IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF ADEN HAILU, AN ADULT.	No. 68531
FANUEL GEBREYES, Appellant, vs. PRIME HEALTHCARE SERVICES, LLC, D/B/A ST. MARY'S REGIONAL MEDICAL CENTER, Respondent.	

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
RENO, NEVADA
THE HONORABLE FRANCES DOUGHERTY
DISTRICT COURT CASE NO. GR15-00125

APPELLANT'S REPLY BRIEF

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Appellant, Fanuel Gebreyes, by and through his counsel, David C. O'Mara, Esq., of The O'Mara Law Firm, P.C., herein submits his reply brief. On July 30, 2015, the District Court erred in denying injunctive relief when it determined that Ms. Aden Hailu ("Aden") met the definition of death pursuant to the Uniform Determination of Death Act when the District Court improperly applied the medical standards and protocols outlined by the American Academy of Neurology. Mr. Gebreyes is asking the Nevada Supreme Court to review the District Court's decision de novo. *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003), *see also Arguello v. Sunset Station Inc.*, 127 Nev. Adv. Op. 29, 252 P.3d 206 (2011)("[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.")

NRS 451.009 required the District Court to apply and construe the Uniform Determination of Death Act (NRS 451.007) ("Act") in a manner that carries "out its general purpose which is to make uniform among the states which enact it the law regarding the determination of death." *see also*, *Waldman v. Maini*, 124 Nev. 121 (2008).

Respondent is asking the Nevada Supreme Court to ignore the Nevada Legislature's directive to apply and construe the Act in a manner that makes it uniform among the states that have enacted it, and instead, impose a standard set by the American Academy of Neurology, which is not the standard applied in any reported case in the United States. Additionally, the District Court's findings of facts are not supported by substantial evidence. Further, the standards set by the American Academy of Neurology violates the specific language of the Act, and thus, are not applicable to determine death.

I. LEGAL ARGUMENT

a. The Court's Findings of Facts are not supported by Substantial Evidence.

Respondent claims that "it cannot be seriously disputed" that the evidence is more than adequate to support the District Court's findings. Additionally, Respondent claims that "the standards and criteria laid out in the Act and the protocols for establishing brain death by the American Academy of Neurology were 'uncontested.'" Neither of these claims are supported by the records.

First, Dr. Heide testified that he determined on April 12, 2015, that Aden was not dead. II AA 259 (115:13-18). Dr. Heide's determination, in part, was based upon the fact that Aden's EEG showed brain functions.

Additionally, the evidence shows that two additional EEGs were conducted in April, and although they showed deterioration, abnormal, and slow, there were brain waves diffusely recordable throughout the EEG and the neurologist commented on that. II AA 367-68 (17:9-16), see also 386 (35:6-22); 387 (36:2-7).

In making its determination of life, Dr. Heide utilized the results of the EEG to conclude that Aden was not dead. Unfortunately, when it came time to determine death, since Aden's case was now handled by lawyers and the administrators, so no additional EEG was performed. According to Dr. Callister, a determination of death could not be made because there was no evidence from an EEG that Aden had an absence of brain function. Specifically, Dr. Callister testified that,

> I would say that there's enough variables and enough questions based on the condition of her physical body, the EEGs and the fact that no further neurologic testing has been done in several months, and the fact that no outside third party neurologist has looked at her that I would have pause.

II AA 399 (48:8-13). A reasonable mind would not, and should not accept testimony that utilizes a medical test to determine life, but then specifically rejects using the test to determine death. The plain language of the Act specifically requires that if there is any functions of a person's brain, including his or her brain stem, then there is no "death." *See e.g. Conservatorship of Drabick*, 200 Cal.App.3d 185 (1988)("Because his electroencephalogram is not flat he is not 'brain dead.'")

Second, Dr. Callister, and to a point, Dr. Bryne contested the use of the standards and criteria set forth by the American Academy of Neurology. In fact, Dr. Callister specifically testified that he did not agree with the determination of death by Dr. Heide because there were "enough variable and enough questions" that would have given him pause to determine death. Dr. Bryne's testimony revolved around the Harvard study, which the findings in all the reported cases around the Country have citied with authority and approval.

Aden's three EEGs showed that Aden had not sustained an irreversible cessation of all functions of her entire brain, and thus, the substantial evidence shows that Aden is alive. One must be careful to distinguish the effect of this decision – determining when a person has died – and when a person may be allowed to die. *See e.g. In Matter of Storar*, 52 NY.2d. 363, 438 N.Y.S.2d 266, 420 N.E.2d 64.

