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IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

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

v.

PATRICK B. LAWSON and
ALISON J. LAWSON,
Respondents.

IN RE: MIRRANDA GRACE LAWSON

Petition for Review From The
Richmond Circuit Court – Case No. CL16-2358

VCU HEALTH SYSTEM AUTHORITY'S PETITION FOR REVIEW

Rodney K. Adams (VSB # 32656)
William H. Shewmake (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

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MISCELLANEOUS

VCU Health System Authority ("VCU Health System"), by counsel, pursuant to Va. Code § 8.01-626 and Rule 5:17A, states as follows:

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. Mirranda was transported to the pediatric intensive care unit (the "PICU") at MCV Hospitals in Richmond. She arrived on a ventilator and has been on a ventilator ever since. Sadly, Mirranda's doctors have clinically concluded that Mirranda has suffered brain death, and standard protocol calls for that initial diagnosis to be confirmed by a non-invasive procedure known as an apnea test.

The area of the brain stem that controls breathing is the last part of the brain to die. If that portion of the brain has died, then the patient is legally dead. The apnea test involves briefly turning off the ventilator to detect if the brain stem tries to signal the body to breathe. If no brain activity is detected during two apnea tests 12 hours apart, then Mirranda would be declared dead pursuant to Va. Code § 54.1-2972. Mirranda's parents, Patrick B. and Alison J. Lawson ("the Lawsons") have objected to the apnea tests, which has led to this case.

The trial court by Final Order held that VCU Health System is allowed to conduct apnea tests to confirm that Mirranda has died. After the Lawsons filed a Notice of Appeal, the court entered an order setting a $30,000 appeal bond that not only suspends execution of the Final Order pending appeal, but enjoins VCU Health System from conducting the apnea tests during the appeal, which could last for months.

Because a physician has a duty to determine if a patient has died, VCU physicians have a right to perform the apnea tests. However, VCU Health System elected to file a petition with the circuit court out of sensitivity to Mirranda's parents. VCU Health System believed it would be easier for the Lawsons if a court confirmed that conducting the apnea test is the right thing to do. VCU Health System did not imagine that it would be enjoined from exercising a right it possessed independent of the court's order, especially after VCU Health System prevailed on the merits. The trial court's temporary injunction constitutes error for a number of reasons. First, the trial court had lost jurisdiction to enter a preliminary injunction because the Lawsons had previously filed a notice of appeal. *Walton v. Commonwealth,* 256 Va. 85, 95 (1998).

Second, the trial court abused its discretion when it failed to analyze the relevant factors that a court must consider when deciding whether to

grant a temporary injunction. Third, a proper analysis reflects that no temporary injunction should have been issued. The trial court had already determined that VCU Health System was likely to succeed on the merits. The final order is consistent with Va. Code § 54.1-2972, which defines death and provides that the attending physician take necessary steps to determine if death has occurred.

Further, by prohibiting VCU Health System from confirming Mirranda's death, VCU Health System and the public are irreparably harmed. There are only 13 beds in the PICU. Having one of the PICU beds, and all the human resources that entails, occupied by Mirranda, who has likely been dead for weeks, jeopardizes the care of critically ill children that VCU Health System is being forced to turn away. It also taxes the limited resources that VCU Health System has to care for critically ill pediatric patients, and it creates extraordinary ethical and emotional issues for a medical team that is compelled to provide care for someone whom they believe has died, at a cost of nearly $10,000 a day. Nor is Mirranda harmed by conducting the tests. If she has died, no harm exists. If the test indicates any brain stem activity, then she would receive additional care.

Finally, VCU Health System has filed a motion to expedite the appeal, *which the guardian ad litem does not oppose.* Despite the urgency, the

Lawsons oppose VCU Health System's Motion. The Lawsons cannot insist on an appellate review of the final order below, and then seek to delay that review as long as possible. If an injunction is to remain in place, then it should require the Lawsons to file their petition for appeal expeditiously.

