MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

The Estate of Joyce Gillette and Kathryn Gillette,

Appellants-Plaintiffs,

v.

Franciscan Alliance, Inc.,

Physician On Duty – St. Francis,

Chris Hyman, and

John Doe Employees of St. Francis,

Appellees-Defendants.

August 21, 2023

Court of Appeals Case No. 22A-CT-1625

Appeal from the Marion Superior Court

The Honorable Gary L. Miller, Judge

Trial Court Cause No. 49D03-1902-CT-7323

Memorandum Decision by Judge Kenworthy
Judges Crone and Felix concur.

Kenworthy, Judge.

Case Summary

[1] The Estate of Joyce Gillette along with Joyce's daughter, Kathryn Gillette, (collectively, "Gillette") brought this action against a hospital and other medical providers concerning treatment rendered to ninety-one-year-old Joyce during a hospital stay prior to her death, when Joyce was unable to speak. The complaint focused on whether the defendants committed battery by providing life-prolonging care to Joyce—care rendered (1) when Joyce's living will had do-not-resuscitate ("DNR") provisions that only applied under specific circumstances and (2) one of Joyce's adult children consented to the care, but only after he was outvoted in a family-wide vote to withhold additional care.

[2] Eventually, there were competing motions for summary judgment. In general, the summary-judgment proceedings concerned the applicability of the DNR provisions in Joyce's living will and the validity of the adult son's consent tendered after the family-wide decision.[1] The parties also focused on parts of Indiana's Health Care Consent Act ("HCCA"). Following a hearing, the trial

[1] The motions also concerned whether Kathryn effectively refused further care because of documents conferring certain powers of attorney to Kathryn. Gillette elected not to discuss those documents on appeal. We therefore do not address whether Kathryn could unilaterally make health care decisions for Joyce.

court granted summary judgment to the defendants.[2] Gillette now appeals, arguing Gillette is instead entitled to summary judgment.

[3] Concluding there is no genuine issue of material fact that under the terms of the HCCA then in effect (1) there were unmet conditions precedent to the applicability of the DNR provisions in the living will and (2) Joyce's adult son was statutorily empowered to consent to further care, we affirm the order granting summary judgment to the defendants. In affirming, we note the HCCA allows for court intervention when a person is incapable of consenting and a family member or health care provider "disagrees with the course of action" as to the person's care. *Matter of Lawrance*, 579 N.E.2d 32, 43 (Ind. 1991) (discussing provisions now codified at Indiana Code Section 16-36-1-8). Under the HCCA, an interested person may petition a court to "make a health care decision" or "appoint a representative to act for the individual." Ind. Code § 16-36-1-8[3]; *see also* I.C. § 16-36-4-13(i)(2) (allowing for court intervention under certain circumstances). In this case, there was no petition for early court intervention regarding life-prolonging care for Joyce.

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[2] The order kept intact a claim against Dr. Imad Shawa, who was named in an amended complaint filed approximately one year after this litigation commenced. In a separate appeal, this Court determined Dr. Shawa was entitled to summary judgment due to the applicable statute of limitations. *See Shawa v. Gillette*, 209 N.E.3d 1196 (Ind. Ct. App. 2023). We therefore omit further discussion of the claim against Dr. Shawa.

[3] Unless otherwise stated, we cite throughout to the version of the HCCA effective in February 2017. We note that the HCCA has since been amended. Had the current statutes applied, the result in this case may have been different.

Facts and Procedural History

[4] On February 22, 2019, Gillette sued Franciscan Alliance, Inc., Physician On Duty-St. Francis, Chris Hyman, and John Doe Employees of St. Francis (collectively at times, "Provider"). The action relates to Joyce's stay at Franciscan Health Indianapolis ("Franciscan"), where Joyce became a hospital patient on February 23, 2017, a few days before her death. Gillette claims Provider committed medical battery by providing life-prolonging care to Joyce. According to Gillette, Provider is liable because Joyce refused life-prolonging care and communicated that refusal to Provider through (1) DNR provisions in Joyce's living will and (2) instructions the family gave hospital staff after several family members conducted a non-unanimous vote to withhold additional care.