The Act requires the cessation of all functions, not whether a person has any potential for a functional outcome. As such, the District Court erred when it issued its findings of facts because the substantial evidence support a finding of life, not death.

b. The District Court did not apply or construe the Act uniformly with other states that have enacted this law.

Respondent's own citations shows that there are serious doubts in the medical community as to the standards and protocols established by the American Academy

of Neurology. Indeed, most, if not all of the case law throughout the United States, rejects the notion that a person can be found to be dead after an EEG shows activity. *See e.g. Matter of Welfare of Colyer*, 99 Wash.2d 114 (1983); *Conservatorship of Drabick*, 200 Cal.App.3d 185 (1988); *Petition of Jones*, 107 Misc.2d 290.

According to Respondent, the Uniform Act was changed in 1980 in order to avoid "debate about what may be reasonable, as opposed to what is actually accepted practice." Respondent claims that the change from "reasonable medical standards" to "accepted medical standards" means that the entire universe has accepted the standards and protocols set forth by the American Academy of Neurology.

Respondents are wrong.[1]

Respondents rely on a commission report from New Jersey which, according to Respondents, was rejected. Second, the commission specifically states in their final report that, "[i]n the November 2012 issue of the American Medical Association Journal of Ethics, Dr. James F. Bartscher, MD and Dr. Panayiotis N. Varelas, MD, PhD., write that recent data show brain death policies are still 'remarkably heterogeneous, even amongst some of the nation's most vaunted medication institutions.'" The report goes on to cite the article for the proposition that "urgent attention must be given to consistent application and regular review of our adopted medical and legal standards [for brain death]" for many reasons, including "***ensuring accuracy in such an irreversible declaration, securing equitable treatment under the law,*** and allaying public suspicion and misunderstanding about BD determination." *See* State of New Jersey, New Jersey Law Revision Commission Final Report on New Jersey Declaration of Death Act,

[1] New Jersey's "death" statute is substantially different than Nevada in that New Jersey requires, among others, the declaration of death to be made by a licensed physician professionally qualified by specialty or expertise. Nevada and other states do not restrict the decision to those with the specialty or expertise.

January 18, 2013, citing "Determining Brain Death – No Room for Error", Volume 12, Number 11:879-884, p. 879 (emphasis added).

According to New Jersey's report, "in this same article, the authors query whether the 'accepted medical standards' to which the UDDA refers truly exist." *Id.* In fact, the authors conclude that **"the AAN guidelines need more research."** *Id.*

Further, the final report cites to a December 2007, article published in Neurology where the authors explained that according to the UDDA:

> Physicians are required to determine death in accordance with medical standards, which can be national, regional, or local. This allows the broad leeway for physicians practicing at different institutions to create and abide by protocols for brain death determination that may be widely disparate. The determination is often at the discretion of the individual physician, which is fundamentally different from other countries that specify exactly what to test. Despite the fact that the American Academy of Neurology (AAN) published practice parameters for the determination of brain death in adults in 1995, it has been noted that there is still a great variety of practice in US hospitals.

Id. citing David M. Greer, MD, MA: Panayiotis N. Varelas, MD, Phd., Shamael Haque, DO, MPH; and Eelco F.M. Wijdicks, MD, PhD, "Variability of Brain Death Determination Guidelines in Leading US Neurologic Institutions", Neurlogy 70, January 22, 2008, published ahead of print on December 12, 2007 at www.neurology.org.

According to New Jersey's final report, "[a] small sampling of state guidelines further illustrates the lack of apparent uniformity for brain death determination." *Id.* However, what is not in dispute are the numerous court decisions throughout the country that confirm that under the Act, the accepted medical death cannot be declared when the EEG is not flat.

Thus, based upon the accepted medical standards, Aden was determined to have "brainwave" activity, and thus she is not "brain dead." *See e.g. Conservatorship of Drabick*, 200 Cal.App.3d 185 (1988) (Because his electroencephalogram is not flat he is not "brain dead."); *Petition of Jones*, 107 Misc. 2d 290 (death was not declared when "EEG suggested no, or at best minimal activity"); *Matter of Welfare of Colyer*, 99 Wash.2d 114 (1983) (despite the dismal prognosis, the girl was not legally dead according to the criteria of the Act.)

