



**FILED**  
ALAMEDA COUNTY

APR 06 2018

CLERK OF THE SUPERIOR COURT  
By *[Signature]*

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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
21 FOR THE COUNTY OF ALAMEDA

22 LATASHA NAILAH SPEARS  
23 WINKFIELD, *et al.*

24 Plaintiffs,

25 v.

26 FREDERICK S. ROSEN, M.D.; UCSF  
27 BENIOFF CHILDREN'S HOSPITAL  
28 OAKLAND, *et al.*

Defendant.

Case No. RG15760730  
[Hon. Stephen Pulido, Dept. 517]

OBJECTIONS TO DECLARATION OF  
D. ALAN SHEWMON, M.D. IN  
SUPPORT OF OPPOSITION TO  
PLAINTIFFS' MOTION TO  
BIFURCATE

DATE: April 19, 2018  
TIME: 2:30 p.m.  
DEPT: 517  
*Reservation No. R-1917827*  
Action filed: 3/3/15  
First Amended Complaint Filed: 11/4/15

1 TO THE COURT, TO PLAINTIFFS, AND PLAINTIFFS' ATTORNEYS OF RECORD:

2 Defendants FREDERICK S. ROSEN, M.D. and UCSF BENIOFF CHILDREN'S  
3 HOSPITAL OAKALND hereby objects to the Declaration of D. Alan Shewmon, M.D., and  
4 opinions stated therein as inadmissible. The declaration should be excluded in its entirety for  
5 the following reasons:

6 1. **Improper legal conclusion.** Dr. Shewmon failed to apply the appropriate legal and  
7 medical standards for determining brain death under California's Uniform Determination of  
8 Death Act ("CUDDA"). There is no substitute to the accepted medical standards for  
9 determining brain death that are set forth in the Guidelines. Video recordings, the onset of  
10 puberty, observation and select imaging studies are not a substitute for the accepted medical  
11 standards for determining brain death. The matters relied upon by Dr. Shewmon are not the  
12 proper basis for forming an opinion on brain death under the CUDDA. A determination of brain  
13 death can only be made by physicians who are familiar with the patient's complete medical  
14 history, have performed the requisite neurological examination and performed an apnea tests are  
15 requirement by the Guidelines. Clinical determinations of brain death require two examinations  
16 by two different physicians and two apnea tests. (Health and Safety Code § 7180 (a); Evid. Code  
17 §§ 801-803; RJN Ex. AA (Nakagawa Decl.), Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider  
18 Decl.)

19 2. **Opinion conflicts with California law.** Dr. Shewmon's opinion that McMath is not  
20 dead is contrary to California law which requires that brain death be determined by the accepted  
21 medical standards set forth in the Guidelines. McMath has not undergone a brain death  
22 evaluation pursuant to the accepted medical standards in the Guidelines since December 2013.  
23 (Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; (RJN Ex. AA (Nakagawa Decl.),  
24 Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider Decl.)

25 3. **Improper basis of opinion.** The opinion that McMath is not dead is (1) not based on a  
26 matter of a type on which an expert may reasonably rely, (2) is based on reasons unsupported by  
27 the material on which the expert relies, and (3) is speculative. (*Sargon Enterprises, Inc. v.*  
28 *University of Southern California* (2012) 55 Cal.4th 747, 771-772; Evid. Code §§ 720, 800-803;  
RJN Ex. AA (Nakagawa Decl.), Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider Decl.)

1           4. **Lack of qualification.** Dr. Shewmon’s theories on brain death, i.e., that brain death is  
2 a “legal fiction” and should not be a legal criteria for death, render him unreliable, unqualified  
3 and unable to provide impartial and unbiased opinions as to whether McMath is dead. Dr.  
4 Shewmon’s lack of qualification and impartiality is evidenced by the fact that he opines that  
5 McMath is no longer brain dead even though the accepted medical standards for assessing brain  
6 death have not been applied to McMath since December 2013. Dr. Shewmon is incapable of  
7 providing an opinion that conforms with California law. (*Sargon Enterprises, Inc. v. University*  
8 *of Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code  
9 §§ 801-803; RJN Ex. AA (Nakagawa Decl.), Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider  
10 Decl.)

