IN THE

SUPREME COURT OF VIRGINIA

Record No. 161321

PATRICK B. LAWSON and
ALISON J. LAWSON,

Appellants,

v.

VCU MEDICAL CENTER, d/b/a
CHILDREN's HOSPITAL OF RICHMOND
AT VCU, and d/b/a VCU HEALTH SYSTEM

Appellee.

IN RE: MIRRANDA GRACE LAWSON

Appeal From The
Richmond Circuit Court – Case No.: CL16-2358

VCU HEALTH SYSTEM AUTHORITY'S BRIEF IN OPPOSITION

Rodney K. Adams, Esquire (VSB # 32656)
William H. Shewmake, Esquire
(VSB # 25409)
Gretchen C. Byrd, Esquire (VSB # 72789)
LeClairRyan, A Professional Corporation
919 East Main Street, 24th Floor
Richmond, Virginia 23219
Telephone: (804) 783-2003
Facsimile: (804) 783-2294
Email: william.shewmake@leclairryan.com

Anne G. Scher, Esquire (VSB # 34689)
Director, Department of Professional
Liability
VCU Health System
P.O. Box 980521
Richmond, VA 23298-0521
Telephone: (804) 648-6300
Facsimile: (804) 648-1100
Email: anne.scher@vcuhealth.org

Counsel for VCU Health System Authority

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

RULES OF COURT

MISCELLANEOUS

Now comes VCU Health System Authority ("VCU Health System") and states:

Statement of the Case

This case involves a two-year-old girl, Mirranda Lawson, who on May 11, 2016 choked on a kernel of popcorn and suffered respiratory cardiac arrest for at least an hour. She was initially taken to Mary Washington Hospital and later that day transferred to the VCU Health System's pediatric intensive care unit (the "PICU") at MCV Hospitals in Richmond. She arrived in the PICU on a ventilator and has remained on one since.

Sadly, Mirranda's doctors have clinically concluded that Mirranda has suffered brain death, and standard protocol calls for that death to be confirmed by an apnea test. The area of the brain stem that controls breathing is the last part of the brain to die. The test involves turning off the ventilator for a short time to detect if the brain stem is trying to signal the body to breathe. If no attempt to breathe is detected during the first test, then the test is repeated 12 hours later. If the apnea tests confirm that Mirranda has suffered brain death, then she would be declared dead pursuant to Va. Code § 54.1-2972. Mirranda's parents, Patrick and Alison Lawson (the "Lawsons"), objected to the apnea tests and initiated this case.

The Lawsons claim that they can block the apnea test under Virginia's Health Care Decisions Act, Va. Code §§ 54.1-2981 to 54.1-2993,

and thereby postpone a determination that Mirranda has died. As set forth below, this is a straightforward case that has nothing to do with Virginia's Health Care Decisions Act. Under that Act, health care is defined as a service furnished "to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability ...." Va. Code § 54.1-2982. The apnea test serves no such purpose. Its sole purpose is to confirm that Mirranda has in fact died.

The doctors' right to perform the apnea test is governed by Va. Code § 54.1-2972, Virginia's version of the Uniform Determination of Death Act. That statute authorizes and requires physicians to determine that a person is dead "based on the ordinary standards of medical practice." The apnea test represents the standard method for confirming brain death. Thus, Mirranda's doctors are entitled to--and indeed must--administer the apnea test. Any other result would contravene not only the plain meaning of Va. Code §§ 54.1-2982 and 54.1-2972, but would also frustrate the purpose and intent of those statutes.

Material Proceedings Below

On May 19, 2016, the Lawsons filed *pro se* a document asking that VCU Health System be enjoined from conducting the apnea tests and declaring that Mirranda had died. Judge Hughes issued a temporary *ex*

parte injunction prohibiting VCU Health System from removing life support. After a hearing, Judge Hughes dissolved the injunction on May 20, 2016.

When VCU Health System's physicians entered Mirranda's room that same day to perform the apnea test, the Lawsons objected to the test. The physicians did not proceed. Instead, on May 23, 2016, VCU Health System filed a petition and motion for an emergency hearing under the same style and case number as the *pro se* injunction request. Specifically, VCU Health System sought an order permitting its health care providers to complete testing for brain death and to act on the results. The Court appointed Michele L. Chiocca as guardian *ad litem*. The Lawsons, by counsel, filed an Opposition to the Petition.

On May 31, 2016, the trial court conducted an ore tenus hearing on VCU Health System's petition. Judge Hughes deferred his ruling until June 10, 2016 to give the Lawsons additional time to have Mirranda transferred from VCU Health System to another facility. (May 31, T. 78-79).

On June 9, 2016, Judge Hughes held a third ore tenus hearing. On June 10, 2016, Judge Hughes entered a final order finding that VCU Health System is allowed to administer the apnea tests, which was amended on June 14, 2016. By order dated June 15, 2016, Judge Hughes set a $30,000 appeal bond which was filed that same day.

