

IN THE DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA  
SECOND DISTRICT

JOHNS HOPKINS ALL  
CHILDREN'S HOSPITAL,  
INC.,

Appellant,

APPEAL NO. 2D24-0382  
L.T. CASE NO. 2018-CA-005321

v.

MAYA KOWALSKI, Individually,  
JACK KOWALSKI, Individually,  
And JACK KOWALSKI, as  
Personal Representative of the  
Estate of BEATA KOWALSKI,

Appellees.

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ON APPEAL FROM THE CIRCUIT COURT  
TWELFTH JUDICIAL CIRCUIT, SARASOTA COUNTY, FLORIDA

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**ANSWER BRIEF OF APPELLEES MAYA KOWALSKI AND  
JACK KOWALSKI**

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GUNSTER, YOAKLEY & STEWART, P.A.  
Michael G. Tanner, Esq.  
Florida Bar Number 261300  
Kenneth B. Bell, Esq.  
Florida Bar Number 347035  
Justin T. Delise, Esq.  
Florida Bar Number 1039356  
mtanner@gunster.com  
kbell@gunster.com  
jdelise@gunster.com  
1 Independent Drive, Suite 2300

Jacksonville, Florida 32202  
(904) 354-1980 / (904) 354-2170 (fax)

ANDERSON GLENN, LLP  
Gregory A. Anderson, Esq.  
Florida Bar Number 398853  
Jennifer C. Anderson, Esq.  
Florida Bar Number 594946  
10751 Deerwood Park Blvd.  
Suite 105  
Jacksonville, Florida 32256  
ganderson@asglaw.com  
janderson@asglaw.com  
btullius@asglaw.com  
rwilliams@asglaw.com

BUELL ELLIGETT FARRIOR &  
FAIRCLOTH, P.A.  
Raymond T. Elligett, Jr., Esq.  
Florida Bar Number 261939  
Amy S. Farrior, Esq.  
Florida Bar Number 684147  
805 W. Azeele Street  
Tampa, Florida 33606  
elligett@belawtampa.com  
pisciotti@belawtampa.com  
farrior@belawtampa.com

*Counsel for Appellees*

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## PRELIMINARY STATEMENT

These abbreviations are used in this brief:

Plaintiffs or the Kowalskis	Appellees/Plaintiffs Maya Kowalski and Jack Kowalski, together
Beata	Beata Kowalski
Maya	Appellee/Plaintiff Maya Kowalski
Jack	Appellee/Plaintiff Jack Kowalski
Kyle	Kyle Kowalski
Defendant or the Hospital	Appellant/Defendant Johns Hopkins All Children's Hospital
[IB.#]	The Hospital's Initial Brief (# = page no.)
[Tr.#]	Transcript of trial proceedings [R____] (# = page no.)
[R.#]	References to the Record on Appeal (# = page no.)
[PX.*-#]	Exhibits received in evidence from Appellees/Plaintiffs (* = exhibit no., # = page no.)
[DX.*-#]	Exhibits received in evidence from Appellant/Defendant (* = Exhibit No.; # = page no.)
[AB.#]	Appellees' Answer Brief (# = page no.)
[AA-#]	Appellees' Appendix accompanying this Answer Brief (# = tab no.)
[FHAAB.#]	Amicus Brief of the Florida Hospital Association (# = page no.)
[AAP/CHAAB.#]	Amicus Brief of the American Academy of Pediatrics and the Children's Hospital Association (# = page no.)

## **STATEMENT OF THE CASE AND FACTS**

The Hospital omits necessary facts and fails to view those facts in the light most favorable to the Kowalskis. The Kowalskis therefore provide their own statement.

### ***The Kowalskis***

Jack Kowalski became the Personal Representative of his wife Beata's estate following her 2017 suicide. [Tr.1536-37, 3087, R.298] Jack is, and Beata was, the natural parent of Maya and Kyle. [Tr.1791-92, 1820, 3087, 3104-05]

When the events described below began in 2015, Maya was nine years old, and Kyle was seven. [Tr.1835, 4245, 4280-81] Maya turned eleven in December 2016, while confined in the Hospital. [Tr.4335]

### ***The Diagnosis and Early Treatment of Maya's CRPS***

Complex Regional Pain Syndrome ("CRPS") is one of the most painful neuropathic conditions from which a person can suffer. [Tr.2443-46, 2708-10, 3755-56, 4750, 6520, 8735] The McGill Pain Scale characterizes CRPS as more painful than amputation, cancer or childbirth. [Tr.2443-46, 4574-75]

The pain "is your hand in a hot stove." [Tr.2443-44]

CRPS is also a chronic, lifelong condition which can be aggravated by minor injuries or stress, leading to fluctuating periods of improvement and relapse, with the pain “waxing and waning” during the sufferer’s life. [Tr.2450-53, 2459-61, 2477-78, 2490-91, 2502-04, 3758-59, 4584, 5697-98, 8715-16, 9558, 9664]

Maya first experienced the onset of unexplained pain following an asthma attack in July 2015. [Tr.1835-37, 3112-13, 4247-49] The Hospital treated her for that attack. [Tr.1746-49, 3112-16, 3589-90, 4247-49] In September 2015, following months of severe pain, increasing muscle weakness, blurred vision and ankles turning inward, Maya was diagnosed with CRPS by an award-winning physician who has practiced for over 40 years and is an expert in the diagnosis and treatment of CRPS. [Tr.3130-34, 3137-38, 3560, 4489, 4686, 4701, 4704-08, 4715-16, 4725-26]

