complaint,  
14 Plaintiffs are not seeking judicial review of that quickly made determination 3 ½ years ago when  
15 the parties were trying to decide whether CHO could harvest Jahi's organs or whether Jahi's  
16 family could maintain efforts to keep her on respiration so Jahi had a chance to prove that her  
17 condition does not fulfill the law's clear definition of brain death, i.e., the irreversible cessation of  
18 all functions of her entire brain. What those earlier attacks and this instant motion by Defendants  
19 consistently misstate is that 9 months after Defendants wanted to harvest Jahi's organs, then  
20 another 1-2 years later, when they unsuccessfully sought, again, in this court and also the Court of  
21 Appeal, to preclude Jahi and her family from proving them wrong, and now today, a full 3 ½ years  
22 later, Jahi's condition continues to defy the Defendants' pronouncements and predictions that she  
23 would disintegrate, the family merely wants to be able to prove at a full trial on the merits that she  
24 is not, and has not been, for several years, brain dead.

25 Rather, the opinion of the triple board-certified pediatric neurologist who examined Jahi,  
26 spent hours with her, and reviewed numerous videotapes of her, is that time has proven that Jahi  
27 has not followed the trajectory of imminent total body deterioration and collapse that was  
28 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. Defendants repeat  
their argument that the expeditious proceeding in December 2013 determining whether CHO

1 could terminate life support based on physicians' opinions that Jahi was "legally dead" precludes  
2 Jahi from bringing an action for personal injury. But the court (Hon. Robert Freedman) already  
3 rejected this argument and granted leave to Jahi to amend to include allegations of changes in her  
4 condition that, if proven, will establish she does not meet the statutory definition of brain death  
5 (and both Judge Freedman and Judge Grillo have recognized that new and changed conditions  
6 prohibit the application of issue preclusion).

7 Defendants pay lip service to the fundamental principle that collateral estoppel will not be  
8 applied where there are new facts and changed circumstances and simply repeat their argument  
9 that this principle does not apply because once physicians opined in December 2013 that Jahi was  
10 brain dead for the purpose of removing life support, her death became static, fixed and permanent,  
11 and Jahi is absolutely precluded from alleging and proving that she is, in fact, alive. But Jahi's  
12 condition is far from static, fixed or permanent. As detailed below, she has presented expert  
13 evidence that at the very least raises triable issues of fact that her condition has changed  
14 dramatically and consistently for the past 3 ½ years since Judge Grillo's ruling in that emergency,  
15 expedited proceeding back in December 2013; that, among other things, there are vast areas of  
16 structurally and relatively preserved brain, that tests demonstrate intracranial blood flow consistent  
17 with the integrity of the MRI and inconsistent with brain death; and that Jahi underwent menarche  
18 (her first ovulation cycle) and began and continued breast development.

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

25 That there are triable issues of fact precluding summary adjudication and entitling  
26 Plaintiffs to a trial on the merits is substantially based on the expert declaration of Dr. D. Alan  
27 Shewmon, whose qualifications are beyond reproach. Dr. Shewmon has been an academic  
28 pediatric neurologist since 1981 and is currently Professor Emeritus of Pediatrics and Neurology

1 at the David Geffen School of Medicine at UCLA. His two main areas of special expertise have  
2 been pediatric epilepsy and the interface between neurology and bioethics, particularly brain death  
3 and vegetative state. A rough estimate of the total number of brain death cases he has diagnosed in  
4 the course of his long career, according to accepted medical standards, is probably between 150  
5 and 200. His philosophical opinion about the concept of brain death has no impact on how he goes  
6 about diagnosing brain death in day-to-day clinical situations. His expertise in brain death is  
7 internationally recognized. In the mid-1980s he was a member of the Child Neurology Society's  
8 Ethics Committee, when it was entrusted with the task of drafting the first diagnostic guidelines  
9 for brain death in children (predecessor of the 1987 Task Force guidelines). (Plaintiffs' Additional  
10 Material Facts "PAMF", nos. 1-5.)

11 While Dr. Shewmon agrees that during the expedited proceedings 3 ½ years ago in  
12 December 2013 Jahi fulfilled the accepted guidelines for determining brain death, there is no  
13 question in his mind that she no longer does, for the primary reason, among others, that the first of  
14 the "three cardinal findings in brain death" coma, absence of brainstem reflexes, and apnea-is not  
15 fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally  
16 conscious state." (PAMF 6.)