Standard of Review

The Lawsons misstate the applicable standard of review. This appeal involves a mixed question of law and fact. Questions of law are reviewed *de novo*, but the trial court's findings are given the weight of a jury verdict and will not be disturbed unless plainly wrong or without evidentiary support. *McBride v. Bennett*, 288 Va. 450, 454 (2014). Further, the evidence must be viewed in the light most favorable to the prevailing party, VCU Health System. *Purce v. Patterson*, 275 Va.190, 194 (2008).[1]

Facts

On May 11, 2016, Mirranda Lawson choked on a popcorn kernel. (May 20, T. 10; May 31, T. 12-13). She suffered 60 to 70 minutes of hypoxic respiratory cardiac arrest. (May 20, T. 10-11; May 31, T. 12-13; June 9, T. 24). Mirranda was taken to Mary Washington Hospital and was then transferred to the VCU Health System PICU on a ventilator. She has

[1] The Lawsons ignore that the evidence must be construed in the light most favorable to VCU Health System. For example, they state that Mirranda is a living patient even though her doctors believe she is dead. *Cf.* Pet., p. 2 with May 31, T. 22. The Lawsons also assert that the apnea test is "dangerous" even though the evidence was the apnea test is the recommended method for confirming brain death. *Cf.* Pet., p. 5 with May 31, T. 27. The Lawsons also cite as fact that VCU Health System has not taken sufficient steps to have Mirranda transferred. *Id.*, p. 21-23. The record reflects that VCU Health System had made repeated but unsuccessful efforts to help arrange a transfer to a qualified facility. (June 9, T. 16-20). In addition, Judge Hughes specifically found that thyroid treatment was not indicated. (May 31, T. 67).

remained on a ventilator since her arrival at the PICU. (May 31, T. 12-13). Mirranda cannot breathe on her own. (May 31, T. 13-16). Her heart continues to beat because of medications that are administered that prop up her blood pressure and cause the heart to beat regularly. (May 31, T. 13-14, 39; May 20, T. 11-12). According to Dr. Douglas F. Willson[2] and Dr. Jesse C. Bain,[3] since May 17, 2016 when initial testing began, all clinical tests of Mirranda have been consistent with brain death, and none of the clinical exams has reflected any brain activity. (May 20, T. 9-11, 14; May 31, T. 15-16, 20). Mirranda is completely unresponsive to any stimulus despite the absence of sedatives. (May 31, T. 19-20; June 9, T. 7-9).

Determining whether brain death occurs involves a two-step process. (May 31, T. 18-19). The first step involves a battery of clinical tests. (*Id.*). If those tests do not reflect any brain activity, the next step is to conduct two apnea tests.[4] (*Id.*). The apnea tests are intended to confirm whether the clinical diagnosis is correct. (*Id.*). The sole purpose of the apnea tests is to confirm the determination of brain death. (May 20, T. 12-13). The

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[2] Dr. Willson is the Chief of the Division of Pediatric Critical Care at VCU at Children's Hospital of Richmond. (May 20, T. 10).

[3] Dr. Bain is a pediatric intensivist. He has board certifications in general pediatrics and pediatric critical care. (May 31, T. 11).

[4] This accepted protocol is set forth in "Guidelines For The Determination Of Brain Death In Infants And Children: An Update Of The 1987 Task Force Recommendations," *Crit Care Med*, 2011, Vol. 39, No. 9. (Record, p. 72).

apnea test is the final method used under the ordinary standards of medical practice to confirm brain death. (May 31, T. 18-19; Record, p. 72).

The apnea test is used because breathing is controlled by the lowest part of the brain stem, and it is invariably the last brain stem function that is lost. (May 20, T. 12). Thus, the apnea test is the standard test to confirm brain death because it is dispositive. If during the two apnea tests the brain stem does not send any signal to try to breathe, then the person is dead as defined in Va. Code § 54.1–2972. (May 20, T. 12-13).

Under the apnea test, the person is first given additional oxygen. (*Id.*). The ventilator is then temporarily shut off, but the patient is provided with oxygen throughout the test. (May 20, T. 12). The patient is closely monitored as the carbon dioxide in the blood rises to such a degree that a brain stem with any function would try to make the person breathe. (*Id.*). If any sign exists that the patient is trying to breathe, then the test is stopped. (May 31, T. 31-32; Record, p. 79). After the test is completed, the doctor performs a maneuver to breathe off the carbon dioxide. (May 31, T. 29). The test is generally administered over a 10-minute period if no attempt to breathe is detected. (*Id.).* If no attempt to breathe is detected, the test is repeated twelve (12) hours later. (May 31, T. 29-30; Record, p. 78). If the second test reveals no attempt at breathing, the patient is declared dead. (May 20, T. 13).