Assignments of Error

1. The trial court erred when it entered an appeal bond order that prohibited VCU Health System from conducting apnea tests to determine whether Mirranda has died, because the trial court had been divested of jurisdiction when the Lawsons filed their Notice of Appeal. (Preserved at pp. 400-405, 422-426).[1]

2. The trial court erred when it failed to consider all the relevant factors governing temporary injunctions before prohibiting VCU Health System from conducting the apnea tests pending the appeal. (Preserved at pp. 400-405, 429-436).

3. The trial court erred when it enjoined VCU Health System from conducting the apnea tests pending appeal. (Preserved at pp. 400-405, 422-436).

Material Proceedings Below

On May 19, 2016, Patrick Lawson filed a *pro se* "Emergency Motion to stop brain dead test and postpone removal of life support." The trial court issued a temporary *ex parte* injunction that day. After an emergency hearing the next day, the injunction was dissolved.

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[1] VCU Health System has paginated the relevant portions of the record and transcripts and will cite the numbered pages as (p. __).

When the Lawsons continued to object, VCU Health System filed a Petition under the same style and case number as that assigned to the *pro se* injunction request. On May 31, 2016, the trial court conducted an *ore tenus* hearing. The court deferred its ruling until June 10, 2016 to give the Lawsons additional time to try to have Mirranda transferred from VCU Health System. (pp. 208-09). On June 9, 2016, the trial court held a third *ore tenus* hearing, and on June 10, 2016, the court entered a final order finding that VCU Health System is allowed to administer the apnea tests. Later that day, the Lawsons filed a Notice of Appeal.

At a June 14, 2016 hearing, the court amended its Final Order with no substantive changes. The court set a $30,000 appeal bond suspending the Amended Final Order and prohibiting VCU Health System from conducting the apnea tests without the Lawsons' consent during the appeal. The Order incorporating these rulings was entered on June 14, 2016, and the Appeal Bond was filed the next day.

Facts

On May 11, 2016, Mirranda Lawson choked on a popcorn kernel. (pp. 13, 142). Mirranda suffered 60 to 70 minutes of hypoxic respiratory cardiac arrest. (pp. 142-43, 274). She was ultimately transported to the VCU Health System PICU on a ventilator and has remained on a ventilator.

(pp. 142-44). Her heart continues to beat because of medications that are administered to prop up her blood pressure and cause the heart to beat regularly. (pp. 14, 15, 143-44, 169). Since May 17, 2016 when initial testing began, all clinical tests conducted on Mirranda have been consistent with brain death. (pp. 14, 17); *see also* (pp. 145-46).

Under standard protocol, determining whether brain death occurs involves a two-step process. (pp. 148-49). 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.[2] (*Id.*). The sole purpose of the apnea tests is to confirm the clinical diagnosis of brain death. (pp. 15-16).

Breathing is controlled by the lowest part of the brain stem, and it is invariably the last brain stem function that is lost. (p. 15). The apnea test is used to confirm brain death because it is dispositive. If during the apnea tests the brain stem does not send any signal to try to breathe, then the person is dead. (pp. 15-16).

The apnea test is non-invasive. (pp. 158-60). The ventilator is temporarily shut off, but the patient is provided with oxygen throughout the test. (*Id.*). The patient is closely monitored as the carbon dioxide in the

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[2] The nationally accepted protocol is "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. (p. 113-29).

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. (pp. 161-62). The test is generally administered over a 10-minute period. (*Id.*). If no attempt to breathe is detected, the test is repeated 12 hours later. (pp. 125, 159). If the second test reveals no attempt at breathing, the patient is declared dead. (p. 16).

Standard of Review

Assignment of Error 1 is a question of law and involves a *de novo* standard of review. Assignments of Error 2 and 3 involve an abuse of discretion standard of review. Failure to properly consider all relevance factors is an abuse of discretion. *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 628-29 (1953) (failure to properly apply correct relevancy test is abuse of discretion); *Egan v. Butler*, 290 Va. 62, 69 (2015); *Baldwin v. McConnell*, 273 Va. 650, 658-59 (2007) (court must consider five factors when ruling on remittitur of punitive damages).