17 He bases this on several grounds. Video evidence developed over the past several years  
18 indicates, beyond any reasonable doubt, that the slower, more deliberate-looking non-myoclonic  
19 movements are in fact not independent of the commands, ruling out some hitherto unknown type  
20 of spinal automatism. There is clearly a causal relationship, indicating that at the times the videos  
21 were made, Jahi was in a responsive state, capable of understanding a verbal command and barely  
22 capable of executing a simple motor response. (PAMF 7-23.)

23 Tests on Jahi performed over the past several years also show that Jahi's brain had (and  
24 presumably still has) a surprising amount of preserved structure for a brain that was supposedly  
25 totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense  
26 physicians' claim that the tests performed since December 2013 are not accepted under the  
27 Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the  
28 accepted medical standards," but to evaluate the structure and electrophysiological functioning of



1 Jahi's brain many months after the uncontroverted diagnosis of brain death according to the  
2 Guidelines. (PAMF 27-34.)

3 The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved  
4 brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when  
5 Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent  
6 blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue  
7 destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic  
8 penumbra." As intracranial blood flow decreases from normal to zero during the  
9 pathophysiological vicious cycle leading to brain death, it necessarily passes through a stage of  
10 global ischemic penumbra. (PAMF 28-32.)

11 If the brain's nonfunction is due to ischemic penumbra, all elements of the standard  
12 diagnostic Guidelines will be fulfilled, but there is still the potential for recovery of function  
13 because the brain tissue is still viable; therefore, the critical element of irreversibility in the  
14 statutory definition of death is not fulfilled. Jahi's MRI scan shows severe damage especially to the  
15 brainstem, with substantial parts of it missing (after the body's removal of necrotic tissue over the  
16 prior 9 months), most likely due to brainstem herniation around the time of diagnosis. Thus, it is  
17 not at all surprising that Jahi should still demonstrate absence of brainstem reflexes and apnea, and  
18 that her motor abilities are so severely limited. By contrast, consciousness, language processing,  
19 and initiation of voluntary movements are mediated by higher brain structures, which the MRI  
20 shows to be partially preserved. The brainstem is not completely destroyed, and it is totally  
21 conceivable that some descending motor pathways have survived. The somatosensory evoked  
22 response test, in and of itself, certainly does not establish a complete "loss of neurological brain  
23 pathway function above this [cervical] level," [Schneider declaration, p. 14, line 1] if the phrase  
24 "brain pathway" is intended to mean all pathways. (PAMF 29-34.)

25 Dr. Shewmon also opines that Jahi McMath does not currently meet California's statutory  
26 definition of death by neurologic criteria on additional grounds. The distinction between  
27 "function" at the organ level and "activity" at the cellular level is valid and important. A function  
28

1 is not defined by how many cells carry it out (which could be very few), but by its role in the  
2 organism. (PAMF 39-41.)

3 Here, the undisputed evidence is that Jahi's hypothalamus, a part of the brain that lies  
4 above and controls the pituitary gland, among many other functions, continues to function. The  
5 regulation of anterior pituitary hormones by the hypothalamus is less clinically obvious than the  
6 presence or absence of diabetes insipidus, but it is a no less physiologically relevant brain function  
7 (actually multiple brain functions, one for each hormone regulated). This is one reason why the  
8 physicians at CHO in December 2013-January 2014 were so sure that the diagnosis of brain death  
9 was correct in Jahi's case, not only because she fulfilled the diagnostic Guidelines but also because  
10 her biological organism was showing signs of dis-integration, as artificially maintained corpses  
11 necessarily do. (PAMF 41-49.)

12 The 1/7/14 Supplemental Declaration of Dr. Heidi Flori which Defendants proffered 3 ½  
13 years ago highlighted this (PAMF 50):

14 The medical team and I believe that additional and more dramatic signs of the  
15 body's deterioration will continue to manifest over time regardless of any  
16 procedures and regardless of any heroic measures that any facility in the country  
17 might attempt. This deterioration became inevitable the moment she died.  
18 Mechanical support and other measures taken to maintain an illusion of life where  
19 none exists cannot maintain that illusion indefinitely. . . . The additional medical  
20 interventions Petitioner proposes are unprecedented. They simply will not bring her  
21 back to life nor enable others to do so. Nor can they correct or even improve the  
22 above-described manifestations of the post-mortem deterioration of Ms. McMath's  
23 body.