Under the applicable standard of care, a physician would not administer the thyroid medications suggested by the Lawsons or perform a tracheostomy on Mirranda. (May 31, T. 22-24, 44, 53; June 9, T. 11, 25, 28, 31-32, 94-95). However, if Mirranda were found to be alive, then her course of treatment would be reconsidered, including whether she should undergo a tracheostomy. (May 31, T. 31; June 9, T. 15, 94-95).

From May 19, 2016 when the Lawsons filed their initial pleading, through the final order of June 14, 2016, the Lawsons failed to transfer Mirranda from MCV Hospitals. Further, the trial court continued the case until June 9, 2016 to give the Lawsons additional time to transfer Mirranda. In addition, VCU Health System actively tried to assist in facilitating a transfer. *Beginning on May 20, VCU Health System tried to arrange a transfer with no less than four hospitals that would be capable of accepting Mirranda and also four home care facilities. (May 31, T. 25; June 9, T. 16-20). All the facilities declined to accept a transfer. (Id.)*[5]

The issue is not whether Mirranda is in a persistent vegetative state in which some minimal brain stem function exists. (May 31, T. 20-21). The issue is whether Mirranda has *any* brain stem function whatsoever. (*Id.*)[6]

Argument

[5] Mirranda remains in the PICU.

[6] VCU Health System takes issue with the Lawsons' "proffer" that Mirranda has not deteriorated and that she is no longer receiving norepinephrine.

I. Mirranda's Doctors Are Authorized By Virginia's Determination Of Death Statute To Perform The Apnea Test. (Assignment of Error II)[7]

A. The History Of Brain Death Statutes.

For centuries, a determination of death was a straightforward affair; doctors would determine if a person's heart and lungs had permanently stopped functioning.[8] But with the advancement of modern medicine, it became apparent that such a definition of death was insufficient. Medicine has advanced to such an extent that even after the brain, including the brain stem, has completely ceased to function, a person's lungs can still function on a ventilator and the heart can be made artificially to beat causing blood to flow through the body for an indefinite amount of time. As one author has put it, modern medicine can keep organs going much like keeping cells alive in the lab. Maureen Condic, *Determination of Death: A Scientific Perspective on Biological Integration*, Journal of Medicine and Philosophy, 41:257-78 April 13, 2016.

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[7] There actually is no Assignment of Error II. The Lawsons did not assign error to the trial court's ruling; instead, they merely claimed that VCU Health System erroneously relied on Va. Code § 54.1-2972. Thus, Assignment of Error II should be dismissed because it is insufficient. Rule 5:17(c)(1)(iii); *Davis v. Commonwealth*, 282 Va. 339, 340 (2011). Further, all the Assignments of Error are defective because the Lawsons do not identify where the purported errors were preserved below. Rule 5:17(c)(1).

[8] The classic definition of death is contained in Va. Code § 54.1-2972(A)(1).

As a result, the American Bar Association, American Medical Association, The National Conference of Commissions on Uniform State Laws, and the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research worked together to draft uniform legislation to determine when someone should be declared dead because the brain, including the brain stem, had ceased to function. *Guidelines for the Determination of Death*, JAMA, November 13, 1981, Vol. 246, No. 19. That effort resulted in the Uniform Determination of Death Act, which includes the classic definition of death involving the loss of heart and lung functions, and a definition of death when the brain, including the brain stem, has irreversibly ceased to function. *Id.* Virginia Code § 54.1-2972 is closely patterned on the Uniform Determination of Death Act.

B. Virginia's Version Of The Determination Of Death Act.

The General Assembly has periodically modified the definition of brain death. When this action was filed, brain death was defined as:

> 2. *In the opinion of a physician*, who shall be duly licensed and a specialist in the field of neurology, neurosurgery, electroencephalography, or critical care medicine, *when based on the ordinary standards of medical practice, there is the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions and*, in the opinion of such specialist, *based on the ordinary standards of medical practice* and considering the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions and the patient's medical record, further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such reflexes or spontaneous functions . . . .

Va. Code § 54.1-2972(A)(2) (emphasis added).

Effective July 1, 2016, the General Assembly again amended the statute. Under the current statute which more closely tracks the Uniform Determination of Death Act, a person is medically and legally brain dead if:

> 2. *In the opinion of a physician*, who shall be duly licensed to practice medicine in the Commonwealth and board-eligible or board-certified in the field of neurology, neurosurgery, or critical care medicine, *when based on the ordinary standards of medical practice, there is irreversible cessation of all functions of the entire brain, including the brain stem, and, in the opinion of such physician, based on the ordinary standards of medical practice* and considering the irreversible cessation of all functions of the entire brain, including the brain stem, and the patient's medical record, further

> attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions . . . .

Va. Code 54.1-2972(A)(2) (effective July 1, 2016) (emphasis added).[9]

C. Under Va. Code § 54.1-2972(A)(2), A Physician Is Not Only Authorized but Required To Determine Death Based On The Ordinary Standards Of Medical Practice.

1. Designated Types Of Physicians Have Express Authority Under Virginia's Determination Of Death Act To Conduct The Apnea Test.

Given the complexity of determining brain death, only certain types of physicians are authorized to determine brain death, and the statute expressly directs that such medical specialists do so "based on the ordinary standards of medical practice." Va. Code § 54.1-2972(A)(2). Virginia's statute governing the determination of death also provides that death shall be deemed to have occurred at the time when irreversible loss of brain function occurred. *Id.* Further, a Virginia physician is *required* to complete and sign the death certificate within 24 hours of death. Va. Code § 32.1-263(C) and 12 VAC 5-550-360.

Unambiguous statutes are to be given their plain meaning. *City of Virginia Beach v. ESG Enterprises, Inc.*, 243 Va. 149, 152 (1992) ("'While in the construction of statutes the constant endeavor of the courts is to

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[9] For the Court's convenience, VCU Health System has appended a copy of the House Bill that blacklines the latest changes.

ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used'"). Moreover, when interpreting a statute that grants certain powers or imposes certain duties, such a grant

> carries with it by implication, in absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty . . . . That which is clearly implied is as much a part of the law as that which is expressed.

1982-83 Virginia Op. Atty. Gen. 603, September 1, 1982 (quoting Sands, Sutherland Statutory Construction § 55.04). *See also Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 173-74 (1991) (Under the Dillon Rule, a locality has "'only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.'"); *Norfolk Southern Ry Co. v. Lassiter,* 193 Va. 360, 364 (1952) ("'A policy that is clearly implied is as effective as that which is expressed . . . . The statute should have a rational construction consistent with its manifest purpose, and not one which will substantially defeat its object.'").

From these basic principles of statutory construction, Mirranda's physicians clearly have the authority to conduct a diagnostic test that the ordinary standards of medical practice require be conducted when determining whether Mirranda is brain dead. The legislature has charged

certain physicians with determining whether brain death has occurred, and directed that they do so in compliance with ordinary standards of medical practice. Two of Mirranda's physicians testified that the accepted standard of medical practice dictates that the apnea tests be conducted. (May 20, T. 12, 14, 22-23; May 31, T. 18-19, 27). Those physicians are precisely the types of physicians who, under the statute, may determine if brain death has occurred. Thus, under Va. Code § 54.1-2972, VCU Health System's physicians have the right to conduct the apnea tests.

2. Even If Virginia's Determination Of Death Act Did Not Expressly Authorize The Physicians To Administer The Apnea Test, That Authority Is Clearly Implied.

At the very least, Va. Code § 54.1-2972 certainly gives the designated physician specialists the implied authority to conduct the tests. The statute requires Mirranda's physicians to use ordinary standards of medical practice in determining death. It defies logic to interpret that same statute to allow a layperson to prohibit the physicians from conducting the very test required by the ordinary standards of medical practice. Such an interpretation could lead to absurd results. If Mirranda's parents can prevent the apnea test, then logically they could block any test to forestall a determination of Mirranda's death. The Lawsons could object to the doctors' checking Mirranda's eyes, taking her pulse, or testing her reflexes.

Further, the General Assembly wanted to ensure as much certainty as reasonably possible before a physician declared that someone is brain dead. That is why the General Assembly specified the types of specialists who must determine brain death. The legislature chose specialized experts who are skilled in making brain death determinations and who know what tests must be run to make such determinations. Under the statute, Drs. Willson and Bain have the authority to conduct the apnea tests.

3. VCU Health System Proved That The Apnea Test Was Necessary Based On The Ordinary Standards Of Medical Practice.

Mirranda's physicians explained why the ordinary standards of medical practice require that an apnea test be conducted.[10] Based on three ore tenus hearings, Judge Hughes found that conducting the apnea test was appropriate to determine whether Mirranda has died. That ruling is given the weight of a jury verdict, and the need for and appropriateness of the apnea tests to determine Mirranda's death are now established facts. *McBride*, 288 Va. at 454. On appeal, the Lawsons can no longer contest

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[10] Apnea is the absence of breathing. *Stedman's Medical Dictionary*, 26th Ed. 1995, p. 114. Breathing represents the most basic fundamental function of the brain stem. Consequently, "apnea" is often expressly part of the brain death definition. *Bioethics for Clinicians*, Ch. 24. Brain Death ("Brain death is defined as the absence of all brain function demonstrated by profound coma, apnea, and absence of all brain-stem reflexes.").

the appropriateness of the apnea test in determining whether a child has suffered brain death, and they did not assign error to those findings.[11]

VCU Health System physicians are tasked to follow accepted medical practice in determining a patient's status. *See* Va. Code § 54.1-2915(A)(12) (mandating that a physician conduct his practice in conformance with medical ethics). It is because of the ordinary standards of medical practice that Mirranda's physicians seek to perform the apnea tests. As Dr. Willson testified, he would be astounded if the apnea tests do not confirm Mirranda's brain death. (May 20, T. 12). And it certainly is not difficult to understand why Dr. Willson would be so astounded: Mirranda's brain went without oxygen for at least an hour, and every single indicator and test conducted on Mirranda reflect that she has no brain or brain stem function. (May 20, T. 9-12, 14; May 31, T. 15-16, 20).

