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
Circuit Court of the City of Richmond
Case No.: CL16-2358

RESPONSE OF PATRICK AND ALISON LAWSON TO VCU HEALTH SYSTEM AUTHORITY'S MOTION TO EXPEDITE THE APPEAL

Phillip J. Menke, VSB #71265
PURNELL, MCKENNETT & MENKE, PC
9214 Center Street, Suite 101
Manassas, VA 20110
Tel. (703) 368-9196
Fax (703) 361-0092
pmenke@manassaslawyers.com
Counsel for Patrick and Alison Lawson

TABLE OF CONTENTS

PATRICK AND ALISON LAWSON'S RESPONSE TO MOTION TO EXPEDITE APPEAL

COME NOW Appellants, Patrick E. Lawson and Alison J. Lawson ("the Lawsons"), by counsel, and hereby file this Response to the Motion to Expedite the Appeal filed by VCU Health System Authority ("the hospital"), and in opposition to said motion, state as follows:

Introduction

The primary issue to be decided in this appeal is whether Virginia law allows the hospital to override and ignore the explicit directives of the health care decision makers of the young patient in this case. The complex legal issues on appeal deserve a full and fair briefing and cannot be completed on an expedited basis.

The hospital has cited no Virginia statute, Supreme Court Rule or decision, or other authority to support its motion to expedite this appeal. Every appeal with a supersedeas bond causes some hardship for the appellee. The hardship here is not one that requires this Court to modify its established procedures. The legislature and this Court have set forth exceptions to the normal schedule for an appeal that do not apply to this case.

The Lawsons' two-year-old daughter Mirranda Grace Lawson ("Mirranda") is a living patient who suffered a severe brain injury on May 11, 2016, and has since been a patient of the hospital. The Lawsons believe Mirranda must be treated as a living patient. Under Virginia Code § 54.1-2986, the Lawsons are the only persons authorized to make health care decisions for Mirranda.

After only eight days, without informing the Lawsons of the risks involved, the hospital sought to perform a harmful apnea brain death test on Mirranda. The hospital believes that after this test they would declare Mirranda to be deceased and stop treating her. The Lawsons believed that they needed to seek alternative options, and have continuously done so. The Lawsons rejected the apnea test since it would be harmful to Mirranda and would not improve her condition in any way. During the apnea test, Mirranda would be taken off her ventilator for ten to fifteen minutes to measure brain response to the poisonous buildup of carbon dioxide in Mirranda's body. The buildup of carbon dioxide will cause side effects such as brain swelling, additional brain damage, and other problems.

On May 23, 2016, the hospital filed a petition to the trial court seeking an order to circumvent the Lawsons' authority and permit their physicians to perform the apnea test on Mirranda.

The Lawsons did find other treatments that would improve her condition, but the hospital refused to do such treatments based on their suspicion that such "would not change her outcome" and is "not their standard of care". The Lawsons have not yet been able to arrange a transfer of Mirranda to another facility or home care. These arrangements are difficult, but not impossible. The Lawsons are within their legal rights to pursue this course, whereas the hospital's petition has no basis in law.

There are no prior Supreme Court cases squarely addressing the issues in this appeal. This appeal concerns determinations of brain death under Virginia Code § 54.1-2972, as balanced against the rights of medical decision-makers under Virginia Code § 54.1-2986. In addition, Virginia Code § 54.1-2990 is silent with respect to the situation in this case, when the decision-maker and the physician disagree on proper health care and an attempt at a transfer of the patient is unsuccessful.

Argument

I. There are No Statutes, Court Rules, Case Decisions, or Other Legal Authority to Support the Hospital's Motion to Expedite the Appeal in this Case.

