IN THE

SUPREME COURT OF VIRGINIA

Record No. 160968

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

Petitioner,

v.

PATRICK B. LAWSON and
ALISON J. LAWSON,

Respondents.

IN RE: MIRRANDA GRACE LAWSON

Petition for Review from the
Circuit Court of the City of Richmond
Case No.: CL16-2358

PATRICK AND ALISON LAWSON'S RESPONSE TO PETITION FOR REVIEW OF VCU HEALTH SYSTEM AUTHORITY

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

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PATRICK AND ALISON LAWSON'S RESPONSE TO PETITION FOR REVIEW

COME NOW Respondents Patrick E. Lawson and Alison J. Lawson ("the Lawsons"), by counsel, and hereby file this Response to the Petition for Review filed by VCU Health System Authority ("the Hospital"), and in opposition to said petition, state as follows:

Statement of the Case

The issue in this case was whether or not the trial court could declare that the Hospital may perform an apnea brain death test on two-year old Mirranda Grace Lawson ("Mirranda"), when Mirranda's parents, the Lawsons, objected to the test.

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 are the only persons authorized to consent to health care decisions for Mirranda. They have asked that she be treated as a living patient and given a chance to improve with treatments the Hospital refuses to provide.

The Hospital wants to perform a medical procedure known as an apnea brain death test on Mirranda. 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 Lawsons rejected the apnea test since it would be harmful to Mirranda and would not improve her condition in any way.

In the lower court, the Hospital presented its case as to why they should be permitted to perform the apnea test, and the Lawsons presented their case as to why they should not. The trial court declared that the Hospital could proceed, and the Lawsons appealed.

In approving the Lawsons' $30,000.00 appeal bond, the trial court correctly ordered that while its order is suspended pending the appeal, the Hospital could not proceed with the test at issue. A supersedeas appeal bond does not itself constitute an injunction subject to a petition for review. By the Hospital's logic, every supersedeas appeal bond is an injunction.

Thus, a petition for review is not allowed in this case, and the issues raised by the Hospital will be properly reviewed in the context of the petition for appeal. The complex legal issues on appeal deserve a full and fair briefing and cannot be completed on an expedited basis.

Facts

On May 11, 2016, Mirranda choked on popcorn and suffered a severe brain injury. (pp. 13, 142). Prior to this event, she was a perfectly healthy two-year old girl. (p. 13). Since then, she has been a patient in the Hospital's PICU. (pp. 14, 143).

After only eight days, without informing the Lawsons of the risks involved or obtaining their consent, the Hospital attempted to perform the apnea brain death test on Mirranda. (p. 150). The Lawsons objected to the test, as documented twice in Mirranda's medical record. (pp. 43-45, 240.) The physicians believe that she has no reasonable hope of recovery, expect her to "fail" this apnea test, and upon failure, declare Mirranda to be deceased and stop treating her. (pp. 15-17). The physicians believe that the other tests they have done so far are consistent with loss of brainstem function, but cannot say so definitively. (p. 260).

The apnea test is inherently dangerous and carries serious health risks. The test requires the removal of the patient's ventilator for ten to fifteen minutes and the test is done on two separate occasions. (pp. 159-160). During the test, excess carbon dioxide in the patient's body results in "side effects" such as acidosis, brain swelling, possible additional brain damage, heart irregularity, hypotension, and other risks. (pp. 177-178, 305-307). Many articles in medical journals have been written by physicians noting the dangers of the apnea test and recommending that it be re-evaluated. (pp. 72-87, 241-250).

The Lawsons wanted to seek alternative options, and they have continuously done so. (pp. 27, 55-56, 139). With medical advice from a

physician outside of the Hospital, the Lawsons found treatments that would improve Mirranda's condition, including thyroid hormones, a tracheostomy for long-term breathing, and a gastrostomy for additional nutrition, among other things. (pp. 56, 61-62, 308-312, 316-317). The Hospital's physicians refused to utilize such treatments. (pp. 182-184, 277-278).