Yet Mirranda's physicians want to conduct the dispositive apnea test because that is what standard protocol demands when diagnosing brain

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[11] The only evidence introduced by the Lawsons was the testimony of Paul Byrne, MD, a retired doctor from Ohio and a well-known opponent of brain death. Dr. Byrne is not licensed to practice medicine in Virginia and is not a specialist in neurology, neurosurgery, electroencephalography, or critical care medicine. (June 9, T. 42). He is, therefore, pursuant to Va. Code § 54.1-2972(A)(2), unqualified to determine whether brain death has occurred, how it should be determined, or what is required under the ordinary standards of medical practice. According to Dr. Byrne, "Brain death is fake death." (June 9, T. 45). Dr. Byrne cannot nullify the definition of death under Virginia Code § 54.1-2972(A)(2).

death. Nowhere in Section 54.1-2972 is a layperson given the right to countermand what a qualified physician deems necessary under the ordinary standards of medical practice to determine if someone has died.

II. The Health Care Decisions Act Does Not Apply In This Case Because The Apnea Test Does Not Involve Health Care. (Assignments of Error I, III, and IV)[12]

A. To Qualify As Health Care Under The Health Care Decisions Act, A Service Must Be For The Purpose Of Treating The Patient.

All the clinical neurological tests reflect that Mirranda does not have any brain on brain stem activity. (May 20, T. 11, 14; May 31, T. 15-16, 20). The only thing left to do before officially determining that Mirranda has died is to conduct the apnea tests. (May 20, T. 17-19). To avoid that determination, the Lawsons try to circumvent Va. Code § 54.1-2972, Virginia's version of the Determination of Death Act, and prohibit the apnea test by invoking Virginia's Health Care Decisions Act.

The Lawsons maintain that the apnea test constitutes a health care decision under the Health Care Decisions Act. According to the Lawsons, they therefore must consent to the apnea test before it can be performed. The Lawsons in effect argue that a conflict exists between Va. Code § 54.1-2972 that compels the doctor to follow ordinary medical practices

[12] Like Assignment of Error II, Assignments I and III are fatally defective because they do not assign error to the trial court's rulings.

when determining if brain death has occurred, and Va. Code § 54.1-2986, which gives the designated agent of an incapacitated patient a say in any health care decision involving that incapacitated patient. Based on this purported conflict, the Lawsons conclude that they can indefinitely delay the apnea tests and force the medical team to continue to maintain Mirranda's body on life support even though that team of highly trained medical professionals believes that Mirranda died months ago.[13]

The Lawsons' reliance on Va. Code §§ 54.1-2986 and 54.1-2990 of the Health Care Decisions Act is misplaced because the apnea test is not health care as defined by the Act. Consequently, the Lawsons cannot prevent VCU Health System's physicians from taking the steps necessary to confirm their clinical diagnosis that Mirranda has died.

Specifically, Va. Code § 54.1-2982 unambiguously defines health care for purposes of the Health Care Decisions Act:

> "Health care" means the furnishing of services to an individual *for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability* including, but not limited to, medications; surgery; blood transfusions; chemotherapy; radiation therapy; admission to a hospital, nursing home, assisted living facility or other health care facility; psychiatric or

[13] Dr. Willson explained the toll it takes on the nurses and doctors to continue tending to a patient they know is dead. (May 20, T. 15). And Judge Hughes recognized that continuing to maintain Mirranda's body places a heavy burden on the hospital. (June 9, T. 102).

other mental treatment; and life-prolonging procedures and palliative care.

Va. Code § 54.1-2982 (emphasis added).

Thus, in order to constitute health care, the service *must be for the purpose of preventing, alleviating, curing or healing a patient's illness, injury, or physical disability*. That is the plain and unambiguous language of the statute. If the apnea test does not serve such a purpose, then the test does not constitute health care under the Health Care Decisions Act.

The apnea test serves none of those purposes and does not constitute the withdrawal of a life-prolonging procedure as the Lawsons argue. (Pet. p.12). All clinical tests indicate that Mirranda is brain dead, meaning she has no brain or brain stem function. Such clinical findings are fully consistent with the fact that Mirranda stopped breathing for at least an hour. As repeatedly explained, the apnea tests are only intended to confirm Mirranda's brain death, not to treat her. The apnea test, therefore, does not constitute health care under the Act, and the Act does not limit or restrict a doctor's ability to take necessary steps to determine if Mirranda has died.

