IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

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 MOTION TO EXPEDITE THE APPEAL

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VCU HEALTH SYSTEM AUTHORITY'S MOTION TO EXPEDITE THE APPEAL

Now comes Virginia Commonwealth University Health System Authority ("VCU Health System") and pursuant to Rule 5:4 of the Supreme Court of Virginia, moves the Court to expedite the appeal as follows:

Statement

VCU Health System has informed opposing counsel and the guardian *ad litem* of this motion. Counsel for Patrick B. Lawson and Alison J. Lawson ("the Lawsons") has indicated that the Lawsons will probably oppose the motion and intend to file a response. Counsel for VCU Health System has not yet heard from the guardian *ad litem,* who may be unavailable this week, and does not know if the guardian *ad litem* will support or oppose the motion and whether she will file a response.

Introduction

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 then 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 stayed on a ventilator ever since. The PICU is the only pediatric care Level 1 trauma center in the

state and the only pediatric critical care unit in central Virginia to provide advanced intensive care such as extracorporeal membrane oxygenation, cardiac surgery, neurosurgery and other highly complex pediatric care. (Jeniece Roane, RN, Affidavit, ¶ 5).

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. 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 brain activity is detected during the first test, the test is repeated twelve (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 have objected to the apnea tests, which has led to this case.

Based on the medical testimony of two of Mirranda's physicians over the course of three hearings, on June 10, 2016, Judge Hughes by final order held that VCU Health System is allowed to conduct the apnea tests to determine if Mirranda has died. Yet despite a final ruling on the merits that VCU Health System should proceed with the apnea tests, the trial court then entered an order setting a $30,000 appeal bond that suspends

execution of the Final Order pending appeal and further prohibits VCU Health System from conducting the apnea tests during the appeal.

VCU Health System asks for an expedited appeal because it is urgent to determine if Mirranda has died. There are only thirteen (13) beds in the PICU, and VCU Health System is having to turn away children who are in desperate need of services that only VCU Health System's PICU can provide in all of central Virginia. (Douglas F. Willson, M.D. Affidavit, ¶s 5-8). Having one of the PICU beds, and all the human resources that entails, occupied by Mirranda, who has likely been dead for weeks, is jeopardizing the care and health 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. During the weeks while this action has been pending, all the clinical tests continue to detect no brain activity because Mirranda has almost certainly died. Mirranda's death is tragic, but the tragedy of the situation does not change the fact that Mirranda's physicians need to conduct non-invasive apnea tests to confirm their clinical diagnosis of death.

VCU Health System emphasizes that the issue is not whether to disconnect Mirranda from life support if she is in a persistent vegetative state. If the apnea tests reveal any brain stem activity, then care would continue. Indeed, if brain activity does exist, then that would alter the care that Mirranda is receiving. Rather, the issue is simply whether VCU Health System can conduct the standard diagnostic test that conclusively establishes whether Mirranda has died. As Drs. Willson and Bain testified below, the apnea tests do not involve a health care decision or treatment. Rather, they represent the accepted, best test to confirm that death has occurred.

The issue in this case is, therefore, simple: can VCU Health System conduct a test used nationwide to confirm a clinical diagnosis of death? The trial court's ruling is given the weight of a jury verdict. *McBride v. Bennett*, 288 Va. 450, 454 (2014). Thus, the trial court's ruling that VCU Health System can conduct the test - after three ore tenus hearings – will likely be affirmed, and the chance of the Lawsons' success on appeal is remote. An expedited appellate process is therefore in the best interest of justice. It provides the Lawsons an opportunity to have this Court review the decision below. It also serves the public good by ensuring a quick resolution that will allow VCU Health System to treat other children in

desperate need of the PICU if the apnea tests confirm that Mirranda has died.

Again, what has happened to Mirranda is tragic. The tragedy should not be compounded by having a dead child interfere with the PICU medical team's ability to treat other gravely ill children whom they can help.

Procedural History

Mirranda's physicians advised her parents that the physicians believed that Mirranda had suffered brain death, and they intended to conduct two apnea tests to confirm their clinical diagnosis that Mirranda had died. On May 19, 2016 the Lawsons filed a pro se, one page handwritten document in Richmond Circuit Court styled "Emergency Motion to stop brain dead test and postpone removal of life support," and asking that VCU Health System be enjoined from conducting the apnea tests and declaring that Mirranda had died. The trial court issued a temporary *ex parte* injunction that day prohibiting VCU Health System from withdrawing life support. On May 20, 2016, a hearing was held on the injunction request, and by order dated May 20, 2016, the injunction was dissolved. It appeared that the Lawsons were no longer objecting to the apnea tests.