During 2015 and 2016, four other physicians practicing in the fields of pain management, neurology, and anesthesiology confirmed or concurred with Maya’s CRPS diagnosis and treated her for that condition. [Tr.2720-24, 2728, 2816-19, 3702-03, 5199, 8276, 8732-35] Their treatments included physical therapy, hyperbaric oxygen therapy, warm water therapy, occupational therapy, intravenous

immunoglobulin (IVIg), and high-dose infusions of the drug Ketamine. [Tr.2010, 2019-20, 2039-40, 2814-15, 3132, 3139-40, 3190-91, 4268-70, 4728-29]

To facilitate the Ketamine infusions, a Hospital staff surgeon implanted a “port” in Maya in early 2016. [R.109959, R.111959; R.114662; R.114682-83; Tr.2019, 3174-75, 4418, 4738-39, 7469]

Maya then continued her Ketamine infusions and other therapies under her treating physicians’ care. [Tr.2021, 2381, 2392-94, 2814-15, 4432, 4434-35] Maya’s symptoms steadily improved during 2016. [R.115503-05; Tr.1841-42, 2074-75, 2823, 3180-81, 3189-91, 4295-96, 8713; PX.2695, PX.2698 (Evidence R.48584)]

Hospital physicians acknowledged and treated Maya’s CRPS during her numerous visits and admissions to the Hospital before October 2016. [R.113782; R.113896; R.114212; R.114682; R.115564-115676]

None of the 20 Hospital physicians who saw Maya in 2015 and 2016 raised a concern about Ketamine treatments or child abuse. [Tr.3194-97]

***Maya's October 2016 Visit to the Hospital and the  
First Report of Child Abuse***

Maya's CRPS flared up in August and September 2016. [Tr.3486-88, 4324-25, 8714; R.109970] After her treating physicians increased the Ketamine infusion dosage to address the flare-up [Tr.8710-12], Maya experienced severe gastrointestinal problems. [Tr.3128-29, 4324-25, 5642; R.100927-28] On October 7, Maya's doctor recommended Jack take Maya to the Hospital's emergency room. [Tr.3198-99, 4325, 8710, 8714-16] Beata met them there. [Tr.3488; R.109943]

The Hospital's staff lacked extensive clinical or academic experience with CRPS. [Tr.2988, 3006, 3202, 5203, 6297, 6307, 8139, 8441, 9066] They telephoned one of Maya's physicians who confirmed the CRPS diagnosis and his recommended (and prescribed) levels of medication, including Ketamine. [R.109944; R.109957; Tr.6294, 8716, 9341-42]

The Hospital's staff were skeptical of these recommendations and debated with the Kowalskis about the proper Ketamine dosage, at first providing a "much lower dose of ketamine," and eventually eliminating, Maya's Ketamine infusions. [R.109978; R.109992-93;

R.109995; R.110001-02; Tr.6293-94, 6566-67, 6574-75, 9341-42, 9391]

The Hospital's staff and physicians also required Maya to do physical therapy [Tr.3349-50, 4346] and undertook other procedures, such as CT scans and inserting a breathing tube, that required physical contact with Maya's body. [R.111753; R.113641; Tr.4327-28, 4905-06, 6599-6600] As is common with CRPS patients, these caused Maya severe pain and inflamed her CRPS. [Tr.2454-55, 2478-80, 2503, 2507, 4328, 4346, 4358, 4383]

Maya told Hospital personnel this was painful for her. [Tr. 6222-23]

Based in part on Jack and Beata's requests that the Hospital provide Maya the prescribed Ketamine treatment, a Hospital social worker contacted the Florida Department of Children and Families ("DCF") child abuse hotline on October 7, although DCF opened no investigation at that time. [Tr.2954, 2995-96, 3000-02, 3971-73; R.111956-57]

### ***The Hospital's Second Report of Child Abuse***

The next day, October 8, Maya's severe pain continued, as did the Hospital staff physicians' refusal to administer the Ketamine

prescribed by Maya's treating physician and requested by her parents. [Tr.3972, 4327-28, 6570, 6574-75, 9341-42; R.109978; R.109989; R.109992; R.110561]

Jack and Beata asked the Hospital to discharge Maya but were told if they tried to leave with her, they would be arrested. [Tr.3208] During this time, Hospital staff discussed Maya's care with the Hospital's Risk Management Department. [R.111568-69, 111949]

Also on October 8 (when there still was no open DCF investigation), Hospital staff contacted Dr. Sally Smith, one of its staff physicians. [Tr.5233, 6573; R.105990; R.105973; R.103799; R.109987-88; R.111954-55] Dr. Smith was also Director of the Pinellas County Child Protection Team ("CPT"). [R.104320; Tr.5224, 7799]

Beginning on October 8, the Hospital gave Dr. Smith full access to Maya's medical records – without her parents' knowledge and consent. [R.105894; R.109929; Tr.3268-70, 4331-32]

On October 9, Jack and Beata again asked the Hospital to transfer Maya to another healthcare facility or release her so she could be treated by one of her regular physicians. [R.109988-89; Tr.3209-11] The Hospital refused. [*Id.*]

That day, a Hospital social worker again contacted the DCF child abuse hotline and reported suspected child abuse by Maya's parents. [Tr.3971; R.111954]

On October 11, Jack and Beata again asked to leave with Maya "to take her to another physician," and once again were threatened with being detained by Hospital security or arrested if they tried to leave. [R.104329; R.109987-88; Tr.3266-68] This violated the Hospital's discharge policy that allowed patients to leave the Hospital against medical advice ("AMA") and caused Jack and Beata extreme stress. [Tr.3281; R.105938; R.101889-90]

