SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JACQUELINE BETANCOURT,	:	DOCKET NO. A-003849-08 T2
Plaintiff-Respondent,	:	Chancery Action
- against -	:	
	:	On Appeal from a Final Decision
	:	Of the Superior Court of New Jersey,
	:	Chancery Division
TRINITAS HOSPITAL,	:	Docket No. UNN-C-12-09
	:	Sat Below: Hon. John Malone, J.S.C
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE GREATER NEW YORK HOSPITAL ASSOCIATION

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PRELIMINARY STATEMENT

The Greater New York Hospital Association ("GNYHA") submits this brief as amicus curiae in support of Defendant-Appellant Trinitas Regional Medical Center's ("Trinitas'") assertion that the hospital and its affiliated physicians should not be required to provide extraordinary life-extending treatments in situations where the treatment would be medically futile, contrary to the standard of care, and inhumane.

The Plaintiff-Respondent, Jacqueline Betancourt (the "Plaintiff") takes the position that the Hospital should not have been permitted to discontinue or suspend treatment of her father, Ruben Betancourt, including dialysis, feeding tubes, and ventilation. Ms. Betancourt made this request as the appointed guardian of her father.

The Plaintiff's father, Ruben Betancourt, remained in a persistent vegetative state for over a year and a half after a post-operative self-extubation. Mr. Betancourt was ventilator and feeding tube dependent and had deteriorated into renal failure, requiring dialysis several times a week. Despite appropriate care, and due to his poor nutritional status, Mr. Betancourt developed severe decubitus ulcers, resulting in deep infections extending into the bone that were not likely to heal. The Trinitas medical staff continued to provide extraordinary treatments in order to support Mr. Betancourt's

ability to breathe, but his body and condition continued to deteriorate until his death on May 29, 2009. Trinitas and its physicians seek a ruling that would permit the provision of health care in a manner that comports with the standard of care in these extraordinary situations. GNYHA supports Trinitas in this effort and also urges the Court to rule, as a policy matter, that hospitals and their affiliated physicians should not be compelled to provide care that is medically futile or inhumane and that only serves to prolong the dying process.

Physicians have legal and ethical obligations to provide care and must be permitted to exercise their professional judgment - within appropriate boundaries, of course - and, in consultation with patients and their families as well as recognized hospital committees, to determine when care is or is not appropriate and when the dignity of life warrants cessation of extraordinary treatment. As medical technology advances and as society focuses on the effectiveness of care, the ethical issues surrounding medically futile treatment increase. These issues are of tremendous public importance and will undoubtedly arise again. Hospitals and other health care providers would benefit immensely from judicial clarification that health care providers need not continue the provision of treatment that is contrary to the standard of care, medically futile, and inhumane.

GNYHA therefore urges this Court to enter an Order reversing the decision of the Trial Court and authorizing Trinitas and its affiliated physicians to withhold extraordinary measures when they are contrary to the standard of care and not in the best interests of the patient. To rule otherwise will not only undermine the professional, legal, and ethical obligations of health care providers but will also undermine the quality and availability of health care services that our trained and licensed health care professionals can provide.

GNYHA also urges that this Court enter an Order denying Plaintiff's motion to dismiss the appeal in its entirety. Although Mr. Betancourt has passed away, this case presents the critical issue of whether health care providers have the right to practice medicine in accordance with the relevant standard of care and not be compelled to provide medically futile treatment.

INTEREST OF AMICUS CURIAE

GNYHA is a trade association serving nearly 250 hospitals and continuing care facilities located throughout New York State, New Jersey, Connecticut, and Rhode Island. GNYHA represents ten of New Jersey's largest hospitals; these hospitals comprise 20 percent of the State's total number of hospital beds. The hospital affected by this specific case, Trinitas Regional Medical Center, is a member of GNYHA, and the

chief executive officer of the hospital is a member of the Executive Committee of GNYHA's Board of Governors and the most recent past-chairman of GNYHA's Board. All of GNYHA's members are either not-for-profit, charitable organizations or publicly-sponsored institutions that provide services ranging from state-of-the-art tertiary services to basic primary care needed by their surrounding communities, many of which are medically underserved.

Among other activities, GNYHA engages in advocacy, policy analysis, education, research, and communication services on behalf of its members. GNYHA provides the foregoing services with respect to issues that arise locally; at the state level in New York, New Jersey, Connecticut, and Rhode Island; and at the Federal level. Additionally, among its other activities, GNYHA participates in lawsuits of interest to its members by filing amicus curiae briefs on their behalf.

