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 ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
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 12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 13 FOR THE COUNTY OF ALAMEDA
 14

15 LATASHA NAILAH SPEARS WINKFIELD;
 MARVIN WINKFIELD; SANDRA
 16 CHATMAN; and JAHl McMATH, a minor, by
 and through her Guardian ad Litem, LATASHA
 17 NAILAH SPEARS WINKFIELD,

18 Plaintiffs,

19 vs.

20 FREDERICK S. ROSEN, M.D.; UCSF
 BENIOFF CHILDREN'S HOSPITAL
 21 OAKLAND (formerly Children's Hospital &
 Research Center at Oakland); MILTON
 22 McMATH, a nominal defendant, and DOES 1
 THROUGH 100,

23 Defendants.
 24

CASE NO. RG 15760730
 ASSIGNED FOR ALL PURPOSES TO:
 JUDGE ROBERT B. FREEDMAN -
 DEPARTMENT 20

Date: January 8, 2016
 Time: 11:00 a.m.
 Dept: 20, Hon. Robert B. Freedman

Date Action Filed: 3/3/15

Reservation Nos. R - 16869755, 1687987

FAX FILING

25 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION**
 26 **TO DEMURRERS, MOTION TO STRIKE, AND**
 27 **REQUESTS FOR JUDICIAL NOTICE BY FREDERICK S. ROSEN, M.D. AND**
 28 **UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND**

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INTRODUCTION

This court granted Jahi McMath leave to amend her complaint to include allegations that – since Judge Grillo’s December 2013 expedited ruling allowing Defendants to terminate Jahi’s life support – facts have occurred which prove she has not suffered brain death and is a young woman of (now) 15 years. As was discussed by counsel and the court at the hearing on the initial demurrer, what human and legal right is more fundamental than the right to claim and prove that “life goes on?” This is what Jahi alleges in her amended complaint, pursuant to the court’s leave, and this is what she will prove – that, despite Defendants’ contrary claim, she has not suffered irreversible cessation of all brain functions, that she continues to live, with hypothalamic function and intermittent responsiveness to verbal command, that she has entered puberty and is a young woman, a full two years later after Defendants’ doctors declared her death.

That Jahi should not be precluded from claiming her life goes on is not just a matter of basic human rights, it is a matter of her legal rights. Defendants’ demurrer continues to be based on collateral estoppel, but for the reasons again detailed below, their arguments are meritless:

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

The instant demurrers filed by defendants recycle their arguments rejected by this court that Plaintiffs should not be allowed to claim that she is in fact alive. Those repeat arguments should again be rejected by the court. Defendants also make one new argument – they contend that ten months after Judge Grillo made his December 2013 ruling, Jahi filed, then withdrew, a petition with Judge Grillo seeking to persuade Judge Grillo to reconsider his ruling, and that this petition collaterally estops Jahi from claiming now that she is alive. This new argument should also be summarily rejected. The elements of collateral estoppel do not apply to Jahi’s withdrawn petition

1 in late 2014. It was not actually litigated (it was withdrawn), it certainly was not decided in the
2 former proceeding, and it was even more certainly not final and on the merits.

3 For these and other reasons detailed below, Defendants' demurrers should be overruled.
4 Neither the death certificate nor the court's ruling on discontinuing life support two years ago
5 indisputably refutes Jahi's claim that she is alive and has been continuously receiving medical care
6 a full two years after Defendants' physicians declared that she had sustained "irreversible cessation
7 of all functions of the entire brain." As this Court has correctly ruled, res judicata and collateral
8 estoppel will not be applied where time and changed circumstances prove that Jahi has not suffered
9 the deterioration that was predicted categorically back in December 2013.^{1/}

10 Plaintiffs have alleged and will prove with expert evidence that Jahi's brain is clearly not
11 "dead" in a neuropathological sense (i.e., necrotic). Her condition unequivocally does not fulfill
12 California's statutory definition of death, which requires the "irreversible cessation of all brain
13 functions," because she exhibits hypothalamic function and intermittent responsiveness to verbal
14 command. That Jahi is currently not brain dead means that she never was truly, legally brain dead,
15 because by definition brain death is the "irreversible" cessation of "all" brain functions.