The Hospital did not inform Jack and Beata that it lacked authority to detain Maya. [Tr.3208, 3266-67] It also did not inform them of its Patient & Family Rights and Responsibilities policy, which states "[t]he patient and family have the right . . . to ask for a transfer to another health care provider, providing it is medically acceptable and the other provider will accept your transfer." [Tr.3208, 3585; R.101888-90] The Hospital's Discharge of Patients Against Medical Advice policy also stated "[i]f the patient/family insist on leaving, they must be permitted to go unless . . . [t]heir departure puts the patient's physical or mental health in imminent danger." [R.105938]

Jack first met Dr. Smith on October 13 when she came to Maya's Hospital room, without introduction or disclosure of her role as a CPT representative. [Tr.3268-71, 4331-32, 9595-97] She was wearing a Hospital lab coat and name badge, which led him to believe she was another Hospital physician there to provide medical care for Maya. [*Id.*]

### ***The Dependency Proceedings and Shelter Orders***

Based on the Hospital's second report to the child abuse hotline, DCF filed dependency proceedings on October 13 against the Kowalskis. [Tr.2651-52, 3971] On October 14, the dependency court placed Maya into DCF's "protective custody" [Tr.2652, 8367-68; R.96382] effective as of 2:30 a.m. on October 13 and designated the Hospital as Maya's shelter location. [Tr.2651-52, 8367; R.96382] There was no dependency court shelter order entered until October 14. [Tr.8367]

The dependency court later modified the October 14 order. [R.96381-90] These shelter orders were not placed into evidence. Instead, over the Kowalskis' objection [Tr.8355-56], the trial court instructed the jury on the orders' terms, as summarized below:

- The Hospital is immune from any civil claim based

on reporting suspected abuse but not for any of the claims being presented to the jury.

- Before October 14, 2016, there was no dependency court order governing Maya's Hospital stay.
- From October 14, 2016, through January 13, 2017, Maya could not be discharged from the Hospital without dependency court approval, and the Hospital is not responsible for the length of Maya's Hospital stay or Beata's inability to visit her.
- The dependency court's placement of Maya in the Hospital did not limit her parents' rights to be informed about, and participate in, decisions concerning her treatment.
- Beata was permitted to exchange written materials with Maya and have supervised telephone calls with her.
- Maya was allowed to have religious artifacts that did not interfere with her rehabilitation, and the dependency court encouraged the Hospital to allow a Catholic priest to have regular contact with Maya.
- Beata was permitted to have video contact with Maya at times and under conditions approved by the Hospital. A later order specifically allowed daily video calls at approximately 11:00 am and 5:00 pm and did *not* require the Hospital to supervise those video calls.

[R.96381-90] At the Hospital's request, the court read the instruction to the jury during trial and included it in the jury's packet at the end of the case. [Tr.8356-57; 10051]

***The Hospital's Medical Treatment of Maya and  
termination of her prescribed medications***

While Maya was in its custody, the Hospital's treatment team decreased and terminated the medications prescribed by Maya's treating physicians. [Tr.2507, 5214-15, 5333, 6273, 7749-50, 7781, 7790-91, 7794-95, 8258-59, 9391; R.110353-4; R.111052-53; R.111190-91; R.103986; R.105921-23; R.106014-24; R.104356; R.105902-03]

The Hospital team discussed Maya's medical treatment with Beata, including her prescribed medications and the possible removal of Maya's port, which Beata objected to. [Tr.6567, 7774-75; R.110298; R.111696]

Dr. Smith agreed with terminating Maya's medications. [Tr.5214-15; 8258-59; R.103986] Dr. Smith also ordered, without parental consent, allergy and other laboratory tests on Maya [Tr.8260-62; R.110242] and consulted with other Hospital personnel about removing Maya's port. [Tr.5211-13, 5298-5301, 7761, 7783-84, 7799; R.103985-87; R.110242]

The Hospital's medical record and trial testimony reflect Dr. Smith's role in creating and being part of Maya's

multidisciplinary/interdisciplinary care team. [R.109929; R.111923; Tr.5290, 5344-45]. Dr. Smith's text messages show she was in frequent contact with other Hospital physicians about Maya's treatment. [Tr.5213, 5217-18, 7789-90; R.103985-103994]

During Maya's three months in its custody, the Hospital gave Maya less than five hours of cognitive behavioral therapy, one of three "general modalities" for pediatric CRPS. [Tr.2142-43, 2175, 2223-24, 4727, 7026, 9390-91, 9395-96] By contrast, during two weeks of CRPS treatment at Tampa General Hospital in August 2015, Maya received five hours of cognitive therapy. [Tr.7654, 8548]

Although the dependency court ordered family therapy sessions, the Hospital did not provide this. [Tr.7288]

***The Hospital's Efforts to Show CRPS was a "charade"***

Hospital personnel, including Dr. Smith, were skeptical of Maya's treating specialists' CRPS diagnosis and rejected their treatments as "absurd," openly suggesting to Maya that her pain was "all in [her] head," that she was performing a "charade," and that Beata had "mental issues" that were harmful and "life threatening" to her daughter. [Tr.4045-46, 4364, 4381-82, 4904, 5943, 6293-95; R.111677; R.111723; R.113676; R.113684; R.104010; R.110020-21]

(“no manifestations of” CRPS); R.105921-23; R.105904-05; R.106014-24; R.104356; R.1059023-03; R.105892; R.103985-89; R.104323; R.104327; R.104330; R.105900-01 R.99633]

The Hospital’s medical record repeatedly referenced Munchhausen by Proxy (also called Factitious Disorder), a psychological disorder implicating Beata in child abuse. [See Tr.4408; R.106925; R.110353; R.110357; R.111179; R.108368-69] Despite Beata not being diagnosed with this disorder, the Hospital refused to transfer Maya to another facility unless the Kowalskis agreed to it in the required transfer form. [Tr.3272, 3277-78, 3280, 4215]