However, when VCU Health System's physicians entered Mirranda's room that same day to perform the apnea tests, the Lawsons handed the

physicians a handwritten objection to the apnea tests. The physicians did not proceed with the test. Instead, on May 23, 2016, VCU Health System filed a petition and a motion for an emergency hearing on the petition in the circuit court under the same style and case number CL 16-2358, as that assigned to the pro se injunction request. Shortly thereafter, the Lawsons obtained counsel. On May 23, 2016 the Court appointed Michele L. Chiocca as guardian *ad litem*. On May 27, 2016 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. No hospital or home health care agency had been willing to agree to Mirranda's transfer. Judge Hughes therefore deferred his ruling until June 10, 2016 to give the Lawsons additional time to have Mirranda transferred from VCU Health System. (May 31, T. 78-79). After the May 31, 2016 hearing, there continued to be numerous attempts to transfer Mirranda to another hospital or home care agency, but no hospital or home health care agency would accept the transfer. (June 9, T. 16-20).

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. Later that same day, the

Lawsons filed a Notice of Appeal. With no order from the trial court setting a suspension bond amount, the Lawsons, through counsel, also filed a $500 appeal bond purporting to suspend execution on the Final Order pending appeal.

On Monday, June 13, 2016, the Lawsons filed a motion to approve the previously filed appeal bond, and a hearing was set before Judge Hughes for Tuesday, June 14, 2016 at 8:30 a.m. Also on June 13, 2016, without notifying VCU Health System's counsel, the Lawsons obtained an *ex parte* Order from Judge Rupe, ordering that VCU Health System not conduct the apnea tests through June 14, 2016 at 10:00 a.m.

At the June 14, 2016 hearing, Judge Hughes amended the June 10, 2016 Final Order without substantively changing it. Judge Hughes then ruled that he would set a $30,000 appeal bond suspending his Final Order upon the bond being filed with the Clerk with proper surety. He further ruled that after the appeal bond was filed, VCU Health System was prohibited from conducting the apnea tests without the Lawsons' consent during the appeal. To allow the Lawsons a reasonable time to file the bond, VCU Health System was ordered not to conduct the apnea tests any time before June 17, 2016 regardless whether an appeal bond had been

filed yet. The Order incorporating these rulings was entered on June 15, 2016, and the Appeal Bond was filed that same day.

Facts

On May 11, 2016, Mirranda Lawson choked on a popcorn kernel. (May 20, T. 10). Mirranda suffered 60 to 70 minutes of hypoxic respiratory cardiac arrest. (May 31, T. 12-13; June 9, T. 24). She was first taken to Mary Washington Hospital and was subsequently transferred to the VCU Health System PICU on a ventilator and has remained on a ventilator since her arrival at the PICU. (May 31, T. 12-13). Mirranda cannot breathe on her own. (May 31, T. 13-14). 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. Willson, since May 17, 2016 when initial testing began, all the clinical tests conducted on Mirranda have been consistent with brain death, and none of the clinical exams has reflected any brain activity. (May 20, T. 11, 14); *see also* (May 31, T. 15-16). She is completely unresponsive to any stimulus despite the absence of any sedatives or other medication. (May 31, T. 19-20; June 9, T. 7-9).

Under standard protocol, 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 under the accepted protocol is to conduct two (2) apnea tests.[1] (*Id.*). The apnea tests are intended to confirm whether the clinical diagnosis is correct. (*Id.*). The apnea tests do not constitute health care. The sole purpose of the apnea tests is to confirm the diagnosis of brain death. (May 20, T. 12-13).

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 tests are the standard test to confirm brain death because they are dispositive. If during the 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).

The apnea tests are non-invasive. (May 31, T. 29-30). 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. (*Id.*). 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 there is any sign that the patient is trying to

[1] The nationwide 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. *See* Exhibit 1.

breathe, then the test is stopped. (May 31, T. 31-32). 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 ten (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; Exhibit 1). If the second test reveals no attempt at breathing, the patient is declared dead. (May 20, T. 13).

The issue is not whether Mirranda is in a persistent vegetative state in which some minimal brain stem activity exists. (May 31, T. 20-21). The test is to determine whether Mirranda has *any* brain stem activity. (*Id.*).

Argument

I. The Apnea Tests Do Not Involve A Health Care Decision But Are The Accepted Diagnostic Tool To Conclusively Determine If Death Has Occurred.

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

> 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,* and, in such event, death shall be deemed to have occurred at the time when these conditions first coincide.

(emphasis added).

