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

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT/APPELLANT, TRINITAS HOSPITAL, WITH RESPECT TO THE "MOOTNESS" ISSUE

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CERTIFICATION

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PRELIMINARY STATEMENT

This appeal presents an issue of grave public importance considering the rights of physicians and hospitals to exercise appropriate clinical judgment, within the constraints of their professional practice, and in consultation with medical experts and hospital prognosis and ethics committees with respect to care sought by a family that is contrary to recommended and appropriate standards of care and would be futile. After this appeal was filed, Mr. Betancourt, the terminally ill patient, died. Plaintiff has contended that the appeal is therefore moot.

Traditionally, a case becomes moot if the disputed issue is resolved with respect to the parties who instituted the litigation. However, here, this case presents an issue of first impression in this state and is capable and almost certainly likely to be repeated. It is axiomatic that when a patient is in a permanent vegetative state, and the physicians or hospital are seeking to discontinue services where the care rendered would be futile, that a patient will often die prior to resolution of the appeal. The issue presented, if not considered, would almost certainly and invariably evade review. It is for these reasons this appeal should and must go forward. Physicians and hospitals have been struggling with the ethics surrounding this issue, and various policy statements, admitted

before the trial Court and in the original Appendix to this appeal, have been issued with respect to the issues at the heart of this litigation. These parties and future parties deserve to have standards set by the Court with respect to these significant issues which have great public importance.

Further, the fact that numerous *amicus curiae* have sought and been granted permission to join this appeal on both sides, demonstrates that this is an issue of public importance that needs to be decided by the Courts of this state to set standards and provide guidance on how to handle these situations which will reoccur with our aging population.

Additionally, the Courts of this state have spoken to these issues in a similar context when a family has sought to terminate extraordinary measures and the patient died prior to resolution of the appeal. Uniformly, the Courts have held that in these circumstances, the importance of the issues presented mandates that the appeal go forward notwithstanding the mootness as to the original parties. No contrary result should be reached here.

Accordingly, and for the reasons that follow, we respectfully request that this Court consider the merits of this appeal and enter an order reversing the improvident decision of the trial Court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant/appellant will rely upon the Statement of Facts and Procedural History portions contained within the merits previously filed. As a supplement, however, Mr. Betancourt died during the pendency of this appeal. Plaintiff thereafter filed a motion for summary disposition to dismiss the appeal as moot. That application was opposed. This Court entered an order reserving decision, pending consideration of the merits and requesting briefing on the issue.

LEGAL ARGUMENT

POINT I

THIS APPEAL SHOULD BE DECIDED ON THE MERITS NOTWITHSTANDING THE DEATH OF RUBEN BETANCOURT.

In support of a motion for summary disposition, plaintiff claimed that the controversy in this matter is moot as the result of the death of Ruben Betancourt on May 29, 2009. Plaintiff relied upon a body of selected cases suggesting that a case is moot if the disputed issue is resolved with respect to the instituting parties. However, there is a large body of law that has developed in this state that requires that appeals with substantial public questions and that are capable of repetition but may evade review be resolved notwithstanding resolution with respect to the initiating parties.

This case implicates a significant and weighty public question; namely, the right of health care providers to comply with the standards of care governing their profession, when care sought by a family is futile and will only prolong the inevitable dying process. New Jersey courts have repeatedly held that in situations of public importance or when a controversy is capable of repetition but evades review because of the short duration of any single party's interest, the appeal should go forward notwithstanding mootness as to the original parties. See Guttenberg Sav. & Loan Ass'n v. Rivera, 85 N.J.

617, 622-23 (1981); Dunellen Education Board v. Dunellen Education Association, 64 N.J. 17, 22 (1973); John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 579 (1971); State v. Union County Park Commission, 48 N.J. 246, 248-49 (1966); East Brunswick Township Education Board v. East Brunswick Township Council, 48 N.J. 94, 109 (1966).

In the context of hospital care, the mootness issue has been presented on several occasions with respect to patient's seeking to avoid necessary blood transfusions. See State v. Perricone, 37 N.J. 463, 469 (1962), cert. denied 371 U.S. 890 (1962). In John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576 (1971), that issue was again considered. In that matter, Delores Heston was taken to the hospital following a severe automobile accident. 58 N.J. at 578. The hospital determined that she would expire unless operated on for a ruptured spleen and that blood transfusions would be required. Id. As a Jehovah's Witness, Ms. Heston and her parents refused to accept blood. Id. Therefore, the hospital made an application to the Court, which appointed a guardian with authority to consent to blood transfusions to preserve life. Id. at 579. Blood was administered, and Ms. Heston survived. Id.

The New Jersey Supreme Court certified the case prior to argument before the Appellate Division. Id. Recognizing

that the controversy was moot as Ms. Heston was healed, the Court confirmed that the public interest warrants resolution of the cause and, therefore, accepted it notwithstanding the mootness.