[5] Provider moved for summary judgment, and Gillette cross-moved for summary judgment. There is designated evidence indicating that, in February 2017, Joyce was ninety-one years old, unable to speak, and receiving in-home hospice care. When Joyce was placed on hospice care, Dr. James Pike—her attending physician at the time—signed a hospice plan with the following certification: "I certify that this patient is suffering from a terminal illness for which palliative care is considered appropriate and that the patient has a life expectancy of 6 months or less if the disease progresses normally." *Appellees' App. Vol. 2* at 169. There is designated evidence Dr. Pike signed the certification on February 22.

[6] On the evening of February 23, Joyce began to choke during dinner. Two of Joyce's family members intervened, trying to clear Joyce's airway. When Joyce later struggled to breathe, the family called 9-1-1 out of concern Joyce "might

still have food blocking her airway." *Id.* at 207. Although the family told emergency responders Joyce "was a DNR," at that time the family was unable to produce a copy of any document containing DNR provisions. *Id.*

[7] Joyce was transported by ambulance to Franciscan, where she received emergency care. Before long, Kathryn gave staff a copy of Joyce's living will, which addresses the degree of life-prolonging care Joyce wished to receive under certain circumstances. In pertinent part, the living will states as follows:

> If at any time my attending physician certifies in writing that:
>
> (1) I have an incurable injury, disease, or illness;
>
> (2) My death will occur within a short time; and
>
> (3) The use of life[-]prolonging 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 performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration. (Indicate your choice by initialling [*sic*] or making your mark before signing this declaration):

Id. at 121. Joyce initialed next to the following statement: "I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me." *Id.*

[8] A Nurse Practitioner ("Nurse") "reviewed . . . [the] living will on February 24, 2017," the day after Joyce was transported to the hospital. *Appellees' App. Vol. 2* at 123. After reviewing the living will, Nurse concluded the DNR provisions did not apply. *See id.* Nurse also concluded no document reflected Joyce's selection of a health care representative. *Id.* Thereafter, Nurse told Joyce's family "all of [Joyce's] first-degree relatives could speak to her care." *Id.* By then, Joyce was intubated and on a ventilator, having received emergency care at Franciscan. The family "argued and argued" over what to do. *Id.* at 212. Joyce had five adult children; four were present at the hospital. The remaining child—Anna—lived in Florida, and the family had so far been unable to reach her. Eventually, each of the four children present "took a turn speaking." *Id.*

[9] Kathryn wanted Joyce to be extubated. But not all siblings agreed, in that Stephen "wanted Joyce to be kept alive with whatever procedures were needed" until Anna could be there. *Id.* In an affidavit, Stephen explained he was "outvoted" and the "final decision was that Joyce should be left as she was with no further intervention." *Id.* at 215. The family relayed the decision to hospital staff on February 24, directing that Joyce "should continue on a ventilator until her adult daughter, Anna, could travel from Florida." *Id.* at 124. At some point in the next day or so, Stephen was in a hospital room with Joyce when a woman "who identified herself as a social worker" approached him. *Id.* at 215. The woman "asked . . . if they could feed Joyce," *id.*, and Stephen "said they could place a feeding tube," *id.* at 216.

[10] Nurse "participated in the care provided to Joyce . . . beginning February 24, 2017[,] until her death on February 28, 2017." *Id.* at 123. Nurse averred that, on the same day Stephen provided consent, hospital staff "attempted to place a [feeding] tube," but the attempt was "unsuccessful." *Id.* at 124. On February 26, Joyce's family asked staff to extubate Joyce, reporting the family was in agreement at that point. Joyce was extubated, and she died two days later.

[11] The trial court held a hearing on the parties' motions for summary judgment. The court later granted summary judgment to Provider.[4] Gillette appeals *pro se*.

Discussion and Decision

[12] "We review summary judgment decisions de novo, applying the same standard as the trial court." *U.S. Automatic Sprinkler Corp. v. Erie Ins. Exch.*, 204 N.E.3d 215, 220 (Ind. 2023). As to summary judgment, the moving party is entitled to summary judgment whenever the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law." Ind. Trial Rule 56(C).