In short, the brain stem controls all the basic autonomic systems. If the brain stem has died, then the person is legally and medically dead. As VCU Health System repeatedly emphasized below, the apnea tests do not involve a health care decision. The tests are only used to definitively confirm whether the patient has died, and the test is used only after all clinical tests and observations indicate that brain death has occurred.

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." As set forth above, the statute states that death shall be deemed to have occurred at the time when irreversible loss of brain function has occurred. A Virginia physician pronouncing death must also complete and sign the death certificate within twenty-four hours of the death. Va. Code § 32.1-263.C and 12 Va. Admin. Code § 5-550-360.

The VCU Health System physicians are tasked by ethics, laws and regulations to follow scientific method and 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). Nowhere in Va. Code § 54.1-2972 is there a requirement that a patient or her surrogate decision maker consent to the physician's determination of death.[2] It is precisely because of medical ethics that Mirranda's physicians want to perform the apnea tests. The Code does not require the physician to perform a specific test to determine death, so a patient can be declared dead without apnea tests. But Mirranda's physicians – who would be astounded if the tests did not confirm brain death – want to be absolutely sure Mirranda has died by using the test that is recognized as dispositive.

[2] The only evidence brought forward 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. Dr. Byrne simply proclaims that Va. Code § 54.1-2972.A.2 is not valid. According to Dr. Byrne, "Brain death is fake death." (June 9, T. 45). Dr. Byrne cannot nullify the definition of death under Va. Code § 54.1-2972.A.2, no matter his personal belief that there is no such thing as brain death. The General Assembly has spoken as to the definition of death in Virginia. That is the definition that physicians licensed in Virginia must follow.

II. The Issue In This Case Is Straight Forward And Can Be Quickly And Easily Briefed. An Extended Appeal Period Would Cause Irreparable Harm To VCU Health System, Its Staff And The Public. If The Appeal Is Not Expedited, Then VCU Health System Would Be In the Position Of Providing Extensive, Complex Care To A Person Who Has Likely Been Dead For Months, While VCU Health System Is Having To Turn Other Children Away Who Need The Care That Can Only Be Provided In The PICU.

As indicated earlier, the issue on appeal is straightforward: can the Lawsons prevent a diagnosis of death by vetoing the tests that will confirm or dispel Mirranda's death. It is uncontradicted that all the standard clinical neurological tests reflect no brain stem activity. The only thing left to do is to conduct the apnea tests. Whether VCU Health System can perform the diagnostic tests was fully argued and briefed below. The Lawsons' Counsel not only filed an Opposition to VCU Health System's petition, but a supplemental brief replete with exhibits. The parties can easily file briefs in this Court in a matter of a few days.

The Lawsons maintain that the apnea tests constitute health decisions that require their consent. They further maintain they can indefinitely delay the apnea tests and force the medical team to continue to maintain Mirranda on life support although the team believes that Mirranda has died. In contrast, VCU Health System maintains that conducting the

standard diagnostic test to confirm if death has occurred is not health care. It is simply part of the protocol to confirm that the patient has died as defined by Va. Code § 54.1-2972. The Lawsons cannot prevent VCU Health System's physicians from taking the steps necessary to confirm their clinical opinion that Mirranda has died.

Thus, expediting the appeal does no harm to the Lawsons. In contrast, a substantial delay would cause irreparable harm to 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.[3] As explained in Dr. Willson and Nurse Jeniece Roane's affidavits attached hereto, over the last few months, the PICU has been operating at full capacity, and VCU Health System has had to turn away or divert children because there is no bed available in the PICU. As Dr. Willson and Nurse Roane also explain, the complex care provided in the PICU is labor intensive, and PICU units can be chronically understaffed in relation to the demanding care provided.

[3] The impact on the care that the PICU can provide other children would be enormous under the normal appellate schedule. For example, currently the petition for appeal is not due until mid-September. If the Lawsons waited until mid-September to file their petition for appeal, then even if VCU Health System immediately filed its brief in opposition, the next scheduled writ panel would not begin until October 18, 2016. The Court's decision whether to grant the petition would not occur until sometime around Halloween.

So, for example, Mirranda requires the constant and full time care of at least one nurse and sometimes more than one. The availability of pediatric critical care is extremely limited, and sufficient staffing is a constant challenge. (Roane Affidavit, ¶ 4; Willson Affidavit ¶s 5, 16). Those limited resources should not be used on someone who is no longer living.