24 However, Jahi's progress over the 3 ½ years ago since Dr. Flori's prediction belies the  
25 defense medical team's opinions that not only was there cessation of all functions of the entire  
26 brain but that said cessation was irreversible. As Dr. Shewmon explains, with proper nutrition and  
27 other treatments appropriate for a patient requiring intensive care, her intestines healed, her skin  
28 turgor and pulmonary status recovered to normal, and she regained spontaneous maintenance of  
blood pressure without pressor medications. She still requires blankets to maintain temperature,  
but for the past 3 ½ years she has remained remarkably healthy, apart from being severely  
neurologically disabled. Most of that time she has not even been in a hospital, but in an apartment  
with the assistance of nothing more than a ventilator, excellent nursing care, hormone  
supplementation, and nutrition. Such recovery from impending multisystem failure and such

1 improvement in overall health, as Jahi exhibited in the early months of 2014, is not possible for a  
2 ventilated corpse. (PAMF 52.)

3           What the evidence and medical opinion prove is that Jahi was never truly dead, even  
4 though she fulfilled the accepted medical criteria for death in December 2013. She exhibited no  
5 brain function at the time, but the cessation of at least two functions – consciousness and  
6 hypothalamic regulation of menstruation and sexual development – has proved not to be  
7 irreversible. Hence she represents an example of a false positive (erroneous) diagnosis of brain  
8 death following the Guidelines. The Guidelines permit the persistence of some brain functions  
9 (neuroendocrine, autonomic); therefore, they do not establish cessation of all brain functions, as  
10 California's statutory definition of death requires. Moreover, Jahi's case demonstrates that neither  
11 do they establish irreversibility of cessation of function, given that there is evidence, to a  
12 reasonable degree of medical certainty, of return of consciousness intermittently and recovery of  
13 some hypothalamic function. (PAMF 53-54.)

14           As Dr. Shewmon opines, Jahi McMath is a living, severely disabled young lady, who  
15 currently fulfills neither the standard diagnostic Guidelines for brain death nor California's  
16 statutory definition of death. At the very least, in a matter of life versus death, the compelling  
17 evidence of responsiveness to commands and of puberty warrants giving life the benefit of the  
18 doubt. (PAMF 55.)

19           Dr. Shewmon's opinion that the guidelines, although generally accepted medically, do not  
20 adequately measure the broadly defined standard laid out by H&S Code section 7180, finds  
21 support in the Nevada Supreme Court's opinion in *In re Guardianship of Hailu* (Nev. 2015) 361  
22 P.2d 524, 531, wherein that Court held (italics added):

23           Second, *whatever their medical acceptance generally, the briefing and testimony*  
24 *do not establish whether the AAN guidelines adequately measure the*  
25 *extraordinarily broad standard laid out by NRS 451.007, which requires, before*  
26 *brain death can be declared under the UDDA, an "irreversible cessation" of "[a*  
27 *ll functions of the person's entire brain, including his or her brain stem."* 11 NRS  
28 451.007(1) (emphases added). Though courts defer to the medical community to  
determine the applicable criteria to measure brain functioning, it is the duty of the  
law to establish the applicable standard that said criteria must meet. In *re Welfare*  
*of Bowman*, 94 Wash.2d 407, 617 P.2d 731, 732 (1980). *The record before us does*  
*not discuss whether the AAN guidelines require an irreversible cessation of all*  
*functions of a person's entire brain, including the brain stem, as NRS 451.007(1)(b)*  
*demand.* Therefore, we are not convinced that St. Mary's properly determined  
death as required under NRS 451.007.

1 Here, we do have a record, and the record reflects diametrically opposed opinions by experts in  
2 their field disputing whether the generally accepted guidelines "adequately measure the  
3 extraordinarily broad standard laid out by [section 7181] which requires an 'irreversible cessation'  
4 of all functions of the entire brain, including the brain stem." Thus, summary adjudication fails.