The hospital brings their motion to expedite this appeal under Rule 5:4. This Rule states the following in paragraph (a)(1):

> All motions, except motions for the qualification of attorneys at law to practice in this Court, shall be in writing and filed with the clerk of this Court. All motions shall contain a statement by the movant that the other parties to the appeal have been informed of the intended filing of the motion. For all motions in cases in which all parties are represented by counsel -- except motions to dismiss petitions for a writ of habeas corpus -- the statement by the movant shall also indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition.

Nowhere in Rule 5:4 is mentioned the availability of motions to expedite the normal appellate procedure.

Supreme Court Rule 5:5(a) states that "[t]he times prescribed for filing ... a petition for appeal (Rules 5:17(a) and 5:21(g)) ... ***are mandatory***." (Emphasis added.)[1] Rule

[1] Rule 5:5 refers to "Rule 5:21(g)", however there is no such "Rule 5:21(g)". Perhaps the actual reference should be made to

5:17(a)(1) establishes the filing deadline for the petition for appeal in this matter: "in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from...." Thus, since the order appealed from here was entered on June 14 (slightly amending the order entered June 10), the Lawsons' petition for appeal is due by September 14.

Part Five of the Supreme Court Rules establishes a thorough process for appeals in Virginia. If this Court wanted to create a procedure for expedited appeals, it could have done so. Attorneys in Virginia are safe to assume that this Court's omission of such a procedure was intentional.

Furthermore, there do exist a few limited exceptions to the normal deadlines for appeals to this Court as determined by the General Assembly and this Court. For one example, in appeals of disciplinary action against attorneys, the petition for appeal itself is omitted and the opening brief must be filed within forty days of

---

Rule 5:21(a)(6), which sets the deadline for filing a petition for appeal from the State Corporation Commission at four months.

the filing of the record on appeal by the clerk of the Disciplinary System. Rule 5:21(b)(4).

Another exception is made for a death penalty cases, in which the General Assembly determined that the Supreme Court shall "give priority to the review" of such cases. Virginia Code § 17.1-313(G). The appellant in such cases must file Assignments of Error and a designation of the relevant parts of the record within thirty days of the Filing Date of the record, and their opening brief is due within sixty days of the Filing Date. Supreme Court Rule 5:22(e).

Third and fourth exceptions are in cases of appeals of orders of quarantine and orders of isolation. The General Assembly specifically mentioned the establishment of these special rules for expedited appeals in Virginia Code § 17.1-503(C):

> In its rules of practice and procedure for the circuit courts, the Supreme Court shall include rules relating to court decisions on any order of quarantine or isolation issued by the State Health Commissioner pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1 that shall ensure, to the extent possible, that such hearings are held in a manner that will protect the health and safety of individuals subject to any such order of quarantine or isolation, court personnel, counsels, witnesses, and the general public.

> The rules shall also provide for expedited reviews by the Supreme Court of decisions by any circuit court relating to appeals of any order of quarantine or isolation.

Appeals in these cases generally must be heard within 48 hours of the filing of the petition for appeal. Virginia Code §§ 32.1-48.010(B) and -48.013(B). The Supreme Court is required to "act upon the petition within 72 hours of its filing". Supreme Court Rule 5:41(D).

A final exception wherein the Rules mention an "expedited appeal" should also be mentioned. "When it clearly appears that an appeal ought to be granted without further delay, an appeal may be granted before the filing of the brief in opposition." Rule 5:18(d). This procedure is available to the Court in this case after the Lawsons file their petition for appeal.

The principle *expressio unius est exclusio alterius* is applicable here. "[T]he mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute." *Smith Mt. Lake Yacht Club v. Ramaker*, 261 Va. 240, 246 (2001). Under this principle, we must conclude that both the Supreme Court and the General Assembly

have intentionally refused to allow expedited appeals except for those few specific instances enacted in statutes and rules. Among those instances where expedited appeals are directed are cases involving the health and safety of individuals. Therefore, it would be improper to create a new law or a special rule in this case that was intentionally excluded by the General Assembly and by the Supreme Court in consultation with the legislature in making procedural rules for appeals in Virginia.