Hospital personnel referred to Maya as the “ketamine girl” [R.105897 (AA-4)] and in a text message to a Hospital colleague, Dr. Smith said “I wouldn’t put anything past her mother [Beata] . . . .” [R.103985] She also texted that Maya was making “physiological mistakes” because “[f]ortunately at 10 years old she can’t *perform the charade* effectively 24/7.” [R.103989 (emphasis added)]

For approximately 48 hours between October 18 and October 20 – with prior approval from the Hospital’s Risk Management Department – Dr. Smith and other Hospital personnel placed Maya

in a room used for EEG monitoring to secretly videotape Maya without her parents' knowledge and consent. [Tr.4360-63, 7786-89; R.105900 (AA-5); PX.2703-A/B/C/D (Evidence R.48584)] Hospital notes reveal that Maya was put there and surveilled "to see if she can walk on her own" and what she was "able to do when no one was there." [R.105900] The notes confirm this secret surveillance received an "okay from risk." [*Id.*]

As part of this scheme Hospital personnel placed the room's only toilet out of Maya's reach. [Tr.4361-62; R.105900; PX.2703-A/B/C/D (Evidence R.48584)] When Hospital personnel ignored her calls for help to go to the bathroom, Maya was forced to soil herself. [Tr.4361-62] When they did respond, they lifted Maya from her bed to the toilet and back, her atrophied legs dangling. [PX.2703-B/C (Evidence R.48584); DX.3085-4 (Evidence R.48586)]

The Hospital states Maya did not soil herself, an example of it construing disputed facts in its favor. [IB.15-16] Although the Hospital says the full video shows no soiling in bed [IB.15-16], each party showed the jury only four clips each, not the full video. [Tr.2366-68, 3316-17, 7517-19, 7763-65, 9174-75; PX.2703-

A/B/C/D (Evidence R.48584); DX3085-1/2/3/4 (Evidence R.48586)]

The Hospital now states the video was for “clinical and diagnostic reasons.” [IB.15] Yet, neither the video nor the Hospital’s staff notes were put in Maya’s medical record. [Tr.5045-47, 7783-84; R.103985; R.109926-113781]

During this time, Maya’s severe CRPS pain returned, reversing her previous progress in controlling the disease. [Tr.2453-55, 2459-60, 2495-96, 4350-51]

Although Hospital physicians disputed that Maya suffers from CRPS [Tr.6562, 7419-20, 7439-40, 7747-48, 7752-53; R.103989], the Hospital billed the Kowalskis’ insurance carrier, Aetna, over \$500,000 to treat that illness, of which Aetna paid over \$300,000. [Tr.3432-41, 5553, 5555, 8590, 8619, 8637-39; R.99279; R.99285; R.99287; R.104992-5888]

### ***The Hospital’s Other Efforts to Break the Kowalskis***

After entry of the shelter order, the Hospital’s employee Catherine Bedy was assigned as its primary social worker overseeing Maya’s sheltering. [Tr.3287, 3959-61, 4375-78]

While Maya was in custody, the Hospital disciplined Bedy for threatening behavior toward other employees. [Tr.3956-57; R.99119-20] A Hospital expert witness agreed that Bedy's behavior on that occasion had been "aggressive." [Tr.8002] Although Bedy had been counseled twice before about her behavior toward colleagues, the Hospital let her oversee Maya. [Tr.8895-96, 8001]

Hospital personnel kept Jack and Kyle's visits to Maya brief [Tr.1854-56] and occasionally, Bedy or other Hospital personnel turned Jack away without explanation. [Tr.3284-89, 4053, 4385]

Although the shelter orders allowed Beata to visit Maya by telephone or FaceTime [Tr.8369-70, 8374-76], Bedy often interrupted their conversations, limiting what Maya and Beata could discuss "to very basic and insignificant things." [Tr.4385-86, 5154-56, 5158-60, 5502-03, 9673-74; PX.2608-A/B/C (Evidence R.48584)] Bedy often made facial expressions to Maya denigrating Beata during these conversations. [Tr.4208]

Bedy sometimes refused to allow Maya and Beata to speak at all, including on Thanksgiving [Tr.4385-86, 5157-58], and she refused to schedule any phone or FaceTime calls during what became the last ten days of Beata's life. [Tr.9674]

Hospital personnel also refused to give Maya a white dress Beata sent as a Christmas gift, despite having received it weeks earlier. [Tr.3304-07, 4390-92] They even refused to give Maya a birthday card from her family. [Tr.4211-12]

During Maya's sheltering, Hospital personnel prohibited or limited visitation by family friends and one of Maya's treating physicians, Dr. Hanna. [Tr.2108-11, 3292, 3299-3300] Because Maya was not listed in the Hospital's computer as a patient, it was difficult for visitors to see her. [Tr.3288, 3291-92]

In addition to limiting or denying Maya comfort from family and friends, they also denied her spiritual comfort by preventing the family's priest from visiting and praying with Maya and members of the Kowalskis' congregation from presenting Maya with a religious statue. [Tr.2111-13, 2172, 2250, 4355] They also confiscated Maya's prayer book, rosary beads, cross, communion wafers and holy water. [Tr.3293, 4353-54] Maya compared "being there alone" as feeling "like torture," caused by the Hospital's violations of its Bill of Patient Rights. [Tr.3292-94, 5530-31; R.101890; R.96381-90]

Hospital personnel also prohibited Maya from using a laptop computer the school district provided to her to access her

coursework. [Tr.1925-26, 3305, 4374-75] Bedy told Maya this was because Bedy feared “I was browsing sex websites.” [Tr.4375]

Bedy prohibited Maya from socializing with other children on the Hospital floor. [Tr.4341-42] She also required that Maya always keep her room door open, even when seeing visitors (including her attorney), showering, or using the toilet. [Tr.3648-51, 3659-62, 4342-44, 5507]

Bedy made disparaging remarks to Maya about her parents and asked Jack if he had considered divorcing Beata. [Tr.3308, 3392, 4212-13, 4345, 4356, 5502-03] She told Maya – falsely – that Beata had been placed in a mental institution and that she (Bedy) would become Maya’s mother and foster her. [Tr.3393-3394, 4067, 4357, 4376-77, 5503-04]

The Hospital saying that Bedy “allegedly” suggested that Jack divorce Beata [IB.33] is another example of its construing disputed facts in its favor. The jury believed Jack.

