IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2012-CA-013584
DIVISION: CV-G

BRENDA ROSIER, Individually,
and BRENDA ROSIER as the
Personal Representative of the
Estate of Tony Rosier,

Plaintiff,

vs.

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.,
d/b/a BAPTIST MEDICAL CENTER SOUTH,
GREGORY SENGSTOCK, M.D., FELMOR AGATEP, M.D.,
and FREDERICK TRENT, M.D.,

Defendants.
_____/

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS, SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC. d/b/a BAPTIST MEDICAL CENTER SOUTH, GREGORY SENGSTOCK, M.D., FELMOR AGATEP, M.D., AND FREDERICK TRENT, M.D., AND ENTERING FINAL SUMMARY JUDGMENT IN FAVOR OF ALL DEFENDANTS

This cause having come on to be heard upon the above-referenced Motions seeking summary judgment as to all Counts of the operative Complaint ("Complaint"), and the Court having reviewed said Motions and Supporting Memoranda of Law, and having heard argument of counsel and being otherwise advised in the premises, finds as follows:

1. In considering a motion for summary judgment, the matters to be addressed are solely those placed in issue by the pleadings.

2. Count 1 of the Complaint asserts a claim for direct liability against Dr. Sengstock, alleging medical negligence in the assessment and declaration of "brain death", and withdrawal of mechanical ventilation of Decedent. Compl. ¶¶ 23, 24, 29 a)-c).

3. Count 2 of the Complaint asserts a claim for direct liability against Dr. Agatep, alleging medical negligence in the assessment and declaration of "brain death", and withdrawal of mechanical ventilation of Decedent. Compl. ¶¶ 23, 38 a)-c).

4. Count 3 of the Complaint asserts a claim for direct liability against Dr. Trent, alleging medical negligence in the assessment and declaration of "brain death", and withdrawal of mechanical ventilation of Decedent. Compl. ¶¶ 23, 46 a)-c).

5. Counts 4 and 5 of the Complaint assert claims for direct and vicarious liability against BMCS, alleging medical negligence in assessment and declaration of "brain death", and withdrawal of mechanical ventilation of Decedent. Compl. ¶¶ 23, 24, 54 a)-c) and 59 a)-c).

6. Plaintiff's claims against all Defendants in Counts 1 through 5 of the Complaint are based solely upon the allegation that assessment of Decedent's "brain death" was not within the standard of care.[1]

7. After presuit, the filing of this action, and Defendants' service of its Answers and Affirmative Defenses to the Complaint, Decedent's Advance Directive Declaration (Advance Directive), dated January 28, 2009, was produced for the first time during discovery.

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[1] Although not pertinent to this Order, the Court notes: 1) Counts 2 and 3 were drafted in such a manner as to incorporate by reference not only the paragraphs contained in the Complaint's preliminary allegations but all of the paragraphs contained in Count 1 as well; and 2) Counts 4 and 5 were drafted in such a manner that each succeeding count incorporated by reference not only the paragraphs contained in the Complaint's preliminary allegations but all of the paragraphs contained in each of the preceding counts as well. That type of pleading practice is confusing and improper. *Frugoli v. Winn-Dixie Stores, Inc.*, 464 So. 2d 1292, 1293 (citing *Chaires v. North Florida National Bank,* 432 So. 2d 183 (Fla. 1st DCA 1983)).

8. Plaintiff admits she knew Decedent had executed the January 28, 2009 Living Will, and Plaintiff admits having no knowledge that Decedent ever revoked the Living Will. Brenda Rosier Dep. 251: 23-252:7; 252:20-25.

9. Decedent's Advance Directive was comprised of a Living Will and Designation of a Surrogate.

10. Decedent's Living Will stated:

> I, Tony Rosier, willfully and voluntarily make known my own desire that my dying shall not be artificially prolonged under the circumstances set forth below, and do hereby declare:
>
> If at any time I should have a terminal condition and my attending physician and one other consulting physician have determined that there is no medical probability of recovery from such condition, where the application of life-sustaining procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedures deemed necessary to provide me with comfort care or to alleviate pain.
>
> In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this declaration shall be honored by members of my family, my physician(s), and all others who may be concerned, as the final expression of my legal right to refuse medical or surgical treatment, and I accept the consequences for such refusal.