Yet there is another intangible harm that cannot be quantified: the damage to the morale of the dedicated PICU team of professionals. As Dr. Willson explained, "I think what is a consideration is how hard it is to take care of a child you know is dead. That's very, very, very difficult for the nurses." (May 20, T. 20).[4]

Even under the best of circumstances, the environment of the PICU is always highly stressed and very emotional given the gravity of the patients' conditions and the toll that takes on the families. The PICU is a small unit with only thirteen (13) beds. That stress is hopelessly exacerbated by the tension that arises between the physicians and nurses who believe Mirranda has died on the one hand, and the family who refuses to allow a test to determine if Mirranda has died. The Court can also appreciate the emotional and ethical turmoil of health care

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[4] Mirranda suffered from respiratory cardiac arrest for at least an hour. Based on clinical observation and testing, Dr. Willson would find it "astounding" if the apnea tests did not confirm that Mirranda had died. (May 20, T. 12).

professionals who are being compelled to provide constant and extended health care to someone they are convinced has died, all the while in the midst of adversarial litigation. (Roane Affidavit, ¶ 11; Willson Affidavit, ¶ 14). Even the Lawsons' counsel noted that a lack of trust has developed between the Lawsons and the medical team. (June 9, T. 102). Such an environment is not conducive to promoting the best possible care on the PICU unit, which the critically ill children on the floor need. Given the publicity attached to this case, staff is also having to deal with a stream of strangers showing up at the PICU, which raises significant security issues for the staff and other families given the emotionally charged atmosphere. (Roane Affidavit, ¶ 11).

All this is occurring while extraordinary costs are being incurred. Given the critical nature and amount of care being provided to Mirranda, not surprisingly the cost of care is almost $10,000 a day. Miranda's care to date has cost hundreds of thousands of dollars, and the additional cost of care going forward would exceed another $1.2 million under the normal appellate schedule for petition.[5] (John F. Duva Affidavit). The irony of all

[5] No insurance payments have been made so it is unknown whether and to what extent insurance will cover the costs. In these situations, insurance companies pay at the end of care. Thus, there is no way to tell at this point what will be covered, especially in light of the doctors' opinion that Mirranda has almost certainly died. (Duval Affidavit, ¶ 14).

this is that a quick resolution furthers Mirranda's best interest if she is somehow alive. If the doctors were to determine that Mirranda is alive, that finding would alter her course of treatment and the care she would receive.[6]

III. The Appeal Should Be Expedited Because The Trial Court Erred When It Enjoined VCU Health System From Conducting The Tests As Part Of The Order Setting The Appeal Bond.

After considering all the evidence, on June 10, 2016, the trial court found that VCU Health System was entitled to conduct the apnea tests. The Lawsons immediately noted an appeal. By noting their appeal, the trial court lost jurisdiction of the case. *Walton v. Commonwealth,* 256 Va. 85, 95 (1998) (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

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[6] The Lawsons argued below that VCU Health System physicians had refused to administer a form of thyroid treatment, which the Lawsons believe could somehow make a difference in Mirranda's condition. They maintained that under Va. Code §§ 54.1-2287 and 2990, the Lawsons therefore had fourteen (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 give the Lawsons an opportunity to arrange a transfer. Mirranda has now been in the PICU for over a month. No other hospital or agency will take Mirranda because all the clinical signs indicate that she has died. As of the filing of this motion, Mirranda remains in the VCU Health System's PICU.

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.'"). However, despite losing jurisdiction, as part of the order setting the appeal bond, the trial court also ordered that VCU Health System could not conduct the apnea tests. The order essentially constituted a temporary injunction. That in turn constituted error.

VCU Health System has always believed that under the law, it has a right to conduct the tests. VCU Health System sought the court's direction out of an abundance of caution and trying to be sensitive to the Lawson family. Having a court confirm that VCU Health System had the right to conduct the tests would help verify for the Lawsons that conducting the tests was the right thing to do. In effect, the petition was declaratory in nature.

Thus, 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 any rights it had *independent* of the trial court's ruling. But that is precisely what the lower court has done. VCU Health System went into court to essentially

have the court declare that VCU Health System physicians have the right to conduct the tests. The trial court confirmed that VCU Health System physicians have the right to do so. But after entering the final order to that effect, the trial court enjoined VCU Health System from exercising its underlying right to conduct the tests. No basis exists for allowing the trial court to effectively enjoin VCU Health System from conducting the tests, especially when the trial court has lost jurisdiction of the case.

Further, in effectively granting a temporary injunction, the trial court would have to consider the factors governing temporary injunctions and stays. It was an abuse of discretion not to do so. If the trial court performed the requisite analysis, it could not possibly have granted an injunction pending appeal. The relevant factors 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.)