GNYHA has long supported legislation promoting the rights and wishes of patients with regard to health care decisions and end-of-life treatment and has specifically supported the need for reform in New York State law regarding surrogate decision-making. GNYHA has also engaged in advocacy and educational briefings on topics related to advance directives, consent to treatment, and Medical Orders for Life Sustaining Treatment (MOLST).

Moreover, a significant portion of the services that GNYHA provides focuses on assisting its member hospitals in their efforts to improve patient care and patient safety, enhance their quality of care, and identify and implement best practices in patient care. This is done collaboratively through member briefings, workgroups, and training sessions.

More particularly, GNYHA, together with the United Hospital Fund, has established the Critical Care Leadership Network (CCLN), which is composed of hospital executives and interdisciplinary staff members who are local and national leaders in the fields of critical care medicine, surgery, and nursing and who are active in critical care initiatives and associations. The core mission of the group, which includes a number of GNYHA's New Jersey members, is to coordinate a unified approach for delivering critical care services in our area by sharing and standardizing the implementation of evidence-based practices and the training of clinicians, in an effort to improve patient outcomes in the intensive care unit (ICU) setting. One of the core areas the CCLN Steering Committee has chosen to focus on is end-of-life care.

The issues raised by this case are thus of considerable importance to GNYHA and its member hospitals, and GNYHA is in a unique position to describe the severe negative impact that the Plaintiff's position, if validated by this Court, would have on

the region's health care system and the patients that they serve. GNYHA members are very concerned that being compelled to provide futile treatment may have a profoundly negative impact on their ability to provide curative and beneficial treatment to patients in their communities.

GNYHA believes that its knowledge and expertise with respect to both the State of New Jersey and the region's larger health delivery system would be of significant assistance to this Court.

QUESTION PRESENTED

May a hospital and its affiliated physicians be required, at the request of a patient or guardian, to continue providing treatment that the hospital and physicians determine is contrary to the standard of care, futile, and medically and ethically inappropriate and inhumane?

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Ruben Betancourt, a 73 year old male, was an in-patient at Trinitas Regional Medical Center in Elizabeth, New Jersey for nearly a year and a half. On January 22, 2008, Mr. Betancourt underwent a mediastinal sternotomy with resection of a malignant thyoma and reconstruction of the innominate artery. Post-

[1] GNYHA, as amicus curiae, will provide only a brief overview of the facts and procedural history of this case. Because they are entwined, GNYHA combines the relevant facts and procedural history.

operatively, Mr. Betancourt removed his own endo-tracheal tube, which resulted in respiratory and cardiac arrest. The patient was resuscitated, but developed anoxic encephalopathy.

The patient was subsequently admitted to various treatment facilities in New Jersey, including JFK Medical Center's Brain Trauma Unit, Genesis Health Care's Ventilation Unit, and Elizabeth Nursing Home. Mr. Betancourt was readmitted to Trinitas on July 3, 2008, with a diagnosis of renal failure. For nearly a year, he remained in Trinitas on an artificial ventilator, and received dialysis and nutrition by means of a feeding tube. Due to the patient's continued deterioration and the apparent futility of care, the attending physicians requested an ethics consultation.

The Trinitas Ethics Committee unanimously agreed that, despite extended maximum support, the patient's condition had continued to worsen. Trinitas medical staff determined that Mr. Betancourt was in an unresponsive, irreversible vegetative state and that further treatment would be futile. In the opinion of those physicians, Mr. Betancourt would never have recovered from his condition and was actively dying -- the patient suffered from bed sores and ulcers on his bones due to chronic bone infection, his body was decomposing, and he was suffering from sepsis. Trinitas representatives spoke to the family, testified in court, and wrote affidavits stating that it was the opinion

of the medical staff that mechanical life support treatment should be discontinued.

The Plaintiff, Jacqueline Betancourt, daughter of the patient, initiated an action by Order to Show Cause and Verified Complaint, seeking to enjoin Trinitas from discontinuing treatment pending further proceedings in the matter. On January 23, 2009, the lower court entered an order requiring the hospital to continue to provide treatment and directing the resumption of dialysis treatment that had been discontinued. On January 30, 2009, the lower court directed that the January 23, 2009, order remain in effect pending a plenary hearing. Hearings were conducted before the Honorable John F. Malone, J.S.C., on January 22, February 17, and February 23, 2009, and the court heard testimony from witnesses on behalf of the hospital and the Betancourt family.