16 Further, as this Court has correctly ruled, a death certificate is only prima facie evidence of
17 death. It can be and is in this case rebutted and cannot be used on demurrer to establish conclusively
18 that Jahi is no longer alive. In short, nothing Defendants argue change this Court's prior ruling that
19 neither the death certificate nor Judge Grillo's finding that Jahi on December 2013 was suffering
20 "irreversible cessation of all functions in the entire brain" and not entitled to life support at that time
21 collaterally estops Jahi and her family from alleging and proving that she is alive and is entitled to
22 maintain her action for personal injury.

23 ///

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25 ^{1/}When the court in the hearing on the initial demurrers posed the hypothetical what if Jahi
26 were to walk into the courtroom, this was proper acknowledgment that if Jahi could prove she has
27 brain function, does not meet the definition of brain death, and therefore is alive, she should surely
28 be allowed to do so. Yet Defendants insist again that Jahi cannot do so. What reason is there to
preclude a person from proving they are living? A declaration of death is not fixed, static or
permanent if there evidence exists that a person is not dead. Plaintiffs allege that there is such
evidence, and they are entitled to proceed beyond the pleading stage.

1 STATEMENT OF THE CASE

2 A. The Negligence of CHO and Dr. Rosen

3 The allegations in the operative first amended complaint are again not challenged by
4 Defendants and therefore the underlying merits of Plaintiffs' claims against Defendants are presumed
5 true, to-wit: In 2013, Dr. Rosen diagnosed Jahi with sleep apnea and recommended that he perform
6 a surgery that was unreasonably complex and risky which included the removal of her tonsils and
7 adenoids, soft pallet and uvula, and a submucous resection of her bilateral turbinates. On December
8 9, 2013, Dr. Rosen took Jahi to the operating room at CHO to perform this extensive surgery.
9 Although Dr. Rosen noted that Jahi had an anatomical anomaly in that her right carotid artery was
10 more to the center and close to the surgical site, which raised a serious issue as to this extensive
11 surgical procedure, he didn't note this in any of his orders for any of the other health care
12 practitioners who would be following Jahi post-op. (Complaint, ¶¶10-11)

13 Just hours after surgery, Jahi began coughing up blood. (¶12) The nurses assured the
14 Winkfields the bleeding was "normal" but Jahi continued to cough up blood. Ms. Winkfield pleaded
15 again and again with the nurses to call a doctor to Jahi's bedside, to no avail. (¶¶ 13-16) The nurses
16 continued to contradict one another and give Ms. Winkfield conflicting instructions. (¶¶15-16) Ms.
17 Winkfield's mother Ms. Chatman, an experienced hospital nurse, arrived and also insisted that the
18 nurses contact doctors to come to Jahi's aid, to no avail. (¶17)

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

28 During the Code, a nurse approached Ms. Chatman to console her, telling her "I knew this

1 would happen." In nursing notes added to the chart several days later, a nurse noted that she had
2 repeatedly advised the doctors in the PICU of Jahi's deteriorating condition and blood loss and
3 charted: "This writer was informed there would be no immediate intervention from ENT or Surgery."
4 Another nurse also noted in the chart that despite her repeated notification and documentation of
5 Jahi's post surgical hemorrhaging and critical vital signs to the doctors in the PICU, no physicians
6 would respond to intervene on behalf of Jahi. (§§21-22)

7 On December 11, the Winkfields were advised that EEG brain testing indicated that Jahi had
8 sustained significant brain damage, and on December 12, the Winkfields were advised that a repeat
9 EEG also revealed that Jahi had suffered severe brain damage. They were advised that Jahi had been
10 put on the organ donor list and that they would be terminating her life support the next morning.
11 (§23) When the Winkfields and Ms. Chatman requested an explanation as to what happened to Jahi,
12 the administration of CHO ignored their requests, instead continuing to pressure the family to agree
13 to donate Jahi's organs and disconnect Jahi from life support. At one point, David J. Duran, M.D.,
14 the Chief of Pediatrics, slammed his fist on the table and said, "What is it you don't understand? She
15 is dead, dead, dead, dead!" Unknown to the family at the time, medical facilities were contacting
16 CHO offering to accept the transfer of Jahi. These offers were given to Dr. Duran on his orders and
17 he did not share those with the family. (§24)

18 Dr. Rosen was negligent in (a) not recommending, prior to deciding to perform the complex
19 and risky surgery, less intrusive and risky procedures be undertaken, including providing Jahi with
20 a CPAP machine, and only removing Jahi's tonsils and adenoids to see if her sleep apnea improved;
21 and (b) during the surgery, Dr. Rosen discovered that Jahi might have a medialized right carotid
22 artery but failed to mention this condition in any of his postoperative orders thus failing to provide
23 the medical staff at CHO with important medical information; and (c) failing to respond post-op to
24 Jahi. (§§38-41)