Clearly, the trial court could not determine that the Lawsons were likely to prevail on appeal. The trial court had already decided on the merits in favor of VCU Health System after three ore tenus hearings.[7] In addition, the Lawsons would not be irreparably harmed. If Mirranda is found to have died, then by definition there would be no harm in conducting the apnea tests. *And if any brain stem activity were detected, Mirranda would receive additional care that she may need.* Conversely, and as previously discussed, VCU Health System and its staff are significantly harmed in a number of ways. Finally, the public interest is significantly harmed when VCU Health System is having to turn away critically ill children from the PICU.[8]

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[7] The trial court's temporary injunction pending the appeal had the strange effect of declaring that VCU Health System should prevail and then giving the Lawsons exactly what they wanted.

[8] In considering whether to grant a temporary injunction, some circuit courts have followed a very similar but slightly different standard set forth in *Winter v. Nat'l Res. Def Council, Inc.*, 129 S.Ct. 365 (2008). The test is similar to that in *Nken*: 1) likelihood of harm; 2) existence of irreparable harm; 3) balance of the equities and 4) the public interest. The test is slightly different because it includes a "balancing of equities," i.e., do the equities favor the person seeking the injunction. In this case, the equities lie with VCU Health System, despite the tragedy involving Mirranda. It is understandable that the Lawsons do not want to know that their beloved 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.

Significantly, the exact same factors that demonstrate that the trial court erred in enjoining VCU Health System pending appeal, likewise militate in favor of an expedited appeal: 1) VCU Health System is very likely to prevail on the merits; 2) the Lawsons are not harmed by an expedited appeal; 3) VCU Health System will suffer irreparable harm from a prolonged appeal; and 4) a prolonged appeal would harm the public that depends on VCU Health System to provide critical pediatric care.

Conclusion

Wherefore, VCU Health System Authority, by counsel, asks the Court to grant this motion to expedite the appeal, and that the Court order 1) the Petition for Appeal be filed within five days of the Court's order, 2) the Brief in Opposition be filed within five days thereafter, and 3) any Reply be filed within two days. VCU Health System also asks that the briefs be electronically delivered to counsel, and that argument on the petition for appeal be likewise expedited, and conducted telephonically if necessary. In the alternative, VCU Health System asks that the appeal be expedited as much as possible as the Court deems otherwise appropriate.

Respectfully submitted,

VCU HEALTH SYSTEM AUTHORITY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been Federal Expressed to opposing counsel and guardian *ad litem* this 17th day of June 2016, as follows:

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Guardian ad litem for Mirranda G. Lawson

William H. Shewmake

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

IN RE: MIRRANDA GRACE LAWSON	)	CASE NO.:

AFFIDAVIT OF
DOUGLAS F. WILLSON, MD

COMES NOW Douglas F. Willson, MD, being duly sworn, deposes and states under penalty of perjury, as follows:

1. I am over the age of 18 years old and a resident of the Commonwealth of Virginia.

2. I am the John Mickell Professor of Pediatrics in the School of Medicine at Virginia Commonwealth University (VCU) in the City of Richmond, Virginia.

3. I serve as the Chief of the Division of Critical Care Medicine in the Department of Pediatrics at the VCU Health System (VCUHS) in the City of Richmond, Virginia.

4. I have an active clinical practice as a pediatric critical care specialist at VCUHS / MCV Hospitals and am licensed to practice medicine in the Commonwealth of Virginia.

5. The pediatric intensive care unit (PICU) at VCUHS / MCV Hospitals (VCUHS/MCVH) provides complex, continuous care for the most critically ill children. It has thirteen (13) beds. The average daily census is ten (10) to eleven (11) patients. However, the unit has been full to overflowing during the past two (2) months. In other words, all of the PICU beds have been occupied with patients needing pediatric critical care services. Unlike adult critical care, which would include a medical intensive care unit, a surgical-trauma intensive care

unit, cardiac care, burn unit, etc.; there is only one (1) critical care unit for children at VCUHS / MCVH.

6. When the PICU is fully occupied and services are needed by additional patients, the critical care team must triage what patients are the sickest and are most in need of a PICU bed.

7. On occasion the PICU has had to go on diversion, meaning that no pediatric patients will be accepted by ambulance. The exception is trauma patients.

8. VCUHS / MCVH's PICU is the only critical care unit in the Richmond region to provide advanced intensive care services such as ECMO (extracorporeal membrane oxygenation, which uses a pump to circulate blood through an artificial lung and back into the bloodstream of a critically ill patient), cardiac surgery, neurosurgery, burn treatment, dialysis, and hematology/oncology care for children. As the only Level I trauma center in Virginia for children, severe trauma patients, including children, are never turned away.