If somehow the doctors are wrong and the apnea tests indicate that Mirranda possesses some minimal brain stem function--after not breathing for more than an hour--then the apnea test would be stopped immediately.

(Record 72, 79). At that point, health care decisions would then arise, and the Lawsons would be involved in those decisions. But before a health care decision can be made, a patient must first be alive.[14]

B. No Conflict Exists Between Virginia's Determination Of Death Act And Its Health Care Decisions Act.

As discussed in Section I.C., *supra*, statutes must be given their plain and ordinary meaning. In addition, courts will not assume that a conflict exists between statutes. They will instead view them in context and "'. . . as a whole, or as parts of a great connected, homogeneous system . . . .'" *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957). Thus, even when statutes do apparently conflict with each other, courts will seek to harmonize the statutes whenever reasonably possible so as to give full effect to both. *Boynton v. Kilgore*, 271 Va. 220, 229 (2006).[15]

No conflict exists between Va. Code § 54.1-2972 and Virginia's Health Care Decisions Act. Under Virginia's version of the Determination of Death Act, physicians with specialized skills must determine whether a

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[14] The guardian *ad litem* asserted the apnea tests should not be conducted because the doctors did not believe that Mirranda was suffering. (May 31, T. 72-76). That overlooks why Mirranda's doctors believe there is no pain: Mirranda needs to be alive to feel pain. Regardless, like Mirranda's parents, the guardian *ad litem* cannot preclude the physicians from conducting the apnea test to determine if Mirranda has died.

[15] The Lawsons acknowledge that statutes must be viewed as a whole. Pet., p. 18. Yet they ignore the need to interpret the Health Care Decisions Act in conjunction with Virginia's Determination of Death Act.

person is dead based on the ordinary standards of medical practice. What constitutes the ordinary standards of medical practice represents a medical decision, and laypersons are not authorized to interfere with that medical decision under Va. Code § 54.1-2972. In contrast, Va. Code § 54.1-2986 concerns treatment decisions for living patients.

Thus, the statutes operate in different spheres, which explains why they are located in separate Code chapters. Determinations of death lie within the exclusive province of medical professionals. Services that are intended to prevent, alleviate, cure, or heal illness or injury to a living patient involve lay people who are designated as the patient's "agent." It is a logical distinction based on common sense and sound public policy.

The Lawsons cite the definition of health care in Va. Code § 54.1-2982 and proceed to argue why "medical tests" and "life-sustaining care" constitute health care. They ignore the critical and fundamental part of the definition: to be health care, the test or service must be for the *purpose* of treating the patient, not for the purpose of determining death.[16]

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[16] Notably, the definition of health care in Section 54.1-2982 is narrower than the definition of health care found elsewhere in the Code. For example, the definition of health care is broader for purposes of malpractice. Va. Code § 8.01-581.1. The Court assumes that the General Assembly chooses its words carefully. *Grigg v. Commonwealth*, 224 Va. 356, 364 (1982) (when legislature limits manner of something, that indicates it can be done no other way); *Virginia Department of Health v. NRV Real Estate, LLC*, 278 Va. 181, 187-88 (2009) (the legislature

It is because of this fundamental distinction that VCU Health System emphasizes that this case does not involve a person who is in a permanent vegetative state. Such people possess some brain function, and they are precisely among those types of people that the Health Care Decisions Act is intended to cover and address. If the VCU Health System's physicians believed that Mirranda were in a persistent vegetative state, they would not conduct an apnea test. The test is only conducted to determine death and after all other clinical results reflect no brain or brain stem function.

C. Courts Try To Harmonize Statutes, Not Create Conflicts.

The Lawsons' argument seeks to create a conflict between Virginia's Determination of Death Act and the Health Care Decisions Act by conflating the diagnostic method to determine if death has occurred with a health care decision involving a living person. After conflating these concepts, the Lawsons then argue that a doctor's ability to diagnose death is limited by a guardian's right to make health care decisions and to provide informed consent. As explained at length, the plain language of the respective statutes belies their interpretation. The Lawsons' argument also ignores the principle that "'statutes are not to be considered as isolated

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chooses its words with care). The reason for the different definitions is simple. The Health Care Decisions Act serves a very limited purpose. That purpose does not include interfering with a physician's ability to determine if the patient has in fact died.

fragments of law, but as a whole.'" *Prillaman*, 199 Va. at 405. The Health Care Decisions Act is not interpreted in a vacuum. The Code differentiates between methods to determine death on the one hand and health care decisions for the purpose of treating living patients on the other.