25 The CHO nurses and physicians were negligent in (a) allowing Jahi to bleed for hours and
26 without the presence and input of any physician, including Dr. Rosen, and (b) failing, in the face of
27 the doctors' refusal to respond, to activate CHO's nursing hierarchy chain of command reporting
28 system to get the medical care which the nurses knew Jahi needed. (§§42-43)

1 After going into cardiac arrest and lapsing into a coma in the early morning hours of
2 December 10, Jahi was maintained on a ventilator at CHO. On Friday December 20, 2013, the family
3 obtained a temporary restraining order preventing CHO from terminating Jahi's life support. (¶26)
4 Judge Grillo endeavored to complete the proceeding in a "reasonably brief period." CHO provided
5 some records to the family, the Court appointed an independent physician, and on December 24,
6 three court days after the petition was filed, the Court found that Jahi had suffered brain death. While
7 the family's emergency petition for mandate a week later was pending in the Court of Appeal (No.
8 A140590), the parties stipulated for Jahi's release to the family (¶ 26), Judge Grillo's TRO was
9 dissolved, and the Court of Appeal denied the petition as moot. To this date, Jahi continues to
10 receive 24/7 nursing care in New Jersey, pursuant to her eligibility in that state for participation in
11 the New Jersey Medicaid Program.^{2/}

12 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 presented
14 in December 2013 would not appear to prevent this court, or some other court, or the
15 California Department of Public Health from reaching a different conclusion based
16 on new facts. California law on claim preclusion and issue preclusion permits
17 "reexamination of the same questions between the same parties where in the interim
18 the facts have changed or new facts have occurred which may alter the legal rights
19 of the parties." (*City of Oakland v. Oakland Police and Fire Retirement System*
20 (2014) 224 Cal.App.4th 210, 230.)

18 (Rosen Ex. O, p. 7.) On October 3, 2014, Plaintiffs filed, then 5 days later on October 8 withdrew,
19 a petition with Judge Grillo to reverse his ruling of brain death based on new and changed facts.
20 Because the petition was withdrawn, no action was taken on the petition. (Rosen Exs. K, T, U.)

21 **B. Jahi's Present Condition**

22 Plaintiffs' first amended complaint includes the following allegations:

23 30. Since the Certificate of Death was issued, JAHJ has been examined
24 by a physician duly licensed to practice in the State of California who is an
25 experienced pediatric neurologist with triple Board Certifications in Pediatrics,
26 Neurology (with special competence in Child Neurology), and
27 Electroencephalography. The physician has a subspecialty in brain death and has
28 published and lectured extensively on the topic, both nationally and internationally.

27 ^{2/}In their Request for Judicial Notice filed in connection with the prior demurrer proceedings,
28 this court granted Plaintiffs' request for judicial notice of the eligibility letters from New Jersey's
Department of Human Services to Jahi (Evid. Code, §§ 452, subd. (c), (h), 459(a)) and Plaintiffs
again cite to those eligibility letters other than for the truth of the matters stated.

1 This physician has personally examined JAHl and has reviewed a number of her
2 medical records and studies performed, including an MRI/MRA done at Rutgers
University Medical Center on September 26, 2014. This doctor has also examined
3 22 videotapes of JAHl responding to specific requests to respond and move.

4 31. The MRI scan of September 26, 2014, is not consistent with chronic
5 brain death MRI scans. Instead, JAHl's MRI demonstrates vast areas of structurally
6 and relatively preserved brain, particularly in the cerebral cortex, basal ganglia and
cerebellum.

7 32. The MRA or MR angiogram performed on September 26, 2014,
8 nearly 10 months after JAHl's anoxic-ischemic event, demonstrates intracranial
9 blood flow, which is consistent with the integrity of the MRI and inconsistent with
10 brain death.

11 33. JAHl's medical records also document that approximately eight
12 months after the anoxic-ischemic event, JAHl underwent menarche (her first
13 ovulation cycle) with her first menstrual period beginning August 6, 2014. JAHl also
14 began breast development after the diagnosis of brain death. There is no report in
15 JAHl's medical records from CHO that JAHl had begun pubertal development. Over
16 the course of the subsequent year since her anoxic-ischemic event at CHO, JAHl has
17 gradually developed breasts and as of early December 2014, the physician found her
18 to have a Tanner Stage 3 breast development.