[13] On appeal, Gillette focuses on a single theory of recovery, asserting the designated evidence shows Provider is liable for battery. Gillette concedes Joyce received "proper" emergency care. *Appellant's Br.* at 10. But Gillette

[4] With a claim remaining against Dr. Shawa at that point, the trial court directed entry of a final judgment.

asserts Provider is liable because it rendered care to Joyce after receiving a "copy of Joyce's living will on the morning of February 24, 2017[.]" *Id.*

[14] When a plaintiff claims there was "a complete lack of consent" to medical care, the claim is for medical battery. *Spar v. Cha*, 907 N.E.2d 974, 979 (Ind. 2009); *see Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608, 610 (Ind. 2007) (addressing a claim of medical battery). Premised on a complete lack of consent, a claim of medical battery differs from a claim the provider failed to obtain the patient's informed consent. *See Spar*, 907 N.E.2d at 979. Whereas a battery claim does not involve a standard of care—instead hinging on a failure to obtain any consent—a claim there was no *informed* consent is instead "a specific form of negligence for breach of the required standard of professional conduct[.]" *Id.*

[15] Here, Gillette alleges Provider is liable for giving care to Joyce after refusal of the care. According to Gillette, the designated evidence shows a valid refusal because the DNR provisions in the living will applied. Gillette further asserts that, even if the DNR provisions did not apply, there was a valid refusal of care because of designated evidence the family voted and decided to refuse further care—a decision that controlled despite any ensuing conversation with Stephen.

Living Will

[16] Chapter 4 of the HCCA addresses living wills and life-prolonging procedures. *See generally* I.C. ch. 16-36-4. Therein, our legislature declared: "A competent adult has the right to control the decisions relating to the competent adult's medical care, including the decision to have medical or surgical means or

procedures calculated to prolong the competent adult's life provided, withheld, or withdrawn." I.C. § 16-36-4-6. The HCCA further provides: "A competent person may consent to or refuse consent for medical treatment, including life[-]prolonging procedures." I.C. § 16-36-4-7(a). Moreover, "[n]o civil or criminal liability is imposed on a health care provider for the failure to provide medical treatment to a patient who has refused the treatment[.]" I.C. § 16-36-4-7(c).

[17] To direct future health care decisions—including decisions about when to stop providing life-prolonging care—a person may execute a valid living will. I.C. § 16-36-4-8(a). A declaration in a living will "[m]ust be substantially in the form set forth in . . . [S]ection 10" of the HCCA. I.C. § 16-36-4-9. That Section sets forth a "living will declaration form" that contains the following language:

> If at any time my attending physician certifies in writing that: (1) I have an incurable injury, disease, or illness; (2) my death will occur within a short time; and (3) the use of life[-]prolonging 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 performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration. (Indicate your choice by initialling [*sic*] or making your mark before signing this declaration)[.]

I.C. § 16-36-4-10. The form provides three options, including the following option: "I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me." *Id.*

[18] In this case, Joyce executed a living will using language from the statutory form. Assuming without deciding the document was properly executed under the HCCA, to resolve summary judgment we must determine whether the provisions in the living will—*i.e.*, the provisions drawn from the HCCA—provided for withholding life-prolonging care under the circumstances.

[19] When we interpret a writing—whether a legal instrument or a legislative enactment—our goal is to identify the intended meaning.[5] *See, e.g.*, *Peirce v. Farmers State Bank of Valparaiso*, 51 N.E.2d 480, 482 (Ind. 1943) (interpreting a will); *Abbott v. State*, 183 N.E.3d 1074, 1080–81 (Ind. 2022) (statute); *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 753 (Ind. 2018) (contract). And we interpret these writings *de novo*, owing no deference to the trial court's interpretation. *See, e.g.*, *id.* In interpreting a writing, we give words their plain meaning. *See, e.g.*, *id.* And when it comes to statutory interpretation, we "consider the structure of the statute as a whole." *Abbott,* 183 N.E.3d at 1081.