Of particular relevance to the subject of this appeal, the Court commented:

> When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to their professional standards.

Id. at 583.

As in John F. Kennedy Memorial Hospital, the issue of physician autonomy with respect to futile care is an issue of significant public importance and is capable of repetition with our aging population. No contrary result should be reached here. This appeal should be decided on the merits.

In a related context, this Court has already determined that in cases of this nature, notwithstanding that an appeal has become moot, the issues at stake should nevertheless be decided. See In re Conroy, 190 N.J. Super. 453 (App. Div. 1983). In Conroy, family members sought to terminate the provision of a nasogastric tube to allow for the death of their relative. 190 N.J. Super. at 455-56. While the matter was pending review by this Court, the patient died of natural

causes. Id. at 456. Addressing the mootness standard, this Court concluded the importance of the issues required resolution notwithstanding mootness. Although the Court expressed ordinary reluctance to render a legal decision in the abstract, the Court held:

> Nevertheless, our courts will decide a moot case that presents issues of great public importance or is based upon a controversy capable of repetition, yet evading review because of the short duration of any single plaintiff's interest.

Id. at 459 (citations omitted).

Further commenting, the Court noted:

> The issues presented by this appeal are of such great public importance that their resolution is clearly warranted. This appeal offers an opportunity to provide guidance to family members, guardians, physicians and hospitals, the need for which extends far beyond the facts of this case. Moreover, this is the type of case that is capable of repetition, yet which evades review because the patients involved often die during the course of the litigation . . . . For these reasons, courts have consistently agreed to decide the rights of terminally-ill patients to refuse life-sustaining treatment even after the patients have died or recovered.

Id. at 459-60 (citations omitted). The New Jersey Supreme Court affirmed. Matter of Conroy, 98 N.J. 321, 341 (1985).

A similar situation was presented in Matter of Farrell, 108 N.J. 335, 347 (1987). In that matter, Mrs. Farrell died while the matter was pending on appeal. As in Conroy, the

New Jersey Supreme Court agreed to render a decision because of the extreme importance of the issues and the inevitability of cases like that one arising in the future. Id.

No contrary result should be reached here. As in each of those cases, the issue presented in this matter is a question of general public importance and is also an issue of first impression in the state and should be considered by the courts. Further, this is a case that is capable of repetition, yet which would often evade review because the patients involved would likely die during the course of the litigation. Mr. Betancourt was in a permanent vegetative state. His death was not unexpected.

Undoubtedly, plaintiff will argue that there is no proof that this is a question of general public importance or that it is capable of occurring because this is a case of first impression. While defendant agrees that this is a case of first impression, it is certainly likely to occur with the expected of rationing of health care to be anticipated with the health care reform currently ongoing. Further, this has been a subject of national and local debate with numerous websites, periodicals, journal articles and texts authored on the subject of futile care. Many of these publications and issues will be presented and cited in the merits brief of *amicus curiae*. Therefore, while the actual issue may be mooted as to the present parties,

court of intervention is required to evaluate, consider and provide guidance on the meritorious issues presented.

POINT II

THIS APPEAL PRESENTS A QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE.

In her papers, plaintiff argued that this case does not present a question of substantial public importance, relying largely on the fact that this is an issue of first impression in the state. While the latter part is true, this issue has occurred in other states and will certainly reoccur in this state.

Plaintiff concedes that our courts have elected to continue moot appeals in "right to die" cases but urges that they are distinguishable from the present matter. However, the only difference is that this is the converse of the situation presented in Conroy. The same significant public importance presented in Conroy is present in this case by virtue of the similarity and the issues at stake. This type of case would virtually always escape review because the patient is terminally ill and the care to be rendered is futile. No physician would seek to terminate care for a patient who was not terminally ill or the care to be rendered was not futile. Accordingly, no case would ever reach perfection of the appeal in like circumstances. It is extremely important to all parties that this matter be resolved and guidance provided for the medical professionals and hospitals who play host to these situations.

Additionally, the public importance of this issue is demonstrated by the number of groups seeing to become *amicus curiae* on both sides of this matter. They will present compelling public policy arguments concerning the care to be rendered in these situations. This appeal is gravely important, and a decision should be rendered on the merits.

CONCLUSION

For the foregoing reasons, defendant/appellant, Trinitas Hospital, respectfully requests that this Court consider the merits of this appeal and enter an Order reversing the decision of the trial court.

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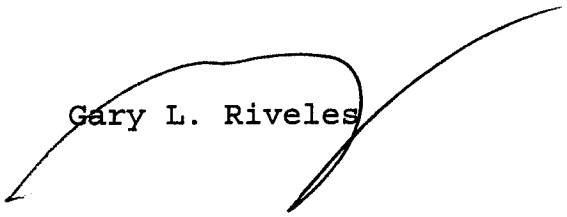

Gary L. Riveles

Date: August 7, 2009