9. When the PICU at VCUHS / MCVH is fully occupied, children must be referred to Children's Hospital of the King's Daughters in Norfolk, the University of Virginia Hospital in Charlottesville, INOVA Fairfax Hospital in Fairfax or on occasion even as far away as Duke University in Durham, North Carolina, University of North Carolina in Chapel Hill, North Carolina or Wake Forest Baptist Medical Center in Winston-Salem, North Carolina.

10. Mirranda Lawson was admitted to the VCUHS / MCVH PICU on May 11, 2016. I have personally examined and cared for Mirranda. I have also reviewed her medical records and conferred with her other attending physicians and staff.

11. Mirranda requires one-to-one (1:1) nursing care. That means that one (1) nurse is solely assigned to care for Mirranda and is not available to care for other critically-ill children. At times, a second nurse is needed to care for Mirranda.

12. Based on my education, training and experience, Mirranda is deceased under Va. Code 54.1-2972.A.2; there is nothing suggesting otherwise. She has been completely unresponsive to any stimulus despite the absence of any sedatives or other medications. The child requires constant medications to prevent extreme dehydration since her pituitary gland no longer functions to modulate her urine output. She also continues to require cardiac stimulant drugs to maintain blood pressure and a regular heartbeat. Testing since May 17, 2016 has found absolutely no indication of brain activity. The final step in confirming or dispelling brain death is the apnea test described in prior testimony. The apnea test is part of the standard protocol that VCU physicians follow to confirm or dispel that brain death has occurred. The VCU protocol is the standard protocol used throughout the United States. The parents have repeatedly refused and obstructed the performance of the apnea test.

13. The physicians, nurses, respiratory therapists and other members of the PICU team are suffering tremendous strain under the cloud of believing, but not being able to definitively confirm through the apnea test, that Mirranda is deceased. The provision of medical and nursing care that requires moment-to-moment adjustment of fluids, ventilation and medications is hard enough where recovery is possible. In Mirranda's case, there is no reasonable hope of recovery.

14. The environment of the PICU is always highly stressed and very emotional due to the gravity of the patients' conditions and the toll that takes on the families and staff. The

distrust that Mirranda's family has displayed toward the PICU team takes the situation to a toxic level. Local media outlets have reported that the parents have stated that they believe the physicians are bad, are lacking in compassion and have given up on Mirranda. This distrust coupled with media reports has caused the PICU team significant distress and adversely affected morale. The situation involving Mirranda's condition and the interaction with her family under these trying circumstances when I and other members of the medical team believe that Mirranda is dead has added to the stress of providing care to the other critically ill patients in the PICU. It is an extremely difficult situation that needs to be resolved.

15. The critical care physicians, including myself, are being forced to provide futile care to Mirranda when she has exhibited no response to the care and there is no reasonable belief that she will in the future. This is contrary to medical ethics and good medical practice.

16. The availability of pediatric critical care specialist physicians, nurses and other professionals is limited. Sufficient staffing of the PICU is always a challenge, and the already fully-utilized staff is further stressed by the thought of where will we put the next incoming patient.

17. If any brain stem activity is detected as a result of the apnea test, then care for Mirranda would continue. If no brain stem activity were detected after two (2) apnea tests twelve (12) hours apart, then Mirranda would be declared dead.

18. If the apnea test indicates that Mirranda is not deceased, then she would likely receive other care indicated for a living patient. Presently, additional care is not medically indicated because by all medical criteria other than the apnea test, she appears to have no brain

stem activity and is therefore believed to be brain dead. Not being able to confirm or dispel brain death, therefore, interferes with the ability to provide Mirranda with care she may need.

19. Since May 18, 2016 the PICU team has communicated with many hospitals, nursing homes and home health agencies at the request of the family to see if Mirranda would be accepted in transfer to another facility or cared for at home. All facilities and home health agencies have declined.

FURTHER AFFIANT SAYETH NOT.

Witness this 17 day of June, 2016

D F Willson MD

Douglas F. Willson, MD

COMMONWEALTH OF VIRGINIA,

~~CITY~~/COUNTY OF Chesterfield, to-wit:

The foregoing instrument was acknowledged before me, a notary public in and for the aforesaid jurisdiction, by Douglas F. Willson, MD on this 17th day of June, 2016.

My commission expires: 4/30/2018

My registration number: 270224

Linda R Walton

Notary Public

LINDA R. [illegible] NOTARY PUBLIC MY COMMISSION NUMBER 270224 COMMONWEALTH OF VIRGINIA

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

IN RE: MIRRANDA GRACE LAWSON)
)
) CASE NO.:
)
)

AFFIDAVIT OF JOHN F. DUVAL

COMES NOW John F. Duval, being duly sworn, deposes and states under penalty of perjury, as follows:

1. I am over the age of 18 years old and a resident of the Commonwealth of Virginia.

2. I am the Vice President for Clinical Services and Chief Executive Officer, VCU Hospitals and Clinics, at VCU Health System (VCUHS) in the City of Richmond, Virginia.