[20] Sometimes, a writing or statute has conditional language. In general, a condition functions as a fulcrum. *See generally, e.g.*, *Indiana State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018–19 (Ind. 1998) (collecting authorities and discussing different types of conditions). That is, if the condition is met, there is one legal outcome—but if the condition is not met, there is a different

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[5] Since 2017, our legislature amended the HCCA to include guidance on interpreting living wills—a type of document referred to as an advance directive. *See* I.C. § 16-36-7-34 (2021). The HCCA now states: "An advance directive must be interpreted to carry out the known or demonstrable intent of the declarant." *Id.*

legal outcome. *See generally, e.g.*, *id.* Typically, a condition must be "literally met or exactly fulfilled" for there to be any change. 13 Williston on Contracts § 38:6 (4th ed.). This "rule of strict compliance," *id.*, generally applies whether the condition concerns the essence of the writing or concerns only a collateral matter, *see generally, e.g.*, *id.*; *Condition*, Black's Law Dictionary (11th ed. 2019).

[21] In Joyce's living will, she did not unconditionally refuse life-prolonging care. Rather, consistent with the living will declaration form provided in Indiana Code Section 16-36-4-10, the DNR provisions in Joyce's living will apply only if there is an eligible written certification from her attending physician. That written certification must be from Joyce's "attending physician," and the certification must state that Joyce has "an incurable injury, disease, or illness"; that her "death will occur within a short time"; and "the use of life[-]prolonging procedures would serve only to artificially prolong the dying process[.]" *Appellees' App. Vol. 2* at 121; *cf.* I.C. § 16-36-4-10. Under the HCCA, "attending physician" means "the licensed physician who has the primary responsibility for the treatment and care of the patient." I.C. § 16-18-2-29.

[22] On appeal, Gillette is not alleging anyone at Franciscan executed a certification while Joyce was at the hospital. *See, e.g.*, *Appellant's Br.* at 6 (framing an issue as whether "the directives in Joyce Gillette's Living Will [were] valid even though no Franciscan Alliance, Inc., doctor certified in writing that Joyce was a terminally ill patient"). Gillette instead focuses on Joyce's status as a hospice patient at the time of her admission. Gillette suggests Joyce could become a hospice patient only if her prior attending physician executed a functionally

equivalent certification. Joyce directs us to the certification Dr. Pike executed on February 22, the day before Joyce was admitted to Franciscan: "I certify that this patient is suffering from a terminal illness for which palliative care is considered appropriate and that the patient has a life expectancy of 6 months or less if the disease progresses normally." *Appellees' App. Vol. 2* at 169. Dr. Pike signed this certification as part of a plan of care for Joyce as his hospice patient.

[23] We address Gillette's argument by assuming without deciding the designated evidence indicates Franciscan had actual or constructive knowledge of this document. Turning to the certification, Dr. Pike certified Joyce had a terminal illness. In the context of hospice care, "terminal illness" means "a life[-]threatening illness with a limited prognosis." I.C. § 16-25-1.1-9. Thus, the certification Joyce had a terminal illness was equivalent to a certification she had "an incurable injury, disease, or illness[.]" *Appellees' App. Vol. 2* at 121. Dr. Pike also certified Joyce had a "life expectancy of 6 months or less if the disease progresses normally," *id.* at 169, which is equivalent to a certification her "death will occur within a short time," *id.* at 121. Thus, the certifications from Dr. Pike satisfied two of the three conditions set forth in Joyce's living will.

[24] But Dr. Pike's only other certification was that "palliative care is considered appropriate" for Joyce. *Id.* at 169. Under our health-care statutes, "palliative care" refers to "patient[-]centered and family[-]focused medical care that optimizes qualify of life by anticipating, preventing, and treating suffering caused by a medical illness or a physical injury or condition that substantially affects a patient's qualify of life." I.C. § 16-19-17-2. And, in general, "palliative

care" refers to "[h]ospital or hospital-like care that is intended not to cure but to reduce the severity of pain and other systems, esp. toward the end of life." *Palliative Care*, Black's Law Dictionary (11th ed. 2019). Here, Dr. Pike's certification—focused on improving Joyce's quality of life—is not equivalent to a certification "[t]he use of life[-]prolonging procedures would serve only to artificially prolong the dying process[.]" *Appellees' App. Vol. 2* at 121. Thus, the third condition precedent in the living will was not met. It follows, then, that because the conditions in the living will and the HCCA remained unfulfilled, the DNR provisions in the living will did not apply under the circumstances.