Argument

I. Physicians Have The Right To Conduct The Apnea Test Because The Test Does Not Involve A Health Care Decision.

Virginia Code § 54.1-2972.A. provides that a person is legally dead if:

> 2. In the opinion of a physician . . . there is the absence of brain stem reflexes, spontaneous brain functions and

> spontaneous respiratory functions and, . . . further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such reflexes or spontaneous functions [.]

The apnea test is used to definitively confirm whether the patient has died. The test is used only after all clinical tests and observations indicate brain death has occurred. The apnea test represents the final component of the clinical evaluation to determine whether the patient has died.

A Virginia physician has the right *and duty* to determine if death has occurred. Virginia Code § 54.1-2972.A.2 expressly grants physicians the authority to make the determination of death based on "brain death." Moreover, physicians are required to follow scientific method and accepted medical practice in determining a patient's status. *See* Va. Code 54.1-2915.A.12 (physician must conform with medical ethics). Virginia Code § 54.1-2972 does not mention, much less require consent from a patient's surrogate decision maker in order for a physician to determine death.

The alternative would make no sense. If a family member could veto the physician's attempt to verify that death has occurred, then loved ones could refuse any examination by the attending physician – including the taking of vital signs – in order to forestall confirmation that their family member has died. That would compel physicians and healthcare professionals to continue providing intensive care to someone who has

been dead for months if not years. It also would induce physicians to declare someone dead without all the possible relevant information, thereby risking a mistake.

The Lawsons argued that the Health Care Decisions Act, Va. Code § 54.1-2981, *et seq.*, applied, and that they needed to consent to the apnea test. The Act is inapplicable because whether to conduct the apnea test is not a healthcare decision. It only involves a determination of whether the patient has died. Moreover, determination of death set forth in Va. Code § 54.1-2972 is not part of and does not refer to the Health Care Decisions Act. To be a patient, one must be alive, and whether someone is alive or dead does not involve a question of parental consent.[3]

II. The Trial Court Lost Jurisdiction To Enter A Temporary Injunction.

The trial court entered a final order declaring that VCU Health System had the right to conduct the apnea tests. That same day, the Lawsons filed

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[3] The Lawsons argued below that physicians had refused to administer a form of thyroid treatment, which the Lawsons believed could somehow make a difference in Mirranda's condition. The Lawsons maintained that under Va. Code §§ 54.1-2287 and 2990, they had 14 days to arrange a transfer before any apnea test was conducted. Again, those statutes do not apply because the apnea tests do not constitute health care. But the trial court delayed ruling until June 10, 2016 to provide the Lawsons a further opportunity to arrange a transfer. No other hospital or agency will take Mirranda because all the clinical signs indicate that she has died. Mirranda remains in the PICU.

a Notice of Appeal. Once the appellant files a notice of appeal, the trial court loses jurisdiction of the case. *Walton*, 256 Va. at 95 (refusing to consider a *nunc pro tunc* sentencing order entered by the trial court after the notices of appeal were filed "because the trial court was divested of jurisdiction once the defendant filed his notices of appeal. We have stated that 'the orderly administration of justice demands that when an appellate court acquires jurisdiction over the defendant involved in litigation and the subject matter of their controversy, the jurisdiction of the trial court from which the appeal was taken must cease.'").[4] When the Lawsons filed their Notice of Appeal, the trial court lost jurisdiction to grant injunctive relief.

Despite losing jurisdiction, the trial court, as part of the appeal bond order, prohibited VCU Health System from conducting the apnea tests irrespective whether the physicians have a right to do so independent of the final order. That prohibition constituted a temporary injunction. *Virginia Civil Procedure*, § 3.3, p. 290-91 (6th Ed. 2014) (order that compels or prohibits action constitutes injunction); *Black's Law Dictionary*, 788 (1999).