II. This Appeal Involves Numerous Statutes and a Thorough Review of the Law in a Fully Briefed Petition is Necessary for a Proper Review of this Difficult Case.

The issues in this appeal are not "straightforward" as the hospital contends in this unusual case. Rather, there are numerous statutes, and in particular those in the Health Care Decisions Act, that must be carefully examined.

Under Virginia Code § 54.1-2986(A)(4), the Lawsons are the sole persons authorized to consent or refuse consent to the provision, continuance, withholding, or withdrawal of health care for Mirranda. As such, the Lawsons have a duty under Virginia

Code § 54.1-2086.1(B) to "undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care" and to base their decisions "on the patient's best interests". In the proceeding below, the Guardian *ad litem* appointed by the Court concurred that it was not in Mirranda's best interests to undergo the apnea test at issue. The Lawsons presented expert testimony supporting the health care decisions they have acted upon and seek to carry out.

The hospital has refused to perform a tracheostomy to support long-term breathing, when such is indicated after ten days of a patient's use of a ventilator with an endotracheal tube. The hospital has refused to screen and treat for hypothyroidism, which the hospital's physician admitted was a "metabolic disturbance", and under their own Guidelines, such must be corrected before an apnea test. The hospital's physician testified that thyroid treatments are given to organ donors to preserve their organs, but not for living patients such as Mirranda. Other treatments requested by the Lawsons have also been refused.

There is no statute that authorizes the hospital, physicians, or court to override the decision of the Lawsons. The apnea test and any other test can only be performed when the Lawsons consent to it according to Virginia Code § 54.1-2986. The hospital's physician admitted in testimony that it was the hospital's policy to obtain informed consent from the patient or the legal decision maker for any test that carries with it risks and in all situations. (June 9, T. 25-26).

The only relief requested by the hospital is that the trial court "enter an Order permitting its health care providers to proceed with and complete testing to determine if brain death has occurred in Mirranda ... and to act on the results in compliance with Virginia Code Section 54.1-2972". (Petition, P. 4.)

In construing Virginia Code § 54.1-2972, "we must apply its plain meaning, and we are not free to add [to] language, nor to ignore language, contained in [it]." *Andrews v. Richmond Redevelopment & Housing Authority*, No. 150977, 2016 Va. LEXIS 70, at *9 (June 2, 2016) (finding that under the statute at issue the circuit court lacked subject matter jurisdiction).

Virginia Code § 54.1-2972 merely describes when a person is "medically and legally dead". Neither this statute nor any other statute confers upon any physician or hospital the right to force anyone to have brain death testing. The hospital has not located a single Virginia case that agrees with their misinterpretation of Virginia Code § 54.1-2972 that would allow them to override a decision maker's directive in order to seek evidence of brain death. Neither this statute nor any other statute supersedes the authority granted to the Lawsons in Virginia Code § 54.1-2986. Under the plain meaning of these statutes, no person can override the Lawsons' decision to forego the apnea brain death test for their daughter. When the lower court imposed the will of the hospital in direct contravention of the will of the Lawsons, such constituted adding language to Virginia Code § 54.1-2972. This is a clear misapplication of the law that must be corrected.

Additionally, Virginia Code §§ 54.1-2987 and -2990 must be properly interpreted in these circumstances, yet the hospital argued to the trial court that the Health Care Decisions Act is inapplicable in this case. This argument is completely without

merit, as these statutes are at the heart of the issues in this case. These sections apply "even if the attending physician determines the health care requested to be medically or ethically inappropriate." Virginia Code § 54.1-2987.