After taking testimony, the lower court entered a written decision on March 4, 2009, appointing Jacqueline Betancourt as guardian and ordering Trinitas to continue to provide life-sustaining treatment. The court entered an Order memorializing this decision on March 20, 2009, and an accelerated appeal was granted. Mr. Betancourt, pursuant to Court Order, remained at Trinitas Hospital receiving ventilator support, dialysis, and nutritional support until his death on May 29, 2009.

POINT I

PROFESSIONAL STANDARDS AND EXISTING LAW DICTATE THE PROFESSIONAL AND ETHICAL OBLIGATIONS OF HEALTH CARE PROVIDERS, AND THE PROVISION OF MEDICALLY FUTILE OR INHUMANE TREATMENT CONFLICTS WITH THESE OBLIGATIONS

Trinitas Followed the Medical and Professional Standards and Procedures for Withholding or Withdrawing Futile Treatment

In the case before the Court, Trinitas and its physicians followed clinical and professional standards as well as New Jersey law for determining and discontinuing medically futile care.

The American Medical Association (AMA) has adopted a Medical Code of Ethics (the "Code"), which for physicians, is comparable to the professional code of conduct adopted by the American Bar Association or similar codes adopted in each of the states for attorneys. The AMA Code clearly provides that physicians are not ethically obligated to deliver care that, in their best professional judgment, will not have a reasonable chance of benefiting their patients. Additionally, under the Code, health care providers have the professional responsibility to determine when treatment is futile or contrary to the standard of care, and patients or their surrogate decision-makers cannot be guaranteed treatments simply because they demand them. As a result, compelling health care providers to provide medically futile treatment conflicts with their

professional and ethical obligations to their patients and the AMA's Medical Code of Ethics.

In recognition of the fact that discontinuing medically futile care and/or discussions about end-of-life care can raise both ethical and clinical issues, the AMA Council on Ethical and Judicial Affairs has published guidelines, entitled the "Report on Medical Futility and End-of-Life Care" (the "Report"), that recommends a process-based approach to futility determinations. Such an approach for determining and withholding or withdrawing what is believed to be futile care includes the provision of an opportunity for patient or proxy to evaluate what a worthwhile outcome would be as well as for health care providers to explain the intent of treatment and whether the primary purpose of the proposed treatment is intended to prolong the dying process without benefit to the patient or others with legitimate interest. The Report further provides a system for addressing the ethical dilemmas around end-of-life care prior to, and ideally instead of, resorting to the judicial system.

The Report details a process that involves joint decision-making between the patient or proxy and the hospital. However, when a course of treatment cannot be agreed upon, the Report recommends referring the case to an institutional committee, such as an ethics committee. In the event of continued disagreement between the patient (or the surrogate decision-

maker) and physician(s), transfer of the patient to another physician or facility should be attempted. If transfer is not possible, the Report states that "the intervention need not be offered."

In the present case, the Trinitas medical staff met with Mr. Betancourt's family on many occasions, and the parties were never able to agree on his care. The Trinitas Prognosis Committee met and determined that continued care would be medically futile and offered no chance for his recovery. Ultimately, attempts to transfer Mr. Betancourt were unsuccessful because no other facility was willing or able to accept him as a patient. Therefore, because a transfer could not be accommodated, the AMA Report would suggest that Trinitas need no longer offer the intervention.

Thus, Trinitas, in accordance with the Report and the ethical obligations of health care providers, followed the appropriate process for both determining medically futile care and whether it should be discontinued. The courts should not contradict the medically recommended process and compel health care providers to engage in a course of treatment that they consider contrary to the standard of care and medically futile, particularly when they are encouraged or instructed by professional and ethical obligations to act otherwise.

State Licensure Laws Provide Oversight of Medical Practice and Professional Standards

The provision of effective health care services depends not only on health care providers being guided by a professional code of ethics but also on state regulation of health care providers through professional licensure and oversight. All health care facilities and providers in the State of New Jersey are licensed and undergo, among other oversight activities, routine supervision with respect to the quality of care being provided. The New Jersey State Board of Medical Examiners protects the citizens of New Jersey through the licensing and regulation of health care professionals. The Board promulgates regulations that serve as a basis regarding the standard of practice and ensures that these regulations and the statutes are followed. Hospitals are further regulated and maintain policies pursuant to state and federal laws.

As closely supervised and regulated entities, health care providers not only strive to, but are required to provide quality, safe, and effective care. In short, hospitals and their physicians treat patients in an effort to improve their health. Unfortunately, because some patients reach a point at which their medical condition can no longer be improved, health care providers must assess whether the care being provided or

requested is medically futile and whether it should be discontinued.

As a society, we call upon and expect that licensed health care providers will perform professionally. We also require them to make fair and responsible medical determinations, given their expertise, professional ethics, and obligations under the law. Unquestionably, they are expected to understand the effects of treatment they provide and to determine medical futility.