19 34. The female menstrual cycle involves hormonal interaction between
20 the hypothalamus (part of the brain), the pituitary gland, and the ovaries. Other
21 aspects of pubertal development also require hypothalamic function. Corpses do not
22 menstruate. Neither do corpses undergo sexual maturation. There is no precedent
23 in the medical literature of a brain dead body developing the onset of menarche and
24 thelarche.

25 35. Based upon the pediatric neurologist's evaluation of JAHl, JAHl no
26 longer fulfills standard brain death criteria on account of her ability to specifically
27 respond to stimuli. The distinction between random cord-originating movements and
28 true responses to command is extremely important for the diagnosis of brain death.
JAHl is capable of intermittently responding intentionally to a verbal command.

36. In the opinion of the pediatric neurologist who has examined JAHl,
having spent hours with her and reviewed numerous videotapes of her, that time has
proven that JAHl has not followed the trajectory of imminent total body deterioration
and collapsed that was predicted back in December of 2013, based on the diagnosis
of brain death. Her brain is alive in the neuropathological sense and it is not necrotic.
At this time, JAHl does not fulfill California's statutory definition of death, which
requires the irreversible absence of *all brain function*, because she exhibits
hypothalamic function and intermittent responsiveness to verbal commands.

21 **C. Plaintiffs' First Amended Complaint**

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

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ARGUMENT

I. AS THE COURT RULED, THE DEATH CERTIFICATE DOES NOT PRECLUDE JAHİ FROM HAVING STANDING.

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

The instant demurrer is based primarily on the assertion that Jahi lacks standing to bring the First Cause of Action because a death certificate was issued on January 3, 2014, and because this court issued orders and a judgment in Case No. RP13-707598 denying Winkfield's petition for medical treatment for Jahi after the court reviewed medical evidence to the effect that Jahi was legally dead as defined by Health and Safety Code sections 7180-7181. (RJN, Exhs. A, B, C and D.) While the court grants the request for judicial notice of such certificate and orders, the court cannot (and does not) take judicial notice of the truth of factual conclusions in the orders or death certificate, and makes no binding determination as to their preclusive effect. (See, e.g., *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120 ["Judicial notice is properly taken of the existence of a factual finding in another proceeding, but not of the truth of that finding."]) Nevertheless, in light of the uncontroverted issuance of such orders and the death certificate, it is appropriate for any cause of action asserted directly by Jahi to have allegations providing a basis for Jahi to have standing notwithstanding such orders and certificate.

Dr. Rosen's demurrer does not renew its argument that the death certificate precludes Jahi from having standing, but CHO does. (CHO FAC Demurrer, at pp. 5, 11 [CHO "asks the court to take judicial notice of the issuance of a Death Certificate, and therefore of the fact that a determination of death was made, that it was considered final, and that in California Jahi is legally dead"].) The court has already rejected this argument, and Dr. Rosen gives no reason why this court is wrong. As the court further explained in its ruling:

Without making any binding determinations on this demurrer, the court notes that a death certificate is prima facie evidence of the facts stated therein but is subject to rebuttal and explanation. (See Health & Safety Code § 103550 ["Any ... death ... record that was registered within a period of one year from the date of the event ... is prima facie evidence in all courts and places of the facts stated therein"]; In re Estate of Lensch (2009) 177 Cal.App.4th 667, 677 n. 3 ["Of course, a death certificate is "subject to rebuttal and to explanation", quoting *Morris v. Noguchi* (1983) 141 Cal.App.3d 520, 523 n. 1.) The court notes that, while it appears that plaintiffs have not petitioned the California Department of Vital Records to void or amend the death certificate, CHO has not submitted authority that this is a prerequisite in order for Jahi to have standing.

The court's ruling is correct and well-supported in the law. (See also *Bohrer v. County of San Diego* (1980) 104 Cal.App.3d 155, 164-65 [death certificates may be admitted as prima facie evidence of

1 the facts stated therein, but it is improper to take judicial notice of the facts stated in the death
2 certificate as part of ruling on a demurrer where the demurring party sought to indisputably establish
3 cause of death]; *People v. Holder* (1964) 230 Cal.App.2d 50, 56 [similar]; *Estate of Scott* (1942)
4 55 Cal.App.2d 780, 782-783 [party may correct a statement in a death certificate by calling as a
5 witness the person who made the death certificate].)