Mirranda's condition is stable and has not deteriorated. (pp. 169, 257, 271-271). She responds to her parents' voices. (p. 24). In order to improve, she needs the treatments the Lawsons requested. (pp. 279-280). The Guardian *ad litem* representing Mirranda's best interests agreed the apnea test should not be performed, noting she is not suffering and her organs are not failing. (pp. 202-206, 341).

After the trial court entered its final order on June 10, 2016, permitting the Hospital to perform the apnea test, the Lawsons filed their Notice of Appeal and a $500.00 Appeal Bond to cover the costs and suspension of the final order. (pp. 383-384.) The Hospital refused to honor the initial appeal bond, asserting its right to proceed with the apnea test on June 14, 2016. (p. 392.) The Lawsons then filed an Emergency Motion to Approve Appeal Bond on June 13, 2016. (pp. 385-395.) After a hearing, the lower court entered an Order on Appeal Bond permitting an appeal bond in the amount of $30,000.00, with surety, that would suspend the final order and

ordered the Hospital to not perform the apnea test while its final order is suspended pending the appeal. (pp. 468-470.)

Standard of Review

This Court must first determine whether a petition for review is permitted in this case. Under Virginia Code § 8.01-626 and Rule 5:17A(f), this Court may only consider that portion of the lower court's order granting injunctive relief. The final order of the lower court was declaratory in nature and the order setting an appeal bond to suspend the final order did not constitute injunctive relief, so a petition for review is not allowed. The question of whether a petition for review is permitted is one of statutory interpretation, so it is a pure question of law which this Court reviews *de novo*. *Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 561 (2013).

Argument

I. The Order Allowing a Supersedeas Bond in this Case is Not an Injunction that May Be Subject to a Petition for Review.

The final order in the trial court was declaratory of the Hospital's purported right to perform the apnea test, in light of the parents' opposition to the test. Either the Hospital was permitted to do the apnea test, or they were not. Since the final order declared that the Hospital was permitted to do so, a suspension of that order required that the apnea test be withheld pending appeal. The supersedeas in this case was not an injunction.

Rule 5:17A(f) governs the scope of petitions for review, and states:

> (i) a petition for review may be considered by this Court whether the lower court's order, or that part of the order dealing with the injunction, is temporary or permanent. If review is sought from a final order that deals with injunctive relief and other issues, a petition for review must address only that part of the final order that actually addresses injunctive relief. All other issues shall be governed by the normal rules and timetables that apply to appeals.

There are two statutes primarily at issue in this petition for review.

The first is Virginia Code § 8.01-626, which states, in pertinent part:

> Wherein a circuit court (i) grants an injunction or (ii) refuses an injunction or (iii) having granted an injunction, dissolves or refuses to enlarge it, an aggrieved party may, within 15 days of the court's order, present a petition for review to a justice of the Supreme Court.

The second is Virginia Code § 8.01-676.1(C), which states:

> An appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file an appeal bond ... conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension, and ... execution shall be suspended upon the filing of such security and the timely prosecution of such appeal.[1]

"[T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007).

[1] The text quoted here is the statute in effect on June 14, 2016, when the lower court entered an order setting an appeal bond. This statute was amended by 2016 Va. ALS 178, effective July 1, 2016, and now refers to such an appeal bond as a suspending bond.

From the early days of the Commonwealth, the purpose of a supersedeas has not changed. "A supersedeas is only intended to stay further proceedings, to leave matters in the condition it finds them, until the Appellate Court can hear the case and pass on the questions involved in the appeal." *Bristow v. Home Bldg. Co.*, 91 Va. 18, 29 (1895). A thorough discussion of supersedeas by this Court was made in *Aetna Casualty & Surety Co. v. Board of Supervisors*, 160 Va. 11, 48-49 (1933):

> It operates to stay all further proceedings on the judgment, or as to any matter embraced therein. Its effect is to prevent the enforcement of the judgment to any further extent than had been had at the time it becomes effective, and, thereby, ***to preserve the status quo at the time the supersedeas becomes effective***. (Emphasis added.)