The Hospital ignored the family’s concerns about Bedy’s involvement with Maya and ignored their requests to remove Bedy from Maya’s supervision. [Tr.3665, 9599; R.105899]

Except for limited contact with her immediate family and with Bedy and other Hospital personnel, Maya, a ten-year-old child, was alone during her three-plus months of “protective” custody, all while being told she was “faking it,” “making it up” and her illness was in her head. [Tr.4342, 4345, 4382, 5509]

Maya testified her physical condition worsened during her Hospital stay. [Tr.4350-51]

### ***The Hospital’s Battery of Maya***

On multiple occasions, Bedy made inappropriate and painful physical contact with Maya by sitting Maya on her lap, slapping Maya’s legs to see if it caused pain, holding Maya, “claw[ing] through” her hair, and kissing her on the cheek and forehead without permission. [Tr.3308-09, 4058, 4066-67, 4201-02, 4207-08, 4376-77, 5533]

On January 6, 2017—at Risk Management’s direction—Bedy and a nurse forcibly stripped Maya down to her underclothes and photographed her, while restraining her on a gurney. [Tr.4000-04, 4392-97, 9667-69; R.129576-599]

Although Maya cried out and protested, Bedy threatened that if she continued to resist, she could not attend a dependency court hearing that morning. [Tr.4003-04, 4058; 4070-72; 4393]

The Hospital admits it did not obtain parental consent to photograph Maya. [Tr.8881]

These photographs, which the Hospital argued it took for medical reasons, were never placed in Maya's medical record. [See R.109926-113781; Tr.4394, 8917]

***The Active Involvement of the Risk Management Department and "Upper Management"***

The Department of Risk Management is a department of the Hospital's parent entity, All Children's Health Systems, Inc. ("ACHS") [R.105930-32] The Department "works collaboratively with [the parent entity] and all of its subsidiaries to analyze, manage, and reduce risk, as well as to enhance clinical patient care and protect [the parent entity's] assets and reputation." [Id.]

"The ultimate authority and responsibility for the ACHS Department of Risk Management rests with the governing body of All Children's, which delegate (sic) authority through the ACHS President/CEO, to the Director of Risk Management." [Id.]

A Risk Management Committee provides “direction and oversight” to The Department of Risk Management. [*Id.*] During Maya’s sheltering, the Risk Management Committee consisted of the Hospital’s: Chief of Staff; Vice President, Medical Affairs; Vice President, Chief Operations Officer; Vice President, Chief Nursing Officer; Johns Hopkins Health Systems Senior Counsel; the Director of Risk Management or designee; and one or more licensed risk managers. [*Id.*]

The court admitted the document showing the foregoing over the Hospital’s relevance objection. [Tr.5767-68]

The Risk Management Department members within the Hospital reported directly to the Hospital’s senior counsel (its chief legal officer) who reported directly to the Hospital’s President/Chief Executive Officer. [Tr.5018-19, 7993-94; R.97467-97471] In this way, the CEO had a “direct conduit of information from Risk Management.” [Tr.7993-94]

The Risk Management Department’s notes show it was aware of what was happening to Maya and how she was being treated by Hospital staff, including Bedy. [R.105900; R.105901; R.105914-15; R.105899; R.99633; R.98964-65; R.98968-69]] For example, an

email from a Risk Management Department “analyst” characterizes Maya’s scratches and lesions as “self-inflicted.” [Tr.5027-28; R.99633; R.98964-65; R.98968-69]]

Bedy testified “Risk Management” approved photographing Maya on January 6, 2017. [Tr.4001; 8865-66; 8877]

The Risk Management Department also received reports that Maya felt she was being lied to by Hospital personnel. [R.105916-17; Tr.5503-04]

Dr. Paola Dees testified “I had contact with what I would perceive to be upper management, without a definition, on at least one occasion during the two weeks that I took care of [Maya].” [Tr.7829-30]

### ***Beata’s Suicide Caused by the Hospital***

Hospital personnel knew Beata was under significant stress, was emotionally fragile concerning Maya’s health, and had suicidal thoughts. [Tr.5836, 6567-69, 6588-90; R.109957; R.111173; R.105897] Yet, they frequently suggested to the Kowalskis that Beata was harming Maya. [Tr.3392, 4207, 4345-56, 5503-04]

Jack told Beata that Hospital personnel were unresponsive to Maya’s needs and were telling Maya her symptoms were all in her

head. [Tr.3308-09, 4209, 5888-89] Beata was “desperate for information” about Maya, being especially concerned about Maya’s health and the Hospital treatment team’s reduction of Maya’s prescribed medications. [Tr.3205, 3309, 9049-50; R.111697-98; R.111951; R.111995] Maya told her mom she was “hurting,” and hoped she could “see [Beata] soon.” [Tr.5155; PX.2608A (Evidence R.48584)]