11. Decedent's Living Will expressly directed withdrawal of life-sustaining/life-prolonging procedures should he have a "terminal condition" with no medical probability of recovery, without regard to any requirement or need for assessment or declaration of "brain death".

12. Decedent's Living Will expressly accepted the consequences for withdrawal of life-sustaining/life-prolonging procedures.

13. Mechanical ventilation is a 'life-prolonging procedure" as that phrase is defined in section 765.101(10), *Florida Statutes*.

14. Florida law recognizes the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, and the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures. Fla Stat. § 765.302 (1) and (3).

15. "Courts overwhelmingly have held that a person may refuse or remove artificial life support, including supplying oxygen by a mechanical respirator. . . ." *Quiles v. City of Boynton Beach*, 802 So. 2d 397, 399 (Fla. 4th DCA 2001) (citing *Singletary v. Costello* 1099, 1104 (Fla. 4th DCA 1996) (quoting *In re Guardianship of Browning*, 568 So.2d 4, 11-12 (Fla. 1990)). The fundamental right of privacy is explicitly enumerated in article I, section 23 of the Florida Constitution. *In re Guardianship of Browning*, 568 So.2d at 10. "An integral component of self-determination is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment." *Id.* "Courts properly have regarded the subjective desires of competent adults to forego medical intervention as dispositive." *Id.*

16. Decedent's Living Will was valid and executed in accordance with the procedural requirements of section 765.302(1), *Florida Statutes*.

17. Decedent's Living Will establishes a rebuttable presumption of clear and convincing evidence of his wishes. Fla. Stat. § 765.302(3). There exists no evidence to rebut that presumption.

18. Section 382.009, *Florida Statutes*, which defines "brain death", specifically states that "brain death" is not the exclusive criteria upon which the decision to withdraw life support systems, including mechanical ventilation, may be made:

> (4) . . . [T]he standard set forth in this section is not the exclusive standard for determining death or for the withdrawal of life support systems.

Fla. Stat. § 382.009(4); *In re Guardianship of Barry*, 445 So. 2d 365, 368-69 (Fla. 2d DCA 1984) (construing section 385.085(4), the predecessor to section 382.009(4), and finding that where brain death cannot be determined under the statutory standard because there exists some minimal functioning in the brain stem, the statutory standard for determining brain death is not the exclusive standard for determining death or for the withdrawal of life-support systems).

19. It is undisputed that Decedent had a "terminal condition" with no medical probability of recovery as defined in section 765.101(17), *Florida Statutes,* and as determined under the procedures set forth in section 765.306, *Florida Statutes.*

20. The Affidavit of Plaintiff's expert, attached as Exhibit A to the Complaint, shows agreement that Decedent's condition was terminal with no medical probability of recovery: (1) "[t]he length of time [Decedent] was in PEA [pulseless electrical activity], the initial presentation of myoclonus, the findings on CT scan of the brain, and the lack of clinical recovery ... all contribut[ed] to a negative prognosis"; (2) "Nurse Sims indicated that Mr. Rosier's wife stated that she understood the terminal prognosis"; and (3) "[t]here is no question whatsoever that [Decedent] suffered a critically severe anoxic brain injury as a result of his cardiorespiratory arrest." James D. Leo, M.D. Aff. ¶¶ 8, 17 and 22 (attached as Exhibit A to Complaint).

21. Decedent's Living Will and his undisputed terminal condition with no medical probability of recovery render moot the allegation of negligence in the assessment and

declaration of "brain death", upon which all of Plaintiff's claims against all Defendants solely rest.

22. Because withdrawal of mechanical ventilation comported with Decedent's express wishes stated in his Living Will, all Defendants are entitled to judgment as a matter of law, and have absolute statutory immunity provided by section 765.109, *Florida Statutes*.

23. There exist no genuine issues of material fact that would preclude entry of final summary judgment in favor of all Defendants in this cause.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. All Defendants' Motions for Summary Judgment are granted.

2. Final summary judgment is hereby entered in favor of all Defendants in this cause.

3. The Court reserves jurisdiction regarding taxation of costs pursuant to section 57.041, *Florida Statutes*.

DONE AND ORDERED in Chambers, at Duval County, Florida this 28 day of August, 2014.

LP Haddock

LAWRENCE P. HADDOCK
CIRCUIT COURT JUDGE

Original to Court File

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