Even in New Jersey, the accepted medical standards require a physician to consider the results of an EEG in making a determination of "brain death." *See In Re Quinlan*, 70 N.J. 10. The Court in *Quinlan* referred, with approval, to the 1968 report of the Ad Hoc Committee of the Harvard Medical School in describing those standards for determining brain death, including, "...as well as "flat" or isoelectric electro-encephalograms." Additionally, in *Strachan v. J.F.K. Memorial Hospital*, 109 N.J. 523 (1998), a hospital administrator instructed the hospital to run two electroencephalograms (EEGs), twenty-four hours apart, to get a "clear understanding of what the boy's condition is."

The accepted medical standards requires that if an EEG is performed, the determination of death cannot be made unless the EEG is flat. The evidence does not support a finding that Aden's entire brain, including her brain stem, has ceased to function. Thus, a determination of death is improper.

c. An EEG that shows brain function precludes a determination of death.

Respondents claim that the results of an EEG are not part of the accepted medical criteria for determining brain death under the AAN guidelines. The purpose of having accepted medical and legal standards in relation to the determination of brain death is to ***ensur[e] accuracy in such an irreversible declaration*** **and** ***securing***

equitable treatment under the law. In this case, Respondent based, in part, its determination that Aden was alive on the results of multiple EEG tests. Nevada law requires that in order to make a determination of death, all brain functions must cease. In order to do that, Respondent should have, but did not, act in line with the accepted standards to confirm that an EEG was flat, before making a determination of death.

In an attempt to support their claim, Respondent is attempting to mischaracterize Dr. Callister's testimony. While it may be true that the AAN does not require an EEG test, Dr. Callister correctly stated that the accepted practice would have been to withhold a determination of death, especially since the results of the EEGs should have given just enough pause to make a determination of death.

The decision of death is one that the Nevada Legislature has specifically stated that "all functions" must cease. The only way to determine if all functions have ceased, in a case like Aden, when an EEG shows signs of life, is to have a confirmatory EEG showing a negative result.

As such, once an EEG has shown brain function, the determination of death cannot be confirmed by a subsequent test. *See e.g. Conservatorship of Drabick*, 200 Cal.App.3d 185 (1988).

d. St. Mary's must continue to administer life-sustaining treatment to Aden.

"The medical profession is trained to preserve life, and to care for those under its control." *Matter of McCauley*, 409 Mass. 134, 138, 565 N.E.2d 411 (1991). "The ethical integrity of the medical profession" allows "hospitals the full opportunity to care for patients under their control, especially when medical science is available to save a patient's life." *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 87 P.3d 521 (2005).

Respondent claims that in retrospect to the *In re Guardianship of L.S. & H.S.*

cases, a physician at the hospital, and not the hospital, should have presented the petition. This new claim is interesting since the hospital took the position that Aden's doctors could not perform the medical care that was suggested by Dr. Michelle Chu and Dr. Anthony Floreani. Both doctors recommended that a tracheostomy be performed on Aden. I *AA* 175 (31:21:23). However, after the initial suggestion by the doctors, Dr. Chu advised Mr. Gebreyes that she would not perform the tracheostomy because Aden's case ***was now handled by lawyers and the administrators***. *Id.* at 176 (32:12-21) (emphasis added).

In light of the fact that Aden is alive, the life-sustaining treatment cannot, and should not be withheld or withdrawn without the written consent of Mr. Grebreyes. St. Mary's has an ethical and statutory obligation to administer the treatment to Aden, and the medical and care plan to maintain this treatment and to preserve life is in the best interest of Aden.

e. The case law around the country supports a determination of life, not death.

Respondent contends that some of the cases cited by Mr. Gebreyes are not applicable to this case. All of these cases cited support the conclusion that a determination of death cannot be made when an EEG test is not flat.

In re Bowman, 90 Wash. 2d. 407, 617 P.2d 731, the Washington Supreme Court held, "[t]he medical profession has established several criteria by which to determine if brain death has occurred." *In re Bowman*, 90 Wash. 2d at 411. In establishing the criteria for brain death, [t]he physician testified that on the date of the hearing Matthew showed no brain activity" and that "an electroencephalogram (EEG) gave no reading." Thus, one of the criteria in Washington was to have an EEG that gave no reading.

