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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

ASSIGNED FOR ALL PURPOSES TO:
JUDGE STEPHEN PULIDO
DEPARTMENT 16

SUPPLEMENTAL BRIEF RE: DEFENDANTS' EVIDENTIARY (REPLY) OBJECTIONS RE: 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

The court in its tentative ruling requested a "written response from Plaintiffs as to the [Defendants'] evidentiary objections, or at least to discuss them in some detail at the hearing. Among other things, the objection to [Dr. Shewmon's] testimony to the extent based on 49 video recordings which have not been introduced into evidence or authenticated appears to have merit."

Pursuant to the court's request, Plaintiff offers the following brief response and will discuss the matter in further detail at the hearing.

1. Expert may state reasons for his opinion and the matters on which it is based, whether or not hearsay or otherwise inadmissible.

The law is settled that an expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. (Ev.C. § 802; *People v. Catlin* (2001) 26 Cal.4th 81, 137.) The opinion may be based on matters "perceived by ... the witness ... before the hearing, whether or not admissible" if of a type that experts reasonably rely upon in forming such opinions. (Ev.C. § 801(b) (emphasis added); *People v. Catlin, supra*, 26 Cal.4th at 137; *People v. Dean* (2009) 174 CA4th 186, 193; Rutter, California Practice Guide, Civil Trials and Evidence, Examination of Expert Witnesses, sections 11:4-5.)

The effect of this rule of evidence is that expert witnesses are specifically permitted to state on direct examination that they have reviewed, considered and relied on even <u>inadmissible</u> evidence of a type upon which experts reasonably rely. The limitation built into this rule is that such inadmissible evidence does not itself thereby become admissible. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 416 [while an expert may state on direct examination he or she relied on information contained in certain reports, the expert may not testify as to the contents of such reports if they are not otherwise admissible]; see also *People v. Miller* (2014) 231 Cal.App.4th 1301, 1310 [courts have long instructed juries that out-of-court statements related by experts as grounds for opinion can only be considered for purpose of evaluating opinion,

not for truth of matter stated].)

Here, ***Plaintiff has provided the videotapes*** that Dr. Shewmon relied upon in part in forming his opinions, ***to Defendants in formal discovery in this case.*** As Dr. Shewmon states in his declaration (para. 10), "these [videos] have all been made available to the . . . expert consultants for the defense, who both cite them as among the material received [Nakagawa, p. 12; Schneider, p. 8] but make no other mention of them in their respective declarations. Every video file has been subjected to expert forensic video analysis and certified to contain no evidence of post-recording alteration." Plaintiffs in fact do have a signed declaration of a videographer who attests to just that. That declaration does not need to be admitted into evidence in order for Dr. Shewmon to appropriately rely on his viewing of the videotapes in making his expert declaration, but in fact authentication is available if it were necessary at this early stage of the proceedings. In addition, in discovery in this case Plaintiffs identified videos in verified responses to form interrogatories in August 2016 and produced the videos in July 2016.

Plaintiffs will proffer those discovery responses at the hearing of the motion for summary adjudication, as well as the signed declaration of an expert videographer who thoroughly examined the videos in detail and opines that they are untampered and accurate. Plaintiffs did not submit those discovery responses and videographer declaration because having those videos admitted into evidence is simply not necessary or required in order to be properly relied upon by Dr. Shewmon as an appropriate albeit partial basis in forming and declaring his opinions in connection with opposing the instant motion.

At a trial on the merits of this issue, Plaintiffs may present the videos as independent evidence of the fact that Jahi is not brain dead pursuant to the statutory definition of brain death. And, as set forth above, Plaintiffs have produced the videos to Defendants and their experts acknowledge receiving

and reviewing them in preparing their declarations. Regardless, and to reiterate, for the purposes of this motion and the admissibility of Dr. Shewmon's opinions, it is not necessary for Plaintiffs to admit the videos into evidence at this time.