11           5. **Unreliable and unaccepted methodology.** Dr. Shewmon’s proposition in this case,  
12 i.e., that brain death can be assessed without application of the accepted medical standards set  
13 forth in the Guidelines, is not accepted by reputable specialists in pediatric brain death. Dr.  
14 Shewmon’s methodology for assessing McMath’s brain function, i.e., review of unauthenticated  
15 video recordings, the alleged onset of puberty, and select medical imaging studies, fails the test  
16 for proper expert evidence. Such matters are not a substitute for the accepted medical standards  
17 for assessing brain death per the CUDDA and the Guidelines. A determination of brain death  
18 can only be made by physicians who are familiar with the patient’s complete medical history,  
19 have performed the requisite brain death examination and performed an apnea test. Clinical  
20 determinations of brain death require two examinations by two different physicians and two  
21 apnea tests. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th  
22 747; Health and Safety Code § 7180 (a); Evid. Code §§ 801-803; RJN Ex. AA (Nakagawa  
23 Decl.), Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider Decl.).)

24           6. **Failure to comport with the generally accepted professional standards.** No  
25 reputable and qualified physician in pediatric or adult brain death would reasonably rely on the  
26 matters that Dr. Shewmon relied upon in opining that McMath is not dead. *Sargon Enterprises,*  
27 *Inc. v. University of Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180  
28 (a); Evid. Code §§ 801-803; RJN Ex. AA (Nakagawa Decl.), Ex. Q (Schneider Decl.), Ex. R  
(Supp. Schneider Decl.).)

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2       7. **Irrelevant and speculative matters** Video recordings, the alleged onset of puberty,  
3 observation, and select imaging studies, are not a proper basis for an expert's opinion in  
4 determining brain death in accordance with the CUDDA. Accordingly, any opinion based on  
5 such irrelevant and speculative matters is invalid. (*Sargon Enterprises, Inc. v. University of*  
6 *Southern California* (2012) 55 Cal.4th 747; Health and Safety Code § 7180 (a); Evid. Code §§  
7 801-803; RJN Ex. AA (Nakagawa Decl.), Ex. Q (Schneider Decl.), Ex. R (Supp. Schneider  
8 Decl.).)

9       8. **Lack of authentication.** Dr. Shewmon's opinion that McMath is not dead is based  
10 materials that are not properly authenticated. (Evid. Code §§ 250, 1400, 1401.) Plaintiffs failed  
11 to authenticate the video recordings or any other matters relied on them in support of the  
12 contention that McMath is not dead. Plaintiffs failed to identify the individuals who took the  
13 video recordings, the dates of the recordings, the location of the recordings, and who else was  
14 present in the room. No one with personal knowledge of the recordings has attested that the  
15 recordings are not altered, fraudulent, etc.

16       9. **Hearsay.** Dr. Shewmon's opinion that McMath is not dead is based on hearsay rather  
17 than the accepted medical standards for determining brain death. The video recordings and  
18 statements therein are hearsay because they were made by someone other than Dr. Shewmon.  
19 (Evid. Code §§ 1200, *et seq.*)

20       10. **Opinion lacks reasoned explanation.** Dr. Shewmon failed to explain how his  
21 opinion that McMath is not brain dead comports with the CUDDA's requirement that brain  
22 death be determined solely by the accepted medical standards in the Guidelines. (See *Jennings v.*  
23 *Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

24       11. **Irrelevant.** Given the complete absence of any showing that McMath has undergone  
25 a brain death evaluation pursuant to the accepted medical standards in the Guidelines as required  
26 by the CUDDA, Dr. Shewmon's opinion that McMath is not dead is lacks relevance. (Evid.  
27 Code § 350.)

28       12. **Lack of personal knowledge.** Dr. Shewmon was not present when the video  
recordings were made. (Evid. §§ 403 and 702(a).)

1 Defendants further reserve the right to object to any subsequent submissions put forth by  
2 the plaintiffs in connection with the instant motion to bifurcate and any trial, hearing, briefing,  
3 or other proceeding to address issues raised in connection with the identification of the accepted  
4 medical standards for determining brain death.

5  
6 DATED: April 6, 2018

COLE PEDROZA LLP

7  
8 By: 

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