6 **II. AS THE COURT RECOGNIZES, RES JUDICATA AND COLLATERAL**
7 **ESTOPPEL DO NOT APPLY HERE WHERE PLAINTIFFS ALLEGE NEW FACTS**
8 **HAVE OCCURRED SINCE THE PRIOR PROCEEDING WHICH ALTER THE**
9 **LEGAL RIGHTS OF THE PARTIES**

10 **A. This Court allowed leave to amend to allege new facts have occurred since the**
11 **prior, extremely expedited and abbreviated proceeding which alter the legal**
12 **rights of the parties, and the FAC amply sets forth those allegations.**

13 In its order granting plaintiffs leave to amend, the court properly rejected Defendants'
14 argument in its prior demurrer that collateral estoppel precluded Jahi from alleging that she is in fact
15 alive and has standing to bring her action for personal injury against Defendants:

16 As to [Defendants'] arguments that collateral estoppel and/or res judicata applies to
17 the determinations in Case No. RP13-707598, it may or may not be appropriate for
18 the court to make a determination in this regard at the pleading stage. These are
19 affirmative defenses as to which the defendants have the burden of proof (See, e.g.,
20 *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.) Under California law, the "theory of
21 estoppel by judgment or res judicata ... extends only to the facts in issue as they
22 existed at the time the judgment was rendered and does not prevent a reexamination
23 of the same questions between the same parties where in the interim the facts have
24 changed or new facts have occurred which may alter the legal rights of the parties."
25 (*City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224
26 Cal.App.4th 210, 230.) In amending, Jahi has leave to include allegations in this
27 regard.

28 (Court's 10/20/15 Rulings; accord, *Union Pacific Railroad Company v. Santa Fe Pacific Pipelines,*
29 *Inc.* (2014) 231 Cal.App.4th 134, 179-182 ("*Union Pacific*"); *Evans v. Celotex Corp.* (1987) 194
30 Cal.App.3d 741, 748; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607,
31 616; *Hurd v. Albert* (1931) 214 Cal. 15, 26; 7 Witkin, Cal. Proc. 5th (2008) Judgm, § 434, p. 1087.)
32 Further, as noted above, Judge Grillo has cited this very same principle.

33 Plaintiffs emphasize that not only do Defendants have the burden on this legal issue, but also,
34 because the law does not favor estoppels, the party invoking collateral estoppel must establish the
35 requirements for collateral estoppel with certainty. (*Kemp Bros. Construction, Inc. v. Titan Electric*
36 *Corp.* (2007) 146 Cal.App.4th 1474, 1482.) Defendants fail to do so. The purpose of issue

1 preclusion is “to prevent a party from repeatedly litigating an issue in order to secure a different
2 result” when it had a full and fair opportunity to do so previously. (*Direct Shopping Network, LLC*
3 *v. James* (2012) 206 Cal.App.4th 1551, 1562–1563; accord, *Union Pacific, supra*, 231 Cal.App.4th
4 at 179.) In *Smith v. Exxon Mobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414, the First District
5 Court of Appeal reversed a judgment of the trial court which had held that the defendant oil
6 company's liability had been “established by application of the doctrine of collateral estoppel [based
7 on] findings of liability in an earlier personal injury action against it...” (*Smith, supra*, 153
8 Cal.App.4th at p. 1410.) The Court of Appeal reversed because, in the earlier action, the defendant
9 “was unable to present a full defense” and that use of collateral estoppel in such circumstances was
10 “inappropriate” (id. at 1417-1418) and “unfair and must be set aside.” (Id. at 1420.) “[E]ven where
11 the technical requirements [of collateral estoppel] are all met, the doctrine is to be applied ‘only
12 where such application comports with fairness and sound public policy.’” (Id. at 1414.) In *Smith*,
13 a defense expert was unable to testify in the prior trial due to a tragedy. Since the prior trial did not
14 provide a full and fair opportunity to present a defense, the Court held it would be unfair to apply
15 collateral estoppel. (Id. at 1420.)

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

27 In addition, courts have consistently emphasized the equitable nature of collateral estoppel
28 and that even where the technical requirements are all met, the doctrine is to be applied “only where

1 such application comports with fairness and sound public policy.” (*Vandenberg v. Superior Court*
2 (1999) 21 Cal.4th 815, 835; *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763;
3 *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941.) Further, in *Consumers Lobby Against*
4 *Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, our Supreme Court held that
5 collateral estoppel will not be applied “if injustice would result or if the public interest requires that
6 relitigation not be foreclosed.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343, and *City of Los*
7 *Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230.)