5 In addition to Dr. Shewmon's medical opinions and observations, Jahi's treating doctor  
6 Alieta Eck, M.D., who has been treating Jahi since November 15, 2014 and regularly sees her  
7 every three months at her family's apartment, personally performs physical examinations of Jahi,  
8 reviews laboratory data, and reviews nursing records from the home health nurses. Dr. Eck is in  
9 regular contact with Jahi's mother, and orders blood tests and x-rays when needed. Based on her  
10 personal observations and review of those records and date, Dr. Eck has sufficient information to  
11 opine as to whether or not Jahi is a deceased person. (PAMF 71.) Jahi has experienced menarche  
12 and has now entered puberty. Jahi had a menstrual period in August and September of 2014,  
13 lasting five days, and had some spotting in October 2014. She began to grow pubic hair in August  
14 2015. This involves the hypothalamus. Puberty starts when the hypothalamus releases a hormone  
15 called the gonadotropin releasing hormone. These hormones cause the pituitary gland to make  
16 hormones that control other glands and many of the body's functions. The hormones produced by  
17 the pituitary gland signal the start of sexual development in both females and males. (PAMF 72.)

18 The hypothalamus is in a part of the brain. If it is functioning, as it is in this case, then  
19 there is brain function. (PMAF 73.)

20 Also, Dr. Eck has been physically present and has observed occasions when Jahi's mother  
21 has directed Jahi to move a specific finger, her third, on a specific hand, and Jahi has responded by  
22 doing so. She is responsive to noxious stimuli, pulling away from something that hurts. In  
23 September 2015 she was having muscle spasms, but these stopped when her in-grown toenail was  
24 fixed by a visiting podiatrist. (PAMF 74.)

25 While Jahi has suffered a serious and significant brain injury and exhibits the presentation  
26 of one who has suffered serious brain trauma, Jahi is not dead. She exhibits signs of brain  
27 function. (PAMF 75.) Dr. Eck opines that as Jahi's treating physician, based upon her  
28 examinations of Jahi, her review of Jahi's medical documentation and Dr. Eck's experience,

1 training, and expertise, it is Dr. Eck's opinion, to a reasonable degree of medical certainty, that  
2 Jahi is not dead, including not brain dead. (PAMF 76.)

3 Nurse Sharleen Bangura, a registered nurse in the State of New Jersey, has in that capacity  
4 regularly provided nursing care to Jahi in her apartment for the past three years. In addition to the  
5 care provided by Jahi's family members, Jahi is cared for by nurses who work in three shifts, 24/7.  
6 Ms. Bangura has been Jahi's nurse on the day shift since she was discharged from St. Peter's  
7 Medical Center in early 2014. (PAMF 77.) On September 9, 2014, in a Nurse's Shift Note & Time  
8 Record dated 9/9/14 attached as Exhibit 1, Ms. Bangura observed and documented the following:  
9 "Pt. Noted to be on her menstrual cycle as evidenced by a large amount of bright red blood in her  
10 diaper." (PAMF 78..)

11 Nurse Bangura has observed that Jahi is more alert on some days than she is on other days.  
12 On her alert days, if Ms. Bangura asks Jahi to squeeze her hand, Jahi does so. If the nurse asks her  
13 to move different parts of her body, Jahi will move that part. When Ms. Bangura puts on  
14 meditation music for Jahi to listen to, she watches Jahi's heart rate go down. Jahi's heart rate  
15 increases when she is listening to music that the nurse knows she enjoys, like Bobby Brown, who  
16 Ms. Bangura knows is one of Jahi's favorite singers. (PAMF 79 and Exhibit 2 to the Bangura  
17 Declaration [Nurse's Shift Notes & Time Records that Ms. Bangura authored between February  
18 18, 2016 and August 7, 2016].). In each of Ms. Bangura's notes, she noted times that she observed  
19 Jahi's movements in response to commands from family members. (PAMF 79.)