As Maya’s CRPS symptoms were worsening, she continued deteriorating. [Tr.3282-83] Jack tried “as much as possible” to tell Beata “every single thing” he knew or learned about Maya. [Tr.3309-10, 5889] He made sure Beata “knew what Cathi Bedy was doing” – Jack told her about the secret video recording of Maya, Bedy’s batteries of Maya, Bedy’s refusal to deliver the Christmas dress Beata sent Maya, Bedy’s statement that Beata was in a mental institution, and Bedy’s advice that Jack divorce Beata. [Tr.3308-10, 3397-400, 3541, 4207-09, 5888-89, 9599] Jack described Beata as “very upset” and “outraged” at this conduct, but feeling there was nothing she could do about it. [Tr.3308-09, 4209, 5888-89] Bedy’s interference with Beata’s phone conversations with Maya “destroyed” Beata. [Tr.3392] Maya’s mistreatment by Bedy and the Hospital led Beata to

continue to grow more desperate and it ultimately “crushed her.”  
[Tr.3308-10]

The Hospital’s conduct caused the Kowalskis great and lingering emotional pain. [Tr.3791-99, 4602-19, 5415-18, 5476-77, 5517-19] Jack described watching Maya and Beata deteriorate. [Tr.3282-83, 3304-05, 3348-49] Beata’s grief manifested itself in a growing desperation to rescue her daughter from the Hospital’s abuse. [Tr.3283, 3308-10, 5836-42]

One Hospital physician, Dr. Teppa-Sanchez, noted Beata “has expressed suicidal thoughts.” [R.111173; Tr.6597-98] After Beata’s death, another physician, Dr. Laura Vose, remarked that she had “predict[ed]” Beata’s suicide. [Tr.4900-02; R.105897]

Beata committed suicide at the family’s home on January 7, 2017. [Tr.1806; PX.2615 (Evidence R.48584); R.128245-65; R.99647]

Two days later, Dr. Smith texted a Hospital treatment team member “about what to do with Maya going forward.” [R.103991] Her text ended with “Craziest case ever!!!” [*Id.*] Another Hospital physician even suggested Maya might have a better life without Beata. [Tr.4902-04, 6597-98; R.105897]

### ***The Hospital's "Immediate Jeopardy" Status***

The Hospital participates in federal funding programs (Medicare and Medicaid) [Tr.8021, 10562-63] and must meet federal hospital quality standards. [Tr.4999, 7955-56, 9980-82, 9986; R.100122-26]

In January 2019, the federal Centers for Medicare and Medicaid Services (CMS) issued a notice placing the Hospital in "immediate jeopardy" status – the most serious classification for a hospital – because it was "out of compliance with one or more Conditions of Participation [in federal programs], and an immediate or serious threat to patient health and safety exists." [R.97747-50; Tr.9986-88] The notice identified deficiencies in four major areas of compliance including "Governing Body" and "Quality Assurance Performance Improvement." [*Id.*] These deficiencies were "egregious and widespread." [Tr.9988]

The Hospital later completed an internal review of the circumstances underlying the CMS notice, noting various deficiencies that existed for three to five years before the survey. [Tr.9989-90] Both retrospective periods overlapped Maya's confinement at the Hospital. [*Id.*]

In December 2018, when the Hospital self-reported its compliance failures, it replaced its CEO. [Tr.9984-85] Its new CEO and the Hospital's "Leadership Team" acknowledged the Hospital's deficiencies. [R.97809-822]

At trial, the Hospital presented its expert witness Mark Anderson who told the jury the Hospital met standards for federal program participation in 2016. [Tr.7956-57] He based his testimony on an outline of topics and limited materials selected by the Hospital's counsel. [Tr.7985-86, 7989-90] Mr. Anderson said nothing about the "immediate jeopardy" notice. [Tr.7940-8042]

The trial court thereafter observed "the hospital has given the impression to the jury that everything was fine. And I'm being presented with evidence that during the relevant period of time that your expert testified that it was fine, that it wasn't fine." [Tr.9647] The court therefore allowed the Kowalskis to conduct mid-trial discovery from the Hospital and then present evidence of the "immediate jeopardy" notice to the jury. [Tr.9647, 9685-88, 9979-10041; R.97747-50]

### ***Termination of the Dependency Proceedings***

On February 1, 2017, a psychologist appointed by the dependency court filed a report with the court based on her comprehensive review of Maya's medical records and interviews with Maya's treating physicians and others. [R.104006-104017] The report found, *inter alia*:

- Maya has experienced excruciating pain resulting from an organic condition beyond her control and Maya's parents sought and followed expert medical advice from CRPS specialists.
- Maya's parents sought treatment for Maya's pain and requested that Ketamine be given in high doses. Hospital staff refused and accused Maya's mother of Factitious Disorder by Proxy.
- The hospital would only discharge Maya to another facility with a mental health diagnosis.
- Three medical doctors have diagnosed Maya's medical condition and three mental health professionals have evaluated Maya, none of whom diagnosed Factitious Disorder.
- The Hospital's alternative diagnosis, Conversion Disorder, is similarly contraindicated.
- Maya had voiced significant frustration at her limited contact with her father and brother and not being permitted to see her priest, other family members, and friends. Maya also said the Hospital staff even makes it difficult for her to contact her attorney.

- There was no evidence Beata had ever suffered from mental health problems.