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

10 [R]elitigation of the issue in a subsequent action between the parties is not precluded
11 in the following circumstances: . . . (3) A new determination of the issue is warranted
12 by differences in the quality or extensiveness of the procedures followed in the two
13 courts or by factors relating to the allocation of jurisdiction between them; or (4) The
14 party against whom preclusion is sought had a significantly heavier burden of
15 persuasion with respect to the issue in the initial action than in the subsequent action;
16 the burden has shifted to his adversary; or the adversary has a significantly heavier
17 burden than he had in the first action; or (5) There is a clear and convincing need for
18 a new determination of the issue (a) because of the potential adverse impact of the
19 determination on the public interest or the interests of persons not themselves parties
20 in the initial action, (b) because it was not sufficiently foreseeable at the time of the
21 initial action that the issue would arise in the context of a subsequent action, or (c)
22 because the party sought to be precluded, as a result of the conduct of his adversary
23 or other special circumstances, did not have an adequate opportunity or incentive to
24 obtain a full and fair adjudication in the initial action.

18 All of the above authority, and the fundamental principles which they embody, fully apply here –
19 Jahi and her family should not be collaterally estopped from contesting the pronouncement that Jahi
20 is dead where they denied this throughout the expedited and abbreviated proceeding – obviously
21 conducted without any discovery and without testimony from live witnesses) – conducted solely for
22 the purpose of making the exigent determination whether CHO would be allowed to terminate life
23 support, and where new evidence subsequent to the December 2013 expedited proceeding and ruling
24 supports their denial. Where the fact of death is alleged and denied, and there is new evidence
25 supporting the denial, to say that an aggrieved patient is collaterally estopped from contesting her
26 “brain death” in her action for medical negligence is to make the antecedent finding of “brain death”
27 dispositive based on a prior finding made under extreme time pressures and with great urgency
28 necessary to decide the heartbreaking question whether to withdraw life support.

1 As set forth above, the first amended complaint alleges changed facts and circumstances that
2 preclude the application of collateral estoppel on demurrer, for both legal and equitable reasons, to-
3 wit: Since Judge Grillo's December 2013 ruling in the expedited proceeding, Jahi has been examined
4 by an experienced pediatric neurologist with triple Board Certifications in Pediatrics, Neurology
5 (particularly Child Neurology), and Electroencephalography, with a subspecialty in brain death, and
6 who has published and lectured extensively on the topic around the world. Based on his personal
7 examination of Jahi, review of her medical records, studies and videotapes performed after
8 December 2013, he opines that the September 2014 MRI scan is not consistent with chronic brain
9 death MRI scans. Instead, Jahi's MRI demonstrates vast areas of structurally and relatively
10 preserved brain, particularly in the cerebral cortex, basal ganglia and cerebellum. Moreover, the MR
11 angiogram performed on September 26, 2014, nearly 10 months after Jahi's anoxic-ischemic event
12 and Judge Grillo's ruling, demonstrates intracranial blood flow, consistent with the integrity of the
13 MRI and inconsistent with brain death. (FAC, ¶30-32.)

14 Jahi's medical records also document that approximately eight months after the anoxic-
15 ischemic event, Jahi underwent menarche (her first ovulation cycle) with her first menstrual period
16 beginning August 6, 2014, and Jahi has gradually developed breasts and as of early December 2014,
17 the physician found her to have a Tanner Stage 3 breast development. (¶33.) The expert explains that
18 the menstrual cycle involves hormonal interaction between the brain's hypothalamus, the pituitary
19 gland and ovaries. Other aspects of pubertal development require hypothalamic function. Corpses
20 do not menstruate or undergo sexual maturation. There is no medical precedent of a brain dead body
21 developing onset of menarche and thelarche. (¶34.)

22 Based upon the expert's evaluation of Jahi, she no longer fulfills standard brain death criteria, due
23 to her ability to specifically respond to stimuli. The distinction between random cord-originating
24 movements and true responses to command is crucial to diagnosis of brain death. Jahi is capable of
25 intermittently responding intentionally to a verbal command. (¶35.)

26 In summary, the opinion of the pediatric neurologist who has examined Jahi, spent hours with
27 her, and reviewed numerous videotapes of her, is that time has proven that Jahi has not followed the
28 trajectory of imminent total body deterioration and collapse that was predicted back in December

1 of 2013, based on the diagnosis of brain death. Her brain is alive in the neuropathological sense and
2 it is not necrotic. At present, Jahi does not fulfill California's statutory definition of death, which
3 requires the irreversible absence of all brain function, because she exhibits hypothalamic function
4 and responsiveness to verbal commands. (§36.)