Under Va. Code § 54.1-2972, VCU Health System physicians have a right to conduct the apnea tests. In effect, VCU Health System's Petition

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[4] This is true even when 21 days had not elapsed from the final order, and the trial court would have had jurisdiction to enter the subsequent order absent the Notice of Appeal. *Id.*

was declaratory in nature. An order setting the Appeal Bond could suspend VCU Health System's ability to *rely* on the trial court's ruling. The Appeal Bond, however, could not prevent VCU Health System from exercising rights it possesses *independent* of the trial court's ruling. It was, therefore, error for the trial court to enjoin VCU Health System from conducting the tests after the court lost jurisdiction.

III. The Trial Court Failed To Apply The Relevant Factors In Deciding Whether To Grant A Temporary Injunction. Applying Those Factors Demonstrates That The Trial Court Erred In Granting A Temporary Injunction.

In granting a temporary injunction, the trial court had to consider the factors governing temporary injunctions and stays. It was an abuse of discretion not to do so. *McNeir, supra; Egan, supra; Baldwin, supra.*

In addition, Va. Code § 8.01-628 provides that "[n]o temporary injunction shall be awarded unless the court shall be satisfied with the plaintiff's equity." This Court has likewise held that "no single test is to be mechanically applied, and no single factor can be considered alone as dispositive. Instead, a court must consider the totality of the circumstances and decide whether equity counsels for the temporary preservation of the status quo." *Commonwealth of Virginia v. Sweet Briar Institute*, p. 3 (Unpub. Opin., 2015). The relevant factors to consider include:

- whether the Lawsons made a strong showing that they would likely succeed on the merits;
- whether the Lawsons would be irreparably injured absent the temporary injunction;
- whether the injunction would injure VCU Health System and others with an interest in the proceedings; and
- where the public interest lies.

See generally, *Nken v. Holder*, 556 U.S. 418, 426 (2009) (factors to consider when deciding to grant a stay).

A proper analysis demonstrates why the lower court erred in granting the temporary injunction. First, the trial court had already concluded the Lawsons would not prevail, and the trial court's findings are given the weight of a jury verdict. *McBride v. Bennett*, 288 Va. 450, 454 (2014). Ironically, the temporary injunction pending appeal had the strange effect of the court declaring that VCU Health System should prevail and then giving the Lawsons exactly what they wanted.

Second, if Mirranda has died, then no irreparable harm to the Lawsons exists in conducting the test. *And if brain stem activity were detected, Mirranda would receive any additional care that she may need.*

In contrast, a substantial delay would irreparably harm VCU Health System, the PICU staff, and the children and families who must be turned

away by VCU Health System while an appeal drags on.[5] VCU Health System has had to turn away or divert children because there is no bed available in the PICU. The complex care provided in the PICU is labor intensive, and PICU units can be chronically understaffed in relation to the demanding care provided.[6] Mirranda requires full time care from at least one nurse and sometimes more. The availability of pediatric critical care is extremely limited and staffing a challenge. (Roane Affidavit; Willson Affidavit). Those limited resources should not be used on someone who has died. The public interest is significantly harmed when VCU Health System is having to turn away critically ill children. (*Id.*) And there is another intangible harm that cannot be quantified: damage to the morale of the dedicated PICU team of professionals. (p. 23).[7]

The environment of the PICU is highly stressed and emotional given the gravity of the patients' conditions and the toll that takes on the families. That stress is exacerbated by the tension that arises between the physicians and nurses who believe Mirranda has died and the family who

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[5] If the Lawsons waited until mid-September to file their petition for appeal, then the next scheduled writ panel would not begin until October 18, 2016.

[6] The injunction is part of an appeal bond the lower court entered pursuant to Va. Code § 8.01-676.1. Section 8.01-676.1(E) provides that this Court may consider affidavits when reviewing suspension bonds. The affidavits are attached to the Motion to Expedite.

[7] Dr. Willson would find it "astounding" if the apnea tests did not confirm that Mirranda had died. (p. 15).

refuses to allow a test to determine if Mirranda has died. The Court can also appreciate the turmoil of health care professionals who are being compelled to provide constant health care to someone they are convinced has died, while in the midst of adversarial litigation. (Roane Affidavit, ¶ 11; Willson Affidavit, ¶ 14); (p. 352). Given the publicity of this case, staff is also dealing with strangers showing up at the PICU, which raises security issues for the staff and other families. (Roane Affidavit, ¶ 11).