Thus, even if such a conflict appeared to exist – which it does not – the Court would seek to harmonize the statutes. The statutes can be easily harmonized. A determination of death involves a diagnosis whether there is any patient to treat. If it is determined that a living patient actually exists then, and only then, will health care decisions arise that would implicate the Health Care Decisions Act. In contrast, the Lawsons interpretation would create hopeless conflict, and would, according to the Lawsons, allow them to block any method of determining that Mirranda has died, thereby forcing physicians and hospitals to provide "care" to a dead person for months, if not years, at a cost of millions.

On appeal, the Lawsons cite 18 VAC 85-20-28 in support of their argument that the method to determine death is somehow a health care decision. Pet., p. 13. The argument should be summarily rejected for three reasons. It appears the argument was not raised below, so it cannot be asserted now. Rule 5:25. Second, a plain reading of the regulation demonstrates that the regulation presupposes a living patient. It does not address the method a physician should use to determine that death has

occurred. Finally, a regulation cannot expand a definition or right set forth in a statute unless authorized by the General Assembly. *See Cherrie v. Virginia Health Services*, 787 S.E.2d 855 (Va. 2016) (regulation cannot create cause of action unless authorized by statute).[17]

The Lawsons have not cited a case in which a court held that under a state's Health Care Decisions Act, a designated agent can prevent a test that a physician seeks to perform pursuant to the state's Determination of Death Act. The reason is apparent. Actions to determine that someone has died manifestly do not involve the treatment or care of a living patient.[18]

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[17] Because the apnea test does not constitute treatment, Dr. Willson has never asked a parent for permission to conduct an apnea test to determine brain death. (May 20, T. 14).

[18] Almost all the cases tangentially related to the case at bar deal with whether a patient can be removed from life support after a doctor has determined death has occurred. Courts recognize that determining whether death has occurred is a medical decision, and that the hospital can remove life support equipment after the patient is declared dead. *See In re Haymer*, 450 N.E.2d 940 (Ill.App.3d 1983); *Dority v. Superior Court,* 145 Cal App.3d 273 (1983); *Matter of Long Island Jewish Medical Center (Baby Doe),* 641 N.Y.S.2d 989 (1996); *Hawkins v. Dekalb Medical Center*, 313 Ga. App. 209, 721 S.E.2d 121 (Ga. App. 2011).

III. VCU Health System Did Not Violate Va. Code § 54.1-2990. (Assignments of Error III and IV)

In their third and fourth assignments of error, the Lawsons contend that there has been a violation of Va. Code § 54.1-2990. The Lawsons claim that Mirranda's physicians did not make a reasonable effort to transfer Mirranda to another physician and impeded the ability to transfer her by refusing to perform a tracheostomy and administer certain thyroid treatments. They claim that such purported failures constituted a failure to provide "life-sustaining care" required by Va. Code § 54.1-2990. Pet., pp. 21-23, 26-28. According to the Lawsons, the trial court erred in failing to require VCU Health System to provide that care. Pet., pp. 26-28. The argument should be rejected for three reasons.

First, the Lawsons never expressly argued that the failure to conduct a tracheostomy and provide thyroid treatments violated Va. Code § 54.1-2990 or that VCU Health System failed to make a reasonable effort to transfer Mirranda. Instead, they argued the trial court should delay the test to allow more time to transfer Mirranda. The Lawsons cannot raise a new argument for the first time on appeal in an effort to reverse a trial court's rulings. Rule 5:25.

Second, whether the standard of care was satisfied and whether VCU Health System failed to reasonably try to effect a transfer is not a question

of law. It is a question of fact. VCU Health System tried to transfer Mirranda to eight different facilities. In light of the trial court's decision, Judge Hughes found that the care provided was appropriate and that VCU Health System had reasonably tried to facilitate a transfer. Those findings carry the weight of a jury verdict.

Third, and perhaps more importantly, as part of the Health Care Decisions Act, Section 54.1-2990 simply does not apply. That statute only involves life-sustaining care provided for the purpose of letting a living person die. It does not involve a short, closely monitored test to confirm that someone has in fact died.

Conclusion

Wherefore, VCU Health System Authority asks that argument on the Petition for Appeal be held expeditiously and that the Petition be denied.