As a preliminary matter, under the plain meaning of the statutes at issue and the purpose of a supersedeas bond, it is clear that a petition for review is not permitted in this case. The Hospital incorrectly asserts that the lower court's order allowing the supersedeas was an injunction.

In this case, the status quo prior to and during the proceedings in the trial court was that the Lawsons objected to the apnea test being performed and the Hospital ***sought permission*** to proceed with the test anyway. 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". (p. 44).

The Hospital presented testimony from its physicians explaining Mirranda's condition and prognosis. The physicians explained why they wanted to perform the apnea test. The Lawsons presented their own medical expert who explained why the apnea test was dangerous and unwarranted, supporting the Lawsons' decision to forego the apnea test and pursue other treatments to improve Mirranda's condition.

The trial court erroneously declared that, despite the objections of the Lawsons, the Hospital could be permitted to perform the apnea test. In its Amended Final Order, the trial court ruled as follows:

> Upon consideration of the evidence, the Petition shall be and is sustained. The Respondent is hereby allowed to administer the apnea test on the subject infant child, who is two years of age, under such mitigating and supportive measures as may be medically necessary and required for the purpose of a determination of the existence, extent, and viability of brain stem activity and thereafter to make or recommend any treatment or in the alternative, make a determination of death as provided by law pursuant to Va. Code 54.1-2972.
>
> The Court finds that, with medical advice, the parents are informed regarding medical care they believe appropriate for their child. However, sufficient time has elapsed for transfer to another medical institution or home for the provision of such desired medical care, without success. (p. 466).

The Hospital agreed the final order at issue was not an injunction. On June 14, 2016, during a telephonic hearing to approve an appeal bond

to suspend the court's final order, the Hospital's counsel stated the final order was "a declaratory action" and "to declare our existing rights". (pp. 437, 453, 460). The judge agreed it was a "declaratory judgment". (p. 448).

The trial court's declaratory ruling was suspended by the authorized appeal bond pursuant to Virginia Code § 8.01-676.1(C). The Hospital argues that the trial court lacked jurisdiction to suspend its order, despite the clear authority granted in Code § 8.01-676.1(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 gave the lower court jurisdiction to hear the motion to set an appeal bond that would suspend its final order, and this is what it did.

The setting of a supersedeas bond does not, of itself, constitute an injunction. In allowing the supersedeas bond, the trial court correctly allowed the suspension of execution of the court's declaratory judgment. The suspension of the final order required the status quo to remain in place. In this case, the status quo was that the Hospital could not proceed with the test without the court's permission, due to the Lawsons' objection. Otherwise, the Lawsons would be deprived of their appeal of the very issue that was litigated. Once the apnea test is done, it cannot be undone.

Therefore, since the lower court did not award injunctive relief in its order setting the supersedeas appeal bond, the petition for review is not permitted and must be dismissed.

II. The Lawsons' Consent is Required in Order to Proceed with the Apnea Test on Mirranda, as the Test is Invasive Health Care.

The issues in this case require a careful review of the application of numerous statutes, and in particular those in the Health Care Decisions Act (the "Act"). The Hospital has no legal authority to override and ignore the Lawsons' decision to forego the apnea test for their daughter, because the Lawsons' consent is required in order to proceed.

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. They have a duty 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". Virginia Code § 54.1-2986.1(B).

Virginia Code § 54.1-2982 provides the definition of "health care" for purposes of the Act, as:

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

> facility; psychiatric or other mental health treatment; and life-prolonging procedures and palliative care.

The definition of "life prolonging procedures" is also set forth in this statute, in pertinent part, as "any medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function...."

The apnea test constitutes "health care" for two reasons. First of all, like any medical diagnostic test, it allows physicians to gain knowledge of the patient's condition in order to determine how to proceed with their care. The physicians advised the trial court that if the apnea test revealed evidence of brainstem function, they would provide a tracheostomy and "additional therapy as appropriate". (pp. 344-345.) Secondly, the medical procedures involved in the apnea test constitute the withdrawal of a life prolonging procedure, namely the ventilator. Therefore, it is evident that the apnea test constitutes "health care" under the Act.