The statutes in the Health Care Decisions Act must be read together to assist this Court in resolving the complex issues on appeal. For example, the Court may consider the clear statement made in Virginia Code § 54.1-2987.1(B) that:

> If the patient is a minor or is otherwise incapable of making an informed decision and the Durable Do Not Resuscitate Order was issued upon the request of and with the consent of the person authorized to consent on the patient's behalf, then the expression by said authorized person to a health care provider or practitioner of the desire that the patient be resuscitated shall so revoke the provider's or practitioner's authority to follow a Durable Do Not Resuscitate Order.
>
> When a Durable Do Not Resuscitate Order has been revoked as provided in this section, a new Order may be issued upon consent of the patient or the person authorized to consent on the patient's behalf.

It is clear that the legislature intended that the authorized decision-maker, especially one for a minor, must have plenary authority over end-of-life issues.

The Petition filed by hospital should have been simply dismissed as it is completely unsupported by law. To the extent the laws at issue are ambiguous or silent with respect to these issues, this appeal will afford this Court the opportunity to properly interpret them for the benefit of the Commonwealth and guide parties in future cases. Clearly, there is great merit in this appeal and a full and normal briefing of the issues is warranted.

If the hospital believes there is a simple, straightforward issue on appeal, it is free to include such an assignment of cross-error in their brief in opposition. However, based on the numerous issues they have raised in their 23-page motion, and the numerous additional issues raised in this brief in response, it is evident that this is not a simple appeal that can be expedited.

It would be impossible to properly brief the issues in this case in five days as suggested by the hospital in this motion. Unlike the hospital's attorneys, the undersigned attorney from a small law firm is representing the Lawsons essentially on a *pro bono* basis and is the sole attorney available to work on the petition for appeal.

III. The Hospital Has Improperly Confused a Supersedeas Bond with an Injunction.

Nowhere in the lower court pleadings or arguments of counsel did the hospital argue that an injunction was sought. Rather, the final order in the trial court was merely declaratory of the hospital's purported right to perform the apnea test, in light of the Lawsons' opposition to the test.

In fact, the hospital has specifically stated that the final order at issue was not an injunction. At a telephonic hearing to approve an appeal bond to suspend the lower court's final order on June 14, 2016, the trial court judge directly asked the hospital's counsel if their position was that the final order was an injunction and counsel replied that it was not, that it was "basically a declaratory action". (June 14, T. 18-20). The judge then agreed that the order he entered was in the nature of a "declaratory judgment". (June 14, T. 31).

The hospital filed its petition because the Lawsons objected to the apnea test. Due to the objection, the hospital sought the Court's permission under the brain death statute to perform the

test. The trial court erroneously declared that the hospital could be granted the authority to perform the apnea test despite the objections of the Lawsons. This declaratory ruling was suspended by the appeal bond authorized by the trial court.

The Lawsons were allowed to seek to suspend the execution of the final order with an appeal bond pursuant to Virginia Code § 8.01-676.1(C), and that is what they did. The trial court was authorized to rule on the form and amount of such an appeal bond pursuant to Virginia Code § 8.01-676.1 (J1). The hospital argues that the trial court lacked the jurisdiction to suspend its order, despite the clear authority granted in the aforementioned paragraph (J1), which provides:

> Any objection to or motion for modification of the form, amount, or issuer of any letter of credit or bond may also be made to, and decided by, the court or commission whose decision is being appealed at any time until the Court of Appeals or the Supreme Court acts upon any similar motion.

This statute provided the lower court with jurisdiction to hear the motion to set an appeal bond amount that would suspend its final order, and this is what it did. The setting of such a supersedeas

bond does not, of itself, constitute an injunction order as argued by the hospital.

IV. The Hospital Raises Factual Concerns That Were Not Litigated in the Trial Court Regarding the Use of Significant Resources.

In their motion, the hospital has now, for the first time, raised concerns about the cost of Mirranda's care and the strain on the hospital's PICU. These issues were not litigated and cannot be subject to review in the context of this appeal, nor can such form the basis for an expedited review.