3. Mirranda Lawson was admitted to the Pediatric Intensive Care Unit (PICU) at VCUHS/MCV Hospitals in Richmond, Virginia on May 11, 2016. She has remained a patient in the PICU through today's date. Mirranda has received hospital services, testing services, medications, and supplies on a daily basis from VCUHS/MCV Hospitals throughout her admission. Mirranda has also received services on a daily basis from attending physicians of MCV Associated Physicians throughout her admission.

4. For any patient admitted to VCUHS/MCV Hospitals, including Mirranda, ultimately, two billing statements will be generated: one billing statement from VCUHS/MCV Hospitals for hospital services provided, and a second billing statement from MCV Associated Physicians for attending physician services provided. Because Mirranda is currently receiving

and continues to receive services from VCUHS/MCV Hospitals and from MCV Associated Physicians, no final billing statements have been generated at this time.

5. I have had an opportunity to review the charges for services provided to Mirranda from VCUHS/MCV Hospitals that have been posted through June 13, 2016. I have also had an opportunity to review the charges for services provided to Mirranda from her attending physicians of MCV Associated Physicians that have been posted through June 13, 2016.

6. The physician charge for services provided to Mirranda by the pediatric critical care attending physicians is $900.00 per day.

7. The hospital charge for the room in the PICU for Mirranda is $5,916.00 per day.

8. The hospital pharmacy charges for services provided to Mirranda to maintain her current level of support are $1,533.26 per day. These charges include daily administration of medications and nutrition required to support Mirranda.

9. The hospital chemistry test charges for services provided to Mirranda to maintain her current level of support average $190.57 per day. These charges include daily and weekly panels and tests.

10. The hospital hematology testing charges for services provided to Mirranda to maintain her current level of support average $16.28 per day. These charges include weekly analysis of blood drawn from Mirranda.

11. The hospital respiratory services charge for services provided to Mirranda to maintain her current level of support is $724.00 per day. This charge includes services provided by respiratory therapy in order to mechanically ventilate Mirranda.

12. The hospital drug charges for services provided to Mirranda to maintain her current level of support are $490.40 per day. This charge is for medications and solutions required on a daily basis in order to support Mirranda.

13. When the above physician and hospital charges are added together, the total current charges for providing physician and hospital services to Mirranda to maintain her current level of support are approximately $9,770.00 per day. These charges are likely to continue as long as Mirranda remains in the PICU at VCUHS/MCV Hospitals.

14. To date, no reimbursement has been received from any health insurer for the services provided by VCUHS/MCV Hospitals or by the attending physicians of MCV Associated Physicians.

FURTHER AFFIANT SAYETH NOT.

Witness this 17th day of June, 2016

John F. Duval

COMMONWEALTH OF VIRGINIA,

CITY/COUNTY OF Richmond, to-wit:

The foregoing instrument was acknowledged before me, a notary public in and for the aforesaid jurisdiction, by **John F. Duval**, on this 17th day of June, 2016.

My commission expires: 11/30/17

awhite-previs
Notary Public

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

IN RE: MIRRANDA GRACE LAWSON	)	CASE NO.:

AFFIDAVIT OF
JENIECE ROANE, MS, RN, NE-BC

COMES NOW Jeniece Roane, MS, RN, NE-BC, being duly sworn, deposes and states under penalty of perjury, as follows:

1. I am over the age of 18 years old and a resident of the Commonwealth of Virginia.

2. I am licensed as a Registered Nurse in the Commonwealth of Virginia.

3. I serve as the Nursing Director for Inpatient Women's and Children's Health at the VCU Health System, MCV Hospitals (VCUHS / MCVH) in the City of Richmond, Virginia.

4. The pediatric intensive care unit (PICU) at VCUHS / MCVH is has thirteen (13) beds. The unit is staffed for a daily census of nine (9) patients. However, during the past several months, the PICU has been fully occupied on most days. This has stretched the limited resources of the unit.

5. VCUHS / MCVH's PICU is the only critical care unit in the Richmond region to provide advanced intensive care services such as ECMO (extracorporeal membrane oxygenation, which uses a pump to circulate blood through an artificial lung and back into the bloodstream of a critically ill patient), cardiac surgery, neurosurgery, burn treatment, dialysis, and hematology/oncology care for children. As the only Level I trauma center in Virginia for

children, severe trauma patients, including children, are never turned away. During the weekend of June 11 to June 12, seven (7) trauma alerts were for children in addition to other children in need of critical care.