The Hospital admitted that its policy requires informed consent from the patient or the legal decision maker for any test that carries with it risks and in all situations. (p. 275.) Virginia regulations also require informed consent, in particular 18VAC85-20-28, which states, in pertinent part:

> 3. Before surgery or any invasive procedure is performed, informed consent shall be obtained from the patient in accordance with the policies of the health care entity. Practitioners shall inform patients of

> the risks, benefits, and alternatives of the recommended surgery or invasive procedure that a reasonably prudent practitioner in similar practice in Virginia would tell a patient.
>
> a. In the instance of a minor or a patient who is incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder, the legally authorized person available to give consent shall be informed and the consent documented.
>
> b. [exception for an emergency situation]
>
> c. For the purposes of this provision, "invasive procedure" means any diagnostic or therapeutic procedure performed on a patient that is not part of routine, general care and for which the usual practice within the health care entity is to document specific informed consent from the patient or surrogate decision maker prior to proceeding.

Contrary to the argument of the Hospital, the apnea test is certainly an invasive procedure, since it is a diagnostic procedure that is not part of "routine, general care", and the Hospital admitted that it customarily obtains consent from patients or their decision-makers to tests that carry risk.

If the Lawsons' appeal is successful, this Court will declare that the Hospital cannot require an apnea test for Mirranda. During the pendency of this appeal, the status quo must remain in place, in that the Lawsons' directive to not perform the apnea test must be honored. For these reasons, the petition for review must be denied.

III. Virginia Code § 54.1-2972 Does Not Grant a Physician any Authority or Right to Gather Evidence of Brain Death.

The Hospital cited Virginia Code § 54.1-2972 in its petition to the lower court, and again relies on it to obtain authority to perform a medical procedure that was rejected by the decision maker. This statute is merely declaratory as to when a person is "medically and legally dead", and does not convey to any physician the right to gather evidence of brain death.

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).

There is no statute, rule, or regulation that confers upon a hospital the right to force anyone to have brain death testing. There is no Virginia case that agrees with the Hospital's misinterpretation of Virginia Code § 54.1-2972 that would allow them to override the decision of an authorized person. No legal authority allows the Lawsons' authority to be ignored.

The plain meaning of this statute allows a physician to make a declaration of death, but does not allow a hospital to override a decision-maker's health care decision. The lower court added language to Virginia Code § 54.1-2972 when it imposed the will of the Hospital in direct contravention to that of the Lawsons. This is a misapplication of the law

that must be corrected. Thus, the Petition for Appeal must proceed and this petition for review must be dismissed.

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

The Hospital has presented new factual issues that were not litigated in the trial court. The Hospital presented affidavits discussing the cost of Mirranda's care and purported strain on PICU staff, claiming it will be harmed by an injunction. This Court should not consider these new allegations in this petition for 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?

(p. 18) (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

covered Mirranda's care and Virginia's Medicaid program for disabled individuals is also available. Mirranda's life is worth no less than any other child's life, and she must not be discriminated against due to her disability.

The Lawsons had no opportunity to cross-examine the affiants on these new factual issues. Nor did they have the opportunity to present contradictory evidence. The Lawsons have stated that they have an excellent relationship with the Hospitals' nurses, and the nurses have not conveyed any undue stress or emotion due to Mirranda. The Hospital has cited no incidents with visitors or "security" problems.

Finally, as the Hospital admits, the 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 new patients. 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 DISMISS the petition for review.

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 5th day of July, 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.
Whitehead & Chiocca PLC
2420 Maplewood Ave., Ste. G
Richmond, Virginia 23220
Tel. (804) 254-5600
Fax (804) 254-5652
mchiocca@whitehead
chioccalaw.com
Guardian *ad litem* for Mirranda

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
Counsel for VCU Health System Authority

Phillip J. Menke