In raising these concerns now, the hospital appears to have reversed from its previous position. The hospital's Chief of the Division of Pediatric Critical Care, Dr. Douglas Wilson, stated in Court under oath on May 20:

> To some extent we – we are flexible to allow parents – but, there is – it is a – busy intensive care unit. It's – you know, we have other children that we need to take care of. These are not unlimited resources. And – and ***that isn't really the issue***, but as you can well understand, if this continues for days and days, or weeks, I mean, what is the purpose?

(May 20, T. 15) (emphasis added). Thus we see from the beginning of this case, Dr. Wilson was not concerned about the use of hospital resources, but rather with providing care that he deemed to be without a purpose.

There is no evidence that the hospital will suffer any damages due to the ongoing costs of care. It was uncontested that the Lawsons' insurance continues to cover Mirranda's care and there has been no denial of coverage. As of June 1, 2016, Virginia's Medicaid program for disabled individuals will also be available to cover Mirranda's medical needs. It is disconcerting that while both the insurance company and Medicaid recognize the fact that Mirranda is a living, disabled patient entitled to health care, the hospital does not recognize this and performs the bare minimum of care.

As a disabled individual, Mirranda's life is worth no less than any other child's life, and she must not be discriminated against due to her disability.

If these issues raised in the Affidavits filed with the hospital's motion had been raised in the trial court, the Lawsons

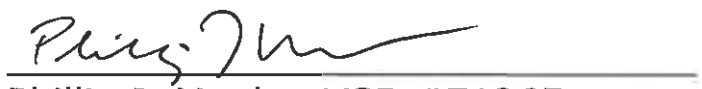
would have been able to cross-examine the affiants and present evidence contradicting their statements. For example, the Lawsons have stated that they have an excellent relationship with the hospitals' nurses, and that the nurses have not experienced any undue stress or emotion due to the ongoing treatment of Mirranda. Furthermore, the "strangers" visiting Mirranda in the PICU are primarily family members and religious leaders who come to pray with the family in Mirranda's room. The hospital has cited no incidents with visitors or "security" problems.

Finally, as the hospital admits, their PICU has thirteen beds and, since Mirranda arrived, only ten to eleven beds have been occupied, on average. This leaves two to three open beds for patients. If they are currently staffed "for a daily census of nine (9) patients", as stated in Nurse Roane's Affidavit, then this appears to be merely a staffing problem of their own making. The hospital can hire additional staff whose services will be fully reimbursed by health insurance or Medicaid. The purported fear of turning needy children away is not based in fact.

Conclusion

WHEREFORE, Patrick and Alison Lawson, by counsel, respectfully request that this Court deny the motion to expedite the appeal in this case, or alternatively to provide the Appellants significantly more time to prepare their Petition for Appeal in this matter than requested by the movant.

Respectfully Submitted,
Patrick and Alison Lawson,
By Counsel,



Phillip J. Menke, VSB #71265
PURNELL, MCKENNETT & MENKE, PC
9214 Center Street, Suite 101
Manassas, VA 20110
Tel. (703) 368-9196
Fax (703) 361-0092
pmenke@manassaslawyers.com
Counsel for Patrick and Alison Lawson

CERTIFICATE OF MAILING

The undersigned counsel for the Respondent hereby certifies that on this 27th day of June, 2016, the undersigned sent a true copy of the foregoing by email and mail to:

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

Michele L. Chiocca, Esq.
Guardian *ad litem* for Mirranda
Whitehead & Chiocca PLC
2420 Maplewood Ave., Ste. G
Richmond, Virginia 23220
Tel. (804) 254-5600
Fax (804) 254-5652
mchiocca@whitehead
chioccalaw.com

Rodney K. Adams, Esq.
William H. Shewmake, Esq.
LECLAIRRYAN, A PROFESSIONAL CORPORATION
919 East Main Street, 24th Floor
Richmond, VA 23219
Tel. (804) 783-2003
Fax (804) 783-2294
Rodney.Adams@leclairryan.com
William.Shewmake@leclairryan.com

Phillip J. Menke