In *Conservatorship of Drabick*, 200 Cal.App.3d 185, 245 Cal.Rptr.840

(1988), the California Court of Appeal, Sixth District, held that "[b]ecause his electroencephalogram is not flat he is not 'brain dead.'" The Court also found that since Mr. Drabick breathes without the assistance of a respirator, he is alive under California law. The point in this case is even if Mr. Drabick was using the assistance of a respirator and other life sustaining medical devises, like Aden, the Court would still confirm that Mr. Drabick is alive because the EEG is not flat. The same goes for Aden.

In the *Petition of Aida Jones*, 433 N.Y.S.2d 984 (1980), the treating physician, after observing that there was no brain activity shown on the EEG, carried out a series of recommended tests. This case certainly is relevant in light of the fact that the series of recommended tests was only performed after the EEG showed no brain activity. Indeed, had the EEG showed brain activity, then there would not have been a need to carry out the recommended test because there was brain activity present. Aden's EEG shows brain activity and thus, unlike Aida Jones, is alive.

In *Matter of Welfare of Colyer*, 660 P.2d 114 (1983), the Washington Court held that Ms. Colyer did not meet the criteria of the Uniform Determination of Death Act, in part, because monitors indicated some activity in her brain stem. Like *Coyler*, Aden's EEG has indicated some activity in her brain, and thus, she does not meet the criteria of the Uniform Determination of Death Act.

In *State v. Clark*, 20 Ohio App.3d 266 (Ohio App. 1984), the physical stated that he could not recognize so called "brain death" because the standard of two flat EEG tests was necessary. Unlike Aden, the deceased EEGs were flat.

In *Hawkins v. Dekalb Medical Center, Inc.*, 313 Ga.App.209 (2011), which is after the AAN standards came into existence, the doctor did not confirm brain death until after the EEG demonstrated electrocerebral silence. *Hawkins*, 313 Ga.App. at 210. The accepted medical standards in this case are exactly what is sought in this case. Indeed, the first EEG was conducted on November 23, and it showed that brain

death was "probably inevitable." *Id.* Contrary to Respondent's claim, a second EEG was conducted on November 29, and was interpreted on December 1 as demonstrating electrocerebral silence. In *Hawkins*, the determination of death did not occur until after the EEG demonstrated electrocerebral silence. In Aden's case, there still has not been an EEG that has demonstrated electrocerebral silence. What is interesting, is that after the EEG demonstrated electrocerebral silence, Ms. Hawkins was subjected to "three-and-a-half months" of extensive neurological testing by numerous physicians to evaluate whether there was any brain function or brain stem function. After all of the three month testing, the Doctor still ordered a final EEG, which demonstrated "elecrocerebral silence, absence of brain wave activity." *Id.* at 212. In concluding that his final EEG was reasonable, Dr. Jackson stated that "it would have been outside the standard of care not to perform the brain death testing." *Id.* Unlike the three silent EEG tests in *Hawkins*, Aden's EEG test have never been silent, or shown to have an absence of brain wave activity.

The accepted medical standards when determining brain death under the Act is to confirm that there is no brain function through a silent EEG test, especially when a previous test, like Aden, confirms brain function. The Nevada Legislature has specifically stated that the criteria for brain death is for the entire brain to cease functioning. The act requires the Court, and medical professionals to ***ensure accuracy in such an irreversible declaration*** **and to** ***secure equitable treatment under the law.*** The equitable treatment under the law is to make sure that a person is in fact "brain dead" using all of the medical tools available. Medical professions should not be allowed to ignore the medical tests that confirm life simply because their personal belief is that Aden would not fully recover. Under the Act, the EEG confirms brain function and thus Aden is alive.

II. CONCLUSION

For the foregoing reasons, Appellant respectfully request that this Court overturn the District Court's decision and order that St. Mary's provide the necessary medical treatment to Aden. The District Court's decision incorrectly interpreted and applied Nevada's Uniform Determination of Death Act when it found that Aden met the definition of death under the standards and protocols outlined by the American Academy of Neurology. This Court should reverse the District Court's decision. Medical professionals must not ignore the medical tests that confirm life in an effort to determine death.

Accordingly, this Court should OVERTURN.

DATED: October 5, 2015

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), and the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a monospaced typeface using Microsoft Word 2008 with so many characters per inch in Times New Roman type style size 14.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

Finally, I hereby certify that I have read this Appellant's Reply Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 5, 2015

/s/ David C. O'Mara
DAVID C. O'MARA

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by:

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