The Law Recognizes the Importance and Value of Professional Judgment

Historically, courts have recognized the importance of the professional judgment of health care providers in our society and have established that physicians should not be forced to provide care that would be medically inappropriate. Moreover, as established above, health care providers are licensed professionals with legal and ethical obligations to provide care that they have determined will be effective.

This Court in *Couch v. Visiting Home Care Services* (329 N.J. Super. 47, App. Div. 2000) held that health care providers may not be ordered to pursue a course of treatment that they believe is inappropriate, unsafe, or against their own professional practices and ethics. The plaintiff in *Couch* was a quadriplegic with decubitus ulcers who sued his county health department and its private contractor of home health services,

seeking to enjoin them from terminating home nursing care. The county health department and home health service agency believed that they could not properly and ethically continue providing extraordinary care that, in their professional opinion, placed their care givers, registered nurses, licensed practical nurses, and certified home health aides, in a dangerous situation with respect to their professional licenses and their professional integrity. This Court held that requiring health care professionals to indefinitely continue providing services that they have determined to be inappropriate treatment is an unwarranted invasion of their professional responsibility.

In the present case, it was the unanimous and unambiguous opinion of the various treating physicians that Mr. Betancourt was in a persistent vegetative state for an extended period of time, with no chance of recovery. The various physicians, many of whom were on the Prognosis Committee at Trinitas and who treated the patient, all agreed that continuing dialysis on the patient was not only contrary to the standard of care but medically and ethically inappropriate. As set forth by this Court in *Couch*, health care providers should not be compelled to provide medical treatment that they believe is medically or ethically inappropriate or futile. Moreover, health care providers should not be compelled to provide medical treatment that is against their own professional practices and ethics.

POINT II

THE CHALLENGES OF DELIVERING CARE IN TODAY'S HEALTH CARE SYSTEM COMPLICATE END-OF-LIFE DECISION-MAKING, BUT PROVIDERS SHOULD NOT BE COMPELLED TO PROVIDE MEDICALLY FUTILE CARE

Technological Advances in Medicine May Prolong Life But May Not Be Beneficial or Effective

Advances in medical technology have made it increasingly possible to prolong the lives of those who would otherwise have died not so long ago. As the author of *That Good Night: Ethicists, Euthanasia and End-of-Life Care*, Tim Falconer, stated: "The technology has far outstripped the ethics. Feeding tubes and ventilators weren't designed to keep people alive for 15 years, but that's what they're being used for."

The presence of such technologies raises questions of whether the technologies are not only effective, but beneficial. Studies in the area have focused on renal dialysis and cardiopulmonary resuscitation, which can replace or restore organ function, although it is less clear whether these interventions provide overall benefits to certain groups of patients.

Once a technology or treatment has been established as being both effective and of beneficial value, and after it becomes widely available to the public, the ethical problems it raises range from those of justly distributing these methods of treatment to those of limiting inappropriate use. The appeal of

using techniques or technologies, together with the prestige sometimes associated with them, may encourage excessive use, thereby exacerbating the ethical problem of using technologies in medically futile circumstances.

The often cited example is cardiopulmonary resuscitation (CPR), which originally was developed to apply to patients who suffered an acute medical event, such as sudden cardiac or respiratory arrest, and whose conditions were largely reversible. Eventually, CPR was applied to all patients who experienced a cardiac arrest, regardless of their underlying disease or quality of life, unless they explicitly refused this intervention. This has prompted some to counsel limiting resuscitation when it is medically futile. In an article entitled "Ethics and Communication in Do-Not-Resuscitate Orders," the authors, Tomlinson and Brody, argue that when resuscitation offers no medical benefit, the physician can make a reasoned determination that a do-not-resuscitate order should be written without any knowledge of the patient's values in the matter. The decision that CPR is unjustified because it is futile is, in their view, a judgment that falls entirely within the physician's technical experience. (T. Tomlinson and H. Brody, *Ethics and Communication in Do-Not-Resuscitate Orders*, New England Journal of Medicine, 318: 43-6 (1988))

In sum, advances in medical technology have increased the ability of health care providers to prolong the lives of their patients. However, it is inhumane and unethical to continue treating certain patients for whom treatment will provide no benefit, and in fact only serves to delay death and prolong the often painful process of dying. The ultimate determination as to whether treatment is futile rests with health care providers, and hospitals and physicians should not be compelled to use treatments they believe to be medically futile simply because such treatments exist and are available.