Plaintiffs note that the court's tentative ruling cited to *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741-742 (which was first cited by Defendants in their second supplemental declaration of Ms. Still just recently received),but Plaintiffs submit that *Garibay* is quite distinguishable from the instant case and other cases where an expert is allowed to rely on hearsay and similar otherwise inadmissible evidence in forming their opinions. In *Garibay* the declaring doctor merely read the records of the defendant doctor (who neither offered a declaration or deposition testimony) and opined that the defendant doctor met the standard of care. The Court of Appeal said "Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524–1525; emphasis added.) "Physicians can testify as to the basis of their opinion, but this is not intended to be a channel by which testifying physicians can place the opinion of out-of-court physicians before the trier of fact. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 895, 112 Cal.Rptr. 540, 519 P.2d 588.) Through his declaration, Dr. Frumovitz attempted to testify to the truth of the facts stated in the declaration for an improper hearsay purpose, as independent proof of the facts." (*Ibid.*) The Court further held "Dr. Frumovitz [the expert doctor] had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court." (*Ibid.*)

In our case (like many cases where an expert bases his or her opinion on such things as articles, treatises, and other matters that may not be independently admissible), however, Dr. Shewmon examined Jahi, he has personal knowledge of her condition, and he and Plaintiffs are not relying on the

videos (at this time) as independent proof of the truth of Dr. Shewmon's opinions in his declaration. Thus, *Garibay* does not alter the broad rule, correctly applied here, that Dr. Shewmon may properly base his opinion (in part) on video evidence that may or may not be subject to hearsay grounds if offered as independent proof that Jahi is not brain dead today.

It is also significant that the Dr. Eck and Nurse Bangura declarations set forth their observations and the foundation for the nursing notes which in turn lay the foundation for the evidence Dr. Shewmon relies upon in forming his opinion that Jahi has not suffered cessation, much less irreversible cessation, of all functions of the entire brain. To-wit, 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.

2. The other bases for Defendant's objections to Dr. Shewmon's opinions are patently meritless.

Defendants raise numerous other grounds (e.g., unqualified, unreliable, unaccepted, improper, improperly legal, illegal, speculative, unreasoned, irrelevant) for their objection to Dr. Shewmon, and all of them are connected by a common, mistaken thread. First and foremost, they complain as they have from the outset of this case that because at the expedited proceeding 3 ½ years ago before Judge Grillo, that determined solely that Defendants could disconnect life support without fear of civil or criminal liability, Dr. Shewmon (and plaintiffs) cannot as a matter of law challenge that decision and prove that today, 3 ½ years later, Jahi is not brain dead under the statutory definition of brain death. As this Court notes at the outset of its tentative ruling, and as Plaintiffs have been arguing in the many pre-trial challenges to the personal injury claim

since this lawsuit was filed, Defendants have proffered no authority (and there is none) supporting Defendant's claim that the expedited proceeding 3 ½ years ago for the purpose of disconnecting life support is "conclusive as a matter of law for all purposes, regardless of an assertion (as here) that there have been changed circumstances."

Rather, as Plaintiffs continue to argue, Jahi unequivocally does not fulfill California's statutory definition of death, which requires **the irreversible cessation of all functions of the entire brain**, because among other things, she has continued over the past 3 ½ years to exhibit hypothalamic function (indisputably a function of the brain) and intermittent responsiveness to verbal command. Whatever Jahi's condition was 3 ½ years ago, when she was declared brain dead for the sole and limited purpose of allowing Defendants to terminate life support without liability, she is not brain dead today under the clear and unambiguous terms of the governing statute.

Defendants' final asserted ground is to claim Dr. Shewmon's lack of personal knowledge. Not so. Dr. Shewmon has examined Jahi. He has witnessed her onset of puberty and other physical changes evidencing that she has unequivocally does not suffer (and has never suffered) the irreversible cessation of all functions of the entire brain. Neither of Defendants' experts can claim any personal knowledge of Jahi's condition today. All they and Defendants can and do claim is that 3 ½ years ago, she met the guidelines for determining whether Jahi was brain dead for the purpose of quickly resolving Defendants' desire to disconnect Jahi from life support at their facility.

Defendants nor their experts can establish as a matter of law that Jahi does not today fulfill the statutory definition of brain death. Plaintiffs have, in part based on the unequivocal expert declaration of Dr. Shewmon, a highly qualified pediatric neurologist, raised ample triable issues of material fact precluding summary dismissal of Jahi's personal injury claim. For the reasons set forth herein

and in Plaintiffs' opposition papers, Plaintiffs request the court deny Defendants' motion for summary adjudication.

DATED: July 13, 2017

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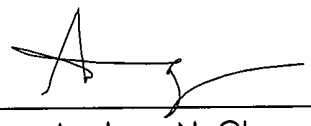
By: 
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