Effect of Stephen's Consent

[25] Although the DNR provisions of Joyce's living will did not apply here, Gillette asserts Provider is liable for trying to place a feeding tube. The designated evidence shows there was an attempt to place a feeding tube after hospital staff "asked [Stephen] if they could feed Joyce," *Appellees' App. Vol. 2* at 215, and Stephen "said they could place a feeding tube," *id.* at 216. This was after Stephen was "outvoted" and the family communicated its "final decision" that "Joyce should be left as she was with no further intervention." *Id.* at 215.

[26] Under the HCCA, when a person "is incapable of consenting" and "has not appointed a health care representative," certain individuals may consent on the

person's behalf.[6] I.C. § 16-36-1-5(a). In pertinent part, the consent statute provides that "consent to health care may be given: (1) by a judicially appointed guardian . . . or a representative . . . ; or (2) by a spouse, a parent, an adult child, or an adult sibling . . . ; or (3) by the individual's religious superior, if the individual is a member of a religious order[.]" *Id.* Further: "An individual authorized to consent for another under this [S]ection shall act in good faith and in the best interest of the individual incapable of consenting." I.C. § 16-36-1-5(d).

[27] Gillette argues Provider should have disregarded Stephen's consent to place a feeding tube. In so arguing, Gillette asserts "seven of Joyce's children and grandchildren . . . had an equal say in Joyce's treatment" under the statute. *Appellant's Br.* at 17. Putting aside whether the statute confers decision-making authority to a grandchild, we agree with Gillette the statute then in effect provides equal decision-making authority to all listed individuals.[7] Moreover, although Gillette focuses on an initial decision communicated by family members, we discern no statutory provision directing a medical provider to follow only the first decision about life-prolonging care, without regard for the

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[6] Gillette has abandoned any contention Joyce appointed a health care representative. *See Appellant's Br.* at 7–8 (asserting "Joyce chose not to name a Health Care Representative in her living will" and "did not leave that decision to anyone else in the family").

[7] The statute has been amended to provide an "order of priority"; this order includes an adult grandchild, but at a priority level below an adult child. I.C. § 16-36-1-5(a) (2018). The amended statute also has mechanisms to address disagreement among "individuals at the same priority level[.]" I.C. § 16-36-1-5(e) (2018). Because this case involves a prior version of Indiana Code Section 16-36-1-5, caution should be exercised in prospectively applying the holding.

possibility an authorized person might change their mind and later give or withdraw consent.

[28] Because Stephen—an adult child—had coequal decision-making authority and because Stephen consented to placement of a feeding tube, we conclude Provider could not be liable for battery by attempting to place a feeding tube after Stephen provided consent. In short, Stephen's unilateral consent was valid under the circumstances and the statutes then in effect, vitiating the prior refusal of further care for Joyce.[8]

Conclusion

[29] Because the designated evidence shows Provider did not render life-prolonging care in the face of a valid refusal, Provider cannot be liable for medical battery. Thus, we affirm the trial court's order granting summary judgment to Provider.

[30] Affirmed.

Crone, J., and Felix, J., concur.

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[8] To the extent Gillette suggests Franciscan battered Joyce by providing unauthorized care after the family's initial refusal but before Stephen later consented to placing the feeding tube, we conclude Gillette has waived this contention for failing to provide cogent argument. *See* Ind Appellate Rule 46(A)(8)(a) (specifying the Argument section of the Appellant's Brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning," with "[e]ach contention . . . supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on"); *cf. Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014) ("[A] pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented."). For example, although Gillette directs us to designated evidence Joyce's attending physician ordered a bolus of fluid at 11:45 a.m. on February 24, Gillette asserts without citation to designated evidence the order came after the initial refusal.