Physicians and Patients May Perceive the Objectives of Medical Treatment Differently

One component of a physician's duty to treat patients is a duty to inform patients or families about treatment they regard as futile. The Council on Ethical and Judicial Affairs of the AMA has noted that the concept and determination of futility encompasses a range of probabilities, and physicians and their patients may perceive the objectives of medical treatment and potential outcomes differently. The technological advances described above can complicate decisions of medical futility for patients or families who might opt for treatments that are available but will ultimately be ineffective.

To demonstrate the differing judgments that can arise, one study asked patients about their wishes concerning five

treatments (artificial respiration, CPR, chemotherapy, amputation, and tube feeding) and compared their responses to those of family members or others chosen by physicians to decide on the patient's behalf. (N.R. Zweibel and C.K. Cassel, "Treatment Choices at the End of Life: A Comparison of Decisions by Older Patients and Their Physician-Selected Proxies," *Gerontologist* 29, 615-21. (1989)) The choices made by surrogates frequently diverged from the patient's own choice: 24 percent of the time for decisions about tube feeding, 44 percent for CPR, and as often as 50 percent for chemotherapy. For artificial respiration, tube feeding, and amputation, *the divergence between patient and surrogate choices arose most often because the patient would have refused treatment and the surrogate would have accepted it.*

The ability of patients and family members to decide about treatment, the importance of their participation in treatment decisions, and the balance that should be struck between the authority of patients and the authority of physicians are all considered as futility is determined. Ultimately, though, many commentators have argued that the proper process is that physicians should first make a medical determination and then talk and explain their findings to the patient or surrogate. Ultimately, however, physicians should be able to decide not to provide treatment they judge to be medically futile.

This has become particularly true as a growing body of data indicates the poor outcomes of treatment for patients in certain medical conditions. Based on these data, physicians are able to determine that for some patients, such as those in the final stages of a terminal illness, certain treatments offer no hope of cure or improvement and limited, if any, chance for prolonging life.

The Nation is Currently Examining the Quality and Effectiveness of Care

The issue of providing medically futile care is important to a larger, ongoing discussion regarding the quality and effectiveness of care. As the cost of health care rises, the nation is looking at how to provide care more effectively on behalf of patients and eliminate unnecessary or ineffective care. In fact, as part of current national health reform efforts, the Obama administration has begun conducting comparative effectiveness research, explained in more detail below. The resulting data will provide information on the relative strengths and weakness of various medical interventions. This research will ideally give clinicians and patients valid information to make decisions that will improve the performance of the national health care system.

Effectiveness refers to care that is based on the use of systematically acquired evidence to determine whether an

intervention, such as a preventative service, diagnostic test, or therapy, produces better outcomes than alternatives - including the alternative of doing nothing. Evidence-based practice requires those who give care consistently to avoid both underuse of effective care and overuse of ineffective care that is more likely to harm than help the patient. (Mark R. Chassin, *Assessing Strategies for Quality Improvement*, Health Affairs 16(3):151-61 (1997)) As part of the American Recovery and Reinvestment Act (ARRA), the Secretary of the United States Department of Health and Human Services will be devoting $400 million to advance this type of research.

As the nation undergoes an evaluation of the quality and effectiveness of the care provided by its hospitals and physicians, undoubtedly some of the ensuing recommendations will raise questions about the provision of medically futile treatments. When considered from a quality and effectiveness perspective, health care providers should neither be permitted nor required to provide unethical, inhumane, or ineffective treatment. The aim of these activities is to ensure that our hospitals and physicians provide effective care, and compelling the delivery of care that is medically futile certainly is antithetical to this goal. GNYHA therefore respectfully requests that this Court not compel health care providers to provide treatment that is medically futile and contrary to the standard

of care when they are otherwise legally and ethically obligated to provide quality and effective medical care to their communities.

CONCLUSION

The patient, Ruben Betancourt, was in a persistent vegetative state for nearly a year and a half. He remained unresponsive, and his physicians maintained that there was no chance for improvement or recovery. Rather, they asserted that he would continue to deteriorate while his bodily functions were maintained by mechanical means. Unfortunately, the extensive medical and mechanical treatments and assistance were not enough, and Mr. Betancourt passed away on May 29, 2009.

For the foregoing reasons, GNYHA supports Defendant, Trinitas Regional Medical Center, and respectfully requests that, as a policy matter, the Court remove any prohibition from terminating mechanical means of support patients when such treatment is determined by treating physicians to be medically futile, against the standard of care, and inhumane. GNYHA also respectfully requests that this Court enter an Order denying Plaintiff's motion to dismiss the appeal in its entirety.

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