6. All hospitals in central Virginia look to VCUHS / MCVH for pediatric critical care services. When the PICU is fully occupied, VCUHS / MCVH must refuse transfer of children from outside hospitals and recommend that the local hospital contact INOVA Fairfax Hospital (Fairfax), Children's National Medical Center (Washington, DC), Children's Hospital of the King's Daughters (Norfolk) or the University of Virginia (Charlottesville). For example, during the week of June 6, 2016, a pediatric patient in need of PICU admission for a neurologic condition could not be accepted by VCUHS/ MCVH from Bon Secours St. Mary's Hospital in Richmond due no bed being available. The parents would not agree to transfer of the child to the University of Virginia. The child was wait-listed for a VCUHS / MCVH bed and children in the VCUHS / MCVH Emergency Department were further triaged as admission of the St. Mary's child was prioritized.

7. When the PICU is near capacity, the PICU team must triage patients from other units in VCUHS / MCVH and its Emergency Department. If at all possible, the less severely ill will be treated in the step down unit, the main pediatrics unit, or occasionally even in an adult intensive care unit (only children age fifteen (15) or older may be admitted to an adult ICU). Occasionally children must be transferred from the VCUHS / MCVH Emergency Department to other hospitals for specialized services due to patient census. At times, VCUHS / MCVH must go on "diversion," meaning that ambulances with children are diverted to other hospitals. (Severe trauma cases are not diverted due to VCUHS / MCVH being the only Level I trauma center in the area.) All of these situations are not optimal for children. For example, during the

week of June 13, 2016, five (5) pediatric cardiac surgery cases were scheduled. Each of these children will require time in the PICU after surgery. If a PICU bed is not foreseeably available, the surgery will have to be rescheduled for a future date.

8. Mirranda Lawson has been in the VCUHS / MCVHS PICU since May 11, 2016. She requires at least one nurse dedicated to her care twenty-four (24) hours per day. Additional nursing staff is needed for turning, suctioning and other tasks. Additionally, respiratory therapists, pharmacists and other ancillary professionals are involved in her daily care.

9. Staff morale of the entire PICU is suffering due to the situation with Mirranda Lawson. As better described by her physicians, Mirranda has no response to any stimulus. She has no gag reflex, no cough, no withdrawal from pain or any other indication of brain activity. The nurses are troubled by the protracted provision of services to a child that has every indication of being deceased. They have asked: Are we doing the right thing by continuing to artificially support her body when there is no benefit and there is every indication that she is already dead? This presents a significant moral and ethical dilemma for the staff.

10. Mirranda has been in the PICU for more than four (4) weeks. The nurses have not observed any change and specifically no improvement, as a result of the care provided. They are aware children who need to be in the unit but for which there is no space. These include children from other units within the VCUHS / MCVH. This adds to the stress of the PICU staff.

11. The nurses have tried hard to preserve their relationship with Mirranda's family, and the family has treated the nursing staff with respect. It has not been the same for the physician team. The parents have refused to hear about Mirranda's condition as well as to consent to the apnea test. While the physicians have taken the brunt of the family's distrust, the nurses are affected as well. The treatment of the physicians takes a toll on the entire team.

Through social media, the family has invited strangers into to the PICU, which creates security concerns for the staff, other patients and families in the PICU. All of these behaviors have has distracted and fatigued the staff.

12. Being forced to care for a patient that appears to be deceased limits VCUHS / MCVH's ability to serve the community and citizens of Virginia. The situation is distressing to everyone involved. Daily the PICU nurses and staff are called upon to provide heroic care to the youngest and sickest of patients. That obligation is not taken lightly by the caregivers. Unfortunately, in Mirranda's case, the caregivers have been pushed almost beyond their limits as they continue to provide futile care to Mirranda with no endpoint in sight.

13. As mentioned above, the specialized services of physicians, nurses, respiratory therapists, and pharmacists of the PICU are limited resources, and the team is concerned about its ability to provide care to other children who need care in the PICU.

FURTHER AFFIANT SAYETH NOT.

Witness this 17th day of June, 2016

Jeniece S. Roane, MS, RN, NE-BC
Jeniece Roane, RN

COMMONWEALTH OF VIRGINIA,

~~CITY~~/COUNTY OF Hanover, to-wit:

The foregoing instrument was acknowledged before me, a notary public in and for the aforesaid jurisdiction, by Jeniece Roane, RN on this 17th day of June, 2016.

My commission expires: 4/30/2018

My registration number: 270224

Lynda R. Walton
Notary Public