[R.104010; 104013; 104016] These conclusions were consistent with the same psychologist's earlier evaluations of Jack (dated November 9, 2016) and Beata (dated December 5, 2016) that found no evidence either parent was harming their daughter. [103977-84; R.104018-33]

On January 13, 2017, six days after Beata's suicide, the dependency court discharged Maya to Jack's custody and terminated the visitation orders. [Tr.8377, 4408-09, 10053-54; R.96390]

The dependency court terminated Maya's shelter status on April 20, 2017. [Tr.10053-54]

### ***The Case Below***

#### ***Pretrial Proceedings***

The Kowalskis filed their initial Complaint on October 5, 2018. [R.297-337] The case was tried on their Eighth Amended Complaint. [R.71725-71814]

The Hospital filed nearly 50 motions to dismiss or motions for partial or final summary judgment. [*See generally*, index to Record on Appeal]

The trial court either dismissed with prejudice or granted summary judgment in favor of the Hospital as to 21 of the Kowalskis' claims. [See, e.g., R.52043-50; 52051-58; 52265-80; 57564-57575; 71656-85; 72639-46; 72647-54; 85829-34; 89304-11]

### ***The Immunity Order***

On January 14, 2022, the trial court entered its Omnibus Order Regarding Motions Directed Toward “Chapter 39 Immunity” (the “Immunity Order”) applying the immunity provisions of Chapter 39, Florida Statutes, to some of the Kowalskis' claims and the Hospital's conduct. [R.53102-32 (AA-1)]

### ***Punitive Damages Proceedings***

On November 15 and December 7, 2021, the trial court entered orders allowing the Kowalskis to assert punitive damage claims in their counts for false imprisonment and battery. [R.49901-04; 50911-24]

In December 2021, the Hospital sought certiorari review of the trial court's orders. See Case No. 2D21-3869 [R.51723-24]

This Court denied certiorari on October 7, 2022. [R.69686-90]

## ***Jury Trial***

The case went to trial on the Kowalskis' claims for false imprisonment, battery, negligent infliction of emotional distress, medical negligence, negligent retention and supervision of Bedy, negligent training and supervision of doctors, fraudulent billing and intentional infliction of emotional distress. [Tr.1270-74; 1537-41]

## ***Chapter 39 Immunity***

The Kowalskis moved in limine to exclude any mention of Chapter 39 and its immunity provisions. [R.91694-97] The trial court denied the motion but prohibited all parties from introducing details about the dependency proceedings. [R.91827-29]

At the Hospital's request, the trial court read the jury a ten-page special instruction describing the Kowalskis' visitation rights and the Hospital's duties under the dependency court's orders. [Tr.8366-77; AB.92]

## ***Evidence Presented at Trial***

The Kowalskis presented evidence showing the above facts. They also presented specific evidence relevant to the Hospital's appellate issues:

***Catherine Bedy***

The Risk Management Department directed Bedy to keep it “up to speed” on Maya’s status. [Tr.3960-61] Bedy agreed the Risk Management Department was “fairly involved in this [Maya’s] case.” [Tr.3962]

She said it was “up to risk” to interpret the DCF shelter orders as to “what we were supposed to do and not do.” [Tr.3969] The limitations she imposed on Maya’s visitation, meals and other activities, such as keeping her room door open, “actually came from the Risk Management Committee.” [Tr.3970, 3987-89]

Regarding the photographs taken of Maya, when she was forcibly disrobed, Bedy testified “I was just directed by risk management to do that.” [Tr.4001-03]

Bedy acknowledged Maya’s parents were not asked permission to photograph Maya [Tr.4003] and when asked if the photos were taken over Maya’s objection, Bedy said “[u]nfortunately, we did.” [Tr.4004]

***Santo S. Bifulco, M.D.***

Dr. Bifulco is a medical doctor specializing in physical medicine and rehabilitation. [Tr.5666] Licensed in three states, including

Florida, he is certified in life care planning, disability evaluation and interventional pain management. [Tr.5667, 5671]

The Kowalskis engaged Dr. Bifulco to evaluate Maya and calculate the cost of Maya's present and future care, including the treatment of conditions Maya now suffers from the trauma she experienced at the Hospital. [Tr.5672-73, 5675] He opined Maya now has a permanent injury and a permanent treatable condition. [Tr.5675] He said that CRPS and PTSD "potentiate" each other. [Tr.5670]

His life care plan for Maya relied on the opinions of treating physicians Kirkpatrick, Brewerton and Wassenaar as to what Maya's medical needs will be. [Tr.5697-99] Maya's life care plan costs between \$6,660,000 and \$8,063,000. [Tr.5701] He provided these figures to Robert Tresp and Kristi Kirby for their opinions about Maya's economic damages. [Tr.5672-73, 5701]

***Timothy Brewerton, M.D.***

Dr. Brewerton is an adult and pediatric psychiatrist [Tr.4558] who is quadruple board certified in general psychiatry, child and adolescent psychiatry, forensic psychiatry, and addiction medicine.

[Tr.4560] A focus of his practice has been post-traumatic stress disorder (PTSD). [Tr.4561]

Dr. Brewerton described his extensive examination and testing of Jack, Maya and Kyle for PTSD, depression and other anxiety disorders. [Tr.4565-66, 4569-70]

Dr. Brewerton described CRPS as “some of the worst pain known to man.” [Tr.4575] Because enormous pain leads to a psychological reaction, including anxiety and depression [Tr.4576], CRPS is often called the “suicide disease.” [Tr.4603-04] CRPS treatment requires treating both “the mental part” and “the physical part.” [Tr.4578]

He opined that because of her experiences at the Hospital, Maya suffers from several chronic illnesses – CRPS, PTSD, “recurrent major depressive disorder of moderate severity,” and “traumatic bereavement.” [Tr.4572, 4582, 4584, 4594, 4602]

Indications that Maya suffers from PTSD include flashbacks, nightmares, sleeplessness [Tr.4586-87], and avoidance behaviors such as her avoidance of healthcare professionals generally [4589-90], and any person who reminds her of Bedy. [Tr.4616-17]

Maya's PTSD is also reflected in her diminished hope for the future and ability to pursue her interests; she no longer ice skates, plays piano or involves herself in church and school activities. [Tr.4592-93, 4616] The Hospital's accusations of Munchausen by Proxy and Factitious Disorder against Beata devastated Maya, causing her stress and psychological and physical pain. [Tr.4583-84]