5 Defendants repeat their argument that the expeditious proceeding in December 2013
6 determining whether CHO could terminate life support based on physicians' opinions that Jahi was
7 "legally dead" precludes Jahi from alleging that she has standing to bring an action for personal
8 injury. But the court already rejected this argument and granted leave to Jahi to amend to include
9 allegations of changes in her condition that, if proven, will establish she is not legally dead (and
10 Judge Grillo has also recognized that new and changed conditions prohibit estoppel).

11 Defendants pay lip service to this fundamental principle that collateral estoppel will not be
12 applied where there are new facts and changed circumstances and simply repeat their argument that
13 this principle does not apply because once physicians opined in December 2013 that Jahi was brain
14 dead for the purpose of removing life support, her death became static, fixed and permanent, and Jahi
15 is absolutely precluded from alleging and proving that she is, in fact, alive. (See CHO Demurrer, 6-7,
16 Rosen Demurrer, 12) But Jahi's condition is far from static, fixed or permanent. As detailed above
17 and in her operative complaint, she has alleged and will prove that her condition has changed
18 dramatically since Judge Grillo's ruling in December 2013 – that there are vast areas of structurally
19 and relatively preserved brain, that tests demonstrate intracranial blood flow consistent with the
20 integrity of the MRI and inconsistent with brain death, and that Jahi underwent menarche (her first
21 ovulation cycle) and began breast development.

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

28 And finally, Health and Safety Code section 7181 specifically limits the legal determination

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

10 **B. Plaintiffs' withdrawn petition in October 2014 to have Judge Grillo reconsider**
11 **his December 2013 ruling has zero collateral estoppel effect.**

12 Defendants' only new rejoinder to the court's prior ruling is to reference that in October
13 2014, Jahi filed – then only days later, withdrew – a petition with Judge Grillo asking him to
14 reconsider his December 2013 ruling. (*Rosen Demurrer*, pp. 4-8.) However, as is clear from the
15 record, the withdrawal of the petition only days after it had been filed and before Judge Grillo made
16 any determination of any kind on the petition, makes clear that the petition, its contents, and the
17 issues raised by that petition were not actually litigated or decided (much less necessarily decided),
18 and certainly were not "finally" adjudicated or "on the merits." For these obvious reasons, there can
19 be no collateral estoppel effect given to that October 2014 petition.

20 "Collateral estoppel precludes relitigation of issues argued and decided in prior
21 proceedings.' [Citation.] The doctrine applies 'only if several threshold requirements are fulfilled.
22 First, the issue sought to be precluded from relitigation must be identical to that decided in a former
23 proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it
24 must have been necessarily decided in the former proceeding. Fourth, the decision in the former
25 proceeding must be final and on the merits. Finally, the party against whom preclusion is sought
26 must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party
27 asserting collateral estoppel bears the burden of establishing these requirements.' " (*Pacific Lumber*
28 *Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.) Further, because the law does

1 not favor estoppels, the party invoking collateral estoppel must establish these requirements with
2 certainty. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474,
3 1482.) The requirements are absent here.

4 1. Not identical. The issue Defendants seek to preclude is whether Jahi is entitled to claim
5 personal injury damages from Defendants, whereas the issues in the expedited proceeding as well
6 as Plaintiffs' withdrawn October 2014 petition was whether CHO was properly allowed to withdraw
7 life support from Jahi in December 2013, and whether Jahi could be afforded life support in
8 California to allow her and her family to return home from New Jersey, where she has been since
9 December 2013. Thus, the issues are not identical, and for this reason alone, Defendants have not
10 met their burden. (*Ibid*; see also *Santa Clara Valley Transportation Authority v. Rea* (2006) 140
11 Cal.App.4th 1303, 1311-1312 [if record is incomplete and court cannot determine one or more of
12 the elements of collateral estoppel, the court cannot apply it].)

13 2. Not actually litigated. As is clear from the record, the October 2014 petition was withdrawn
14 by Plaintiffs, and no determination of the petition was ever made.

15 3. Not decided, much less necessarily decided, finally decided, or on the merits. The record is
16 clear that Judge Grillo confirmed the withdrawal of the petition and advised Plaintiffs that if in the
17 future she elected to seek reconsideration of his December 2013 ruling, she could do so, and further
18 still, Judge Grillo recognized the new or changed facts would prohibit issue preclusion.