Respectfully submitted,

VCU HEALTH SYSTEM AUTHORITY

Rodney K. Adams, Esquire
William H. Shewmake, Esquire
Gretchen C. Byrd, Esquire
LECLAIRRYAN, A PROFESSIONAL CORPORATION
919 East Main Street, 24th Floor
Richmond, VA 23219
Telephone: (804) 783-2003
Facsimile: (804) 783-2294
Email: rodney.adams@leclairryan.com
william.shewmake@leclairryan.com
gretchen.byrd@leclairryan.com

Attorneys for VCU Health System Authority

Anne G. Scher, Esquire
Director, Department of Professional Liability
VCU Health System
P.O. Box 980521
Richmond, VA 23298-0521
Telephone: (804) 648-6300
Facsimile: (804) 648-1100
Email: anne.scher@vcuhealth.org

Counsel for VCU Health System Authority

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed and mailed to opposing counsel and guardian *ad litem* this 19th day of September 2016, as follows:

Phillip J. Menke, Esquire
Purnell, McKennett & Menke, PC
9214 Center Street
Suite 1001
Manassas, VA 20110
Email : pmenke@manassaslawyers.com
Counsel for Patrick E. Lawson and Alison J. Lawson

Michele L. Chiocca, Esquire
Whitehead & Chiocca, PLC
2420 Maplewood Avenue
Suite G
Richmond, VA 23220
Email : mchicca@whiteheadchioccalaw.com
Guardian ad litem for Mirranda G. Lawson

William H. Shewmake

CHAPTER 97

An Act to amend and reenact § 54.1-2972 of the Code of Virginia, relating to declaration of neurological death.

[H 652]

Approved March 1, 2016

Be it enacted by the General Assembly of Virginia:

1. That § 54.1-2972 of the Code of Virginia is amended and reenacted as follows:

§ 54.1-2972. When person deemed medically and legally dead; determination of death; nurses' or physician assistants' authority to pronounce death under certain circumstances.

A. A person shall be medically and legally dead if:

1. In the opinion of a physician duly authorized to practice medicine in ~~this~~ *the* Commonwealth, based on the ordinary standards of medical practice, there is the absence of spontaneous respiratory and spontaneous cardiac functions and, because of the disease or condition ~~which~~ *that* directly or indirectly caused these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation would not, in the opinion of such physician, be successful in restoring spontaneous life-sustaining functions, and, in such event, death shall be deemed to have occurred at the time these functions ceased; or

2. In the opinion of a physician, who shall be duly licensed *to practice medicine in the Commonwealth* and ~~a specialist~~ *board-eligible or board-certified* in the field of neurology, neurosurgery~~, electroencephalography~~, or critical care medicine, when based on the ordinary standards of medical practice, there is ~~the absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions~~ *irreversible cessation of all functions of the entire brain, including the brain stem,* and, in the opinion of such ~~specialist~~ *physician*, based on the ordinary standards of medical practice and considering the ~~absence of brain stem reflexes, spontaneous brain functions and spontaneous respiratory functions~~ *irreversible cessation of all functions of the entire brain, including the brain stem,* and the patient's medical record, further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such ~~reflexes or spontaneous~~ functions, and, in such event, death shall be deemed to have occurred at the time when ~~these conditions first coincide~~ *all such functions have ceased.*

B. A registered nurse or a physician assistant who practices under the supervision of a physician may pronounce death if the following criteria are satisfied: (i) the nurse is employed by or the physician assistant works at (a) a home health organization as defined in § 32.1-162.7, (b) a hospice as defined in § 32.1-162.1, (c) a hospital or nursing home as defined in § 32.1-123, including state-operated hospitals for the purposes of this section, (d) the Department of Corrections, or (e) a continuing care retirement community registered with the State Corporation Commission pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2; (ii) the nurse or physician assistant is directly involved in the care of the patient; (iii) the patient's death has occurred; (iv) the patient is under the care of a physician when his death occurs; (v) the patient's death has been anticipated; (vi) the physician is unable to be present within a reasonable period of time to determine death; and (vii) there is a valid Do Not Resuscitate Order pursuant to § 54.1-2987.1 for the patient who has died. The nurse or physician assistant shall inform the patient's attending and consulting physicians of his death as soon as practicable.

The nurse or physician assistant shall have the authority to pronounce death in accordance with such procedural regulations, if any, as may be promulgated by the Board of Medicine; however, if the circumstances of the death are not anticipated or the death requires an investigation by the Office of the Chief Medical Examiner, the nurse or physician assistant shall notify the Office of the Chief Medical Examiner of the death and the body shall not be released to the funeral director.

This subsection shall not authorize a nurse or physician assistant to determine the cause of death. Determination of cause of death shall continue to be the responsibility of the attending physician, except as provided in § 32.1-263. Further, this subsection shall not be construed to impose any obligation to carry out the functions of this subsection.

This subsection shall not relieve any registered nurse or physician assistant from any civil or criminal liability that might otherwise be incurred for failure to follow statutes or Board of Nursing or Board of Medicine regulations.

C. ~~Death, as defined in subdivision A 2, shall be determined by a specialist in the field of neurology, neurosurgery, electroencephalography, or critical care medicine and recorded in the patient's medical record.~~

~~D.~~ The alternative definitions of death provided in subdivisions A 1 and A 2 may be utilized for all purposes in the Commonwealth, including the trial of civil and criminal cases.