All this is occurring while extraordinary costs are being incurred. The cost of Mirranda's care is almost $10,000 a day. (John F. Duval Affidavit). The additional cost of care going forward would exceed another $1.2 million under the normal appellate schedule for a petition of appeal.[8]

In considering whether to grant a temporary injunction, some courts have followed a slightly different test set forth in *Winter v. Nat'l Res. Def Council, Inc.*, 129 S.Ct. 365 (2008). The test differs *Nken* because it includes a "balancing of equities." The equities lie with VCU Health System. It is understandable that the Lawsons do not want to know their

[8] No insurance payments have been made, and it is unknown to what extent insurance will cover the costs, especially in light of the doctors' opinion that Mirranda has almost certainly died. (Duval Affidavit, ¶ 14). The $30,000 appeal bond does not begin to cover the costs VCU Health System will incur if Mirranda continues to receive care for months.

child has died. But VCU Health System, the PICU team – and the public who depends on them – urgently need to know if Mirranda has passed.

The balance is further altered by the Lawsons' opposition to the Motion to Expedite the Appeal. The guardian *ad litem* does not oppose the Motion to Expedite the Appeal; yet, the Lawsons oppose it. Even if the Lawsons – at extraordinary cost to VCU Health System, staff and the public – were entitled to prevent temporarily the apnea tests in order to permit an appellate review, equity demands a quick review. Any injunction should require that the Lawsons expedite their appeal.[9]

Conclusion

Wherefore, VCU Health System Authority, by counsel, asks the Court to grant its Petition for Review and vacate the appeal bond order in its entirety, or in the alternative 1) vacate the portion that enjoins VCU Health System from conducting the apnea tests or 2) modify the injunction to require that the Lawsons file their petition for appeal either within five days of the Court's order modifying the appeal bond order, or within such other deadline that the Court deems appropriate.

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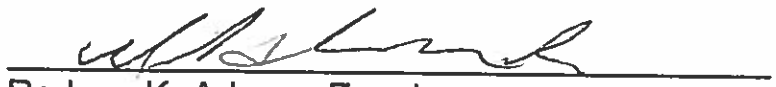
[9] Because this Court has jurisdiction of the case, it has authority to suspend, vacate *or* modify the terms of the trial court's appeal bond order and injunction. *See* Va. Code § 8.01-626; *Purcellville v. Potts,* 179 Va. 514 (1942); *Virginia Civil Procedure*, Section 3.3, p. 295 (6th Ed. 2014).

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

I hereby certify the following:

1. The Petitioner and its counsel and required information are:

Virginia Health System Authority, Petitioner

VCU

Rodney K. Adams (VSB # 32656)
William H. Shewmake (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: rodney.adams@leclairryan.com
william.shewmake@leclairryan.com
gretchen.byrd@leclairryan.com

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

2. The Respondents and their counsel and required information are:

Patrick B. Lawson and Alison J. Lawson, Respondents

Phillip J. Menke, Esquire (VSB # 71265)
Purnell, McKennett & Menke, PC
9214 Center Street, Suite 1001
Manassas, Virginia 20110
Telephone: (703) 368-9196
Facsimile: (703) 361-0092
Email: pmenke@manassaslawyers.com

3. The Guardian *ad litem* is:

Michele L. Chiocca, Esquire (VSB # 41342)
Whitehead & Chiocca, PLC
2420 Maplewood Avenue, Suite G
Richmond, Virginia 23220
Telephone: (804) 254-5600
Facsimile: (804) 254-5652
Email: mchiocca@whiteheadchioccalaw.com

4. The copy of the record being filed is an accurate copy of the record of the lower tribunal and contains everything therefrom necessary for a review of the Petition.

5. The Petition has been served on all opposing counsel and Guardian *ad litem* by Federal Express and email this 27th day of June, 2016.

William H. Shewmake, Esquire