19 **III. DEFENDANTS' ARGUMENT THAT THIS COURT LACKS SUBJECT MATTER**
20 **JURISDICTION IS SPECIOUS.**

21 Defendants argue that this Court lacks jurisdiction over the issue of whether Jahi has standing
22 to bring her cause of action for personal injury. The authority cited by Defendants to support the
23 argument is totally inapposite, because (as Defendants even admit) those cases involve jurisdiction
24 not over an "issue" but rather, over a "proceeding," "cause" or "matter." (Rosen Demurrer pp. 13-
25 14; see *Williams v. Superior Court of Los Angeles County* (1939) 14 Cal.2d 656, 662 [where "a
26 *proceeding* has been assigned to one department of the superior court, it is beyond the jurisdictional
27 authority of another department of the same court"]; *Silverman v. Superior Court* (1988) 203
28 Cal.App.3d 145, 150-151 ["Silverman has failed to establish that the instant action and the joint

1 debtor proceeding in the S.C. case in fact are the same *proceeding*"]; *People v. Madrigal* (1995) 37
2 Cal.App.4th 791, ["An order made in one department during the progress of a *cause* can neither be
3 ignored nor overlooked in another department"]; *Ford v. Superior Court* (1986) 188 Cal.App.3d
4 737, 742 ["A judgment rendered in one department of the superior court is binding on that *matter*
5 upon all other departments"].) There is no dispute in this case that the proceeding, cause or matter
6 before this Court is not the same proceeding, cause or matter that was before Judge Grillo.

7 What Defendants argue is simply a rehash argument that Jahi should be estopped from
8 asserting the *issue* that she is alive and thus has standing to bring her personal injury action. As
9 explained above and in her amended allegations, estoppel does not apply because "the facts have
10 changed, or new facts have occurred which may alter the legal rights of the parties." (The Court's
11 10/20/15 ruling, citing *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224
12 Cal.App.4th 210, 230.) Judge Grillo has himself recognized this fundamental principle does not
13 preclude him, or some other judge, from considering such new or changed facts.

14 **IV. THE MOTION TO STRIKE SHOULD BE DENIED.**

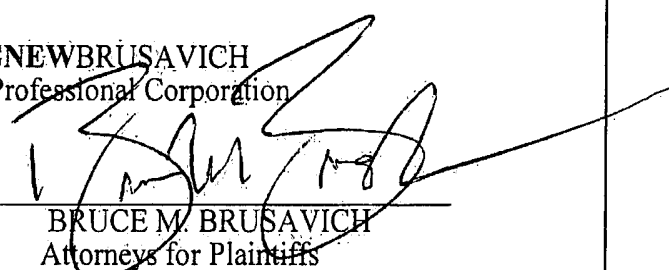
15 CHO moves to strike the claim for future damages and the alternative claim for wrongful
16 death on the ground that the claims are inconsistent with Defendants' claim that Jahi is dead. For
17 the reasons set forth herein, Jahi is not dead, and thus the motion is meritless.

18 **CONCLUSION**

19 For the foregoing reasons, the demurrers should be overruled. In the event the Court is
20 inclined to want more specificity, Plaintiffs request leave to amend. "If a complaint does not state
21 a cause of action, but there is a reasonable possibility that the defect can be cured by amendment,
22 leave to amend must be granted." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th
23 26, 38-39.)

24 DATED: December 23, 2015

AGNEWBRUSAVICH
A Professional Corporation

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26 By: 
BRUCE M. BRUSAVICH
Attorneys for Plaintiffs

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is **AGNEWBRUSAVICH**, 20355 Hawthorne Blvd., 2nd Floor, Torrance, California. On December 23, 2015, I served the within document **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRERS, MOTION TO STRIKE, AND REQUESTS FOR JUDICIAL NOTICE BY FREDERICK S. ROSEN, M.D. AND UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Torrance, California, addressed as set forth below:
- by placing a true copy thereof enclosed in a sealed envelope(s), and caused such envelope(s) to be delivered via OVERNIGHT DELIVERY addressed pursuant to the document(s) listed above to the person(s) at the address(es) set forth below.
- by electronic service. Based on a court order or an agreement of the parties to accept service by electronic transmission. I caused the documents to be sent to the persons at the electronic notification addresses as set forth below:

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I am readily familiar with the firm's practices of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if post cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at which direction the service was made.

Executed this 23rd day of December, 2015 at Torrance, California.



JAN DUNN