20 **B. Defendants' Claim That Dr. Shewmon Has An Opinion That Is A**  
21 **"Philosophical Minority Opinion" Is Completely Irrelevant To The Opinions**  
22 **Dr. Shewmon Provides Here.**

22 Defendants contend Dr. Shewmon's opinion is a "philosophical minority opinion that  
23 denies and conflicts with the accepted medical standards in the Guidelines as well as California  
24 law." This is utter nonsense. Dr. Shewmon's opinion about the conceptual rationale for brain death  
25 is completely irrelevant to his competence as a pediatric neurologist and to his clinical judgment  
26 whether Jahi fulfills or does not fulfill the accepted medical standards (the pediatric Guidelines)  
27 for brain death or whether she meets California's statutory definition of death. His opinion that  
28 Jahi does not fulfill those standards or statutory definition of brain death is not in any way

1 whatsoever "based on" his opinion about the philosophical nature of death. (PAMF 56-57, 58-69.)  
2 Defendants also claim in a federal district court decision that rejected a constitutional challenge to  
3 California's brain death statute (certainly not an issue here as Jahi has never claimed it is  
4 unconstitutional, to the contrary she contends she does not meet its definition), the court stated that  
5 the minority philosophical challenge to the concept of brain death does not warrant striking the  
6 statute down as unconstitutional. (*Fonseca v. Kaiser Permanente Med. Ctr. Roseville* (E.D. Cal.  
7 2016) 222 F.Supp.2d 850, 872.) As noted, Dr. Shewmon's opinions are not based on any  
8 philosophical view of life and death but rather strictly on medical concepts and knowledge and the  
9 statutory definition of brain death. Moreover, if anything, the *Fonseca* decision highlights that in  
10 the present case, where the parties dispute whether the brain death statute has been met under the  
11 unique, unprecedented facts of this case, that question deserves the thorough presentation and  
12 examination of expert medical testimony that only a trial on the merits can accomplish. This is not  
13 a philosophical debate. It is a medical debate, and Jahi deserves to have it decided on medical  
14 evidence under the literal word of California's definition of brain death.

15 **C. As Defendants Appear To Concede, Proof Of New Or Changed Circumstances**  
16 **Prohibits Issue Preclusion.**

17 In its orders twice overruling Defendants' demurrers, the court (Hon. Robert Freedman)  
18 properly rejected Defendants' arguments that collateral estoppel precluded Jahi from alleging and  
19 proving that she has not suffered irreversible cessation of all functions of the entire brain and has  
20 standing to bring her action for personal injury against Defendants. (*City of Oakland v. Oakland*  
21 *Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 230 [the "theory of estoppel by  
22 judgment or res judicata . . . extends only to the facts in issue as they existed at the time the  
23 judgment was rendered and does not prevent a reexamination of the same questions between the  
24 same parties where in the interim the facts have changed or new facts have occurred which may  
25 alter the legal rights of the parties"]; accord, *Union Pacific Railroad Company v. Santa Fe Pacific*  
26 *Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179-182; 7 Witkin, Cal. Proc. 5th (2008) Judgm, §  
27 434, p. 1087.) Moreover, Judge Grillo also has acknowledged that nothing in the law prevents  
28 Plaintiffs from arguing that at present, Jahi is not brain dead. Defendants now appear to concede

1 this principle, but circle back to their meritless argument that Dr. Shewmon's opinions are not  
2 competent evidence that raises a triable issue of material fact whether Jahi today, 3 ½ year after  
3 Defendants claimed she was brain dead, does not fulfill either the generally accepted guidelines, or  
4 the statutory definition, of brain death. Contrary to Defendants' argument, Dr. Shewmon's  
5 opinions are not only competent and sufficient to raise a triable issue of material fact defeating  
6 Defendants' motion for summary adjudication, they and other lay and medical evidence Plaintiffs  
7 will produce at trial of this matter will prove by a preponderance of the evidence that Jahi has not  
8 suffered the irreversible cessation of all functions of the entire brain, within the clear and  
9 unambiguous of California's statutory definition of brain death. Plaintiffs simply ask the court that  
10 they be allowed a trial on the merits to prove their medical/legal case.

11 **CONCLUSION**

12 For all the foregoing reasons stated herein and in the documents supporting this opposition  
13 and the entire court file, summary adjudication should be denied.

14 DATED: June 29, 2017

AGNEW BRUSAVICH

ESNER, CHANG & BOYER

17  
18 By 

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