These chronic conditions give Maya a "very guarded and negative long-term prognosis." [Tr.4586] Maya's psychological injuries put her at risk for physical disorders such as cardiac disease, diabetes, cancer and auto-immune diseases. [Tr.4590] These risks will increase as Maya ages and encounters life's challenges [Tr.4591-92] and the psychological stress puts her at greater risk for relapses of her CRPS. [Tr.4595-96]

Her psychiatric and psychological disorders also substantially diminish her earning capacity. [Tr.4596-97]

Maya will need long-term psychological and psychiatric healthcare [Tr.4605], including life-long anti-depressant medications [Tr.4600-01], psychiatric counseling and psychotherapy. [Tr.4595-97, 4601-02]

Dr. Brewerton opined Jack and Kyle both suffer from PTSD and show signs of major depressive disorder from the trauma at the Hospital and losing Beata. [Tr.4617]

Combined, these circumstances give the Kowalskis a much-diminished ability to comfort and support each other [Tr.4573], resulting in an unfavorable prognosis for the family as a unit. [Tr.4619]

***Regina Chmiel***

Ms. Chmiel was Beata Kowalski's sister. [Tr.4878] She testified about their youth in communist Poland before emigrating to the United States. [Tr.4878-79] Their father, a Solidarity Union movement leader, had been arrested at home in front of Beata and the family and imprisoned by the communist government. [Tr.4879-80] Ms. Chmiel said their parents taught them to "stick up for ourselves and to educate ourselves as best we could." [Tr.4881] She also said the Roman Catholic faith was important to their family. [*Id.*]

***Pradeep Chopra, M.D***

Dr. Chopra is a Harvard Medical School-trained physician, who teaches at Brown University Medical School, specializing in the care of "medically complex patients, mostly with pain." [Tr.2432-35] He is

board certified in pain anesthesia, in critical care and in pain medicine. [Tr.2434] He has experience with over 100,000 CRPS patients during his career. [Tr.2440]

Dr. Chopra agrees that pain from CRPS is “the world’s worst pain,” a 46 out of 50 on The McGill Pain Scale, placing it above the pain associated with amputation, cancer or childbirth. [Tr.2443-46]

The worst aspect of CRPS pain is that it “does not go away. It is there 24 hours, seven days a week, and it just stays on and on and on.” [Tr.2443-44] Patients cannot sleep, eat or work and “[t]heir families do not believe them.” [Tr.2443-44] CRPS is permanent in almost 90% of cases. [Tr.2477] Patients have some good days and some bad days. [Tr.2491]

A CRPS diagnosis requires checking a “certain number of boxes,” many of which are observable, including temperature differences within the body, skin color changes, swelling, blister-like lesions, hair changes, nail changes, tremors, muscle weakness and atrophy, and asymmetry in muscle groups (called dystonia). [Tr.2441-43] Dystonia is similar to cramping or tightening of the muscles. [*Id.*]

CRPS is not uncommon, but many physicians misdiagnosis it.  
[Tr.2446]

One of the mechanisms of pain sensation is inflammation of the glial cells within the brain, which can be triggered by either physical or psychological stress. [Tr.2450-53]

Dr. Chopra examined Maya in 2017, after her release from the Hospital. [Tr.2436, 2461] He reviewed her medical records and photographs taken of her before and during her Hospital stay. [Tr.2462-63, 2467-70] He testified Maya suffered from CRPS while in the Hospital. [Tr.2472] This condition was evidenced by diffused pain from touch to both legs and her upper extremities [Tr.2464-65], a two-degree temperature difference between different parts of her body (a one-degree difference being significant) [Tr.2465-66], differences in the circumference of her limbs, indicating muscle atrophy [Tr.2466], skin color changes [Tr.2466-67], muscle spasms [Tr.2467-68], and “classic” CRPS lesions. [Tr.2468-70]

Dr. Chopra opined the Hospital breached the standard of care owed Maya by:

- (1) failing to diagnose her CRPS and questioning whether she had it [Tr.2478-80];

- (2) aggravating Maya's CRPS by subjecting her to painful examinations and physical therapy [*Id.*, 2453-54; 2463] and questioning her pain which caused her emotional stress [Tr.2459-60];
- (3) interrupting Maya's Ketamine treatments which stopped her slow improvement and caused her added physical and emotional stress [Tr.2453-54, 2459];  
and
- (4) failing to determine the appropriate therapeutic Ketamine dosage and denying her access to that dosage. [Tr.2488-89, 2495-96]

Finally, he testified the Hospital's deviations from the standard of care permanently aggravated her CRPS. [Tr.2455, 2459, 2492]

***Joseph Corcoran, D.O.***

Dr. Corcoran has worked in hospital management since 2013. [Tr.4987-4993] He has served as the Chief Medical Officer for hospitals in Florida, California and Nevada. [*Id.*] He said "job one for a Chief Medical Officer" is clinical quality and patient care. [Tr.4990, 4994] He is currently a consultant for HCA Health Care, a company with roughly 180 hospitals in over 20 states. [Tr.4987-89]

Dr. Corcoran testified the Hospital had “no system-wide approach to quality assurance and performance improvement.” [Tr.5083-84, 5871-72] The Hospital’s system failed Maya and her family “primarily because the architecture was so siloed that there . . . [were] gaps in the safety net that let her care fall short.” [Tr.5088] By design, the responsibility for quality assurance and performance was left at the division level. [Tr.5084-85] The pediatric department alone had 15 divisions. [Tr.5871-72] As Maya moved from the emergency room (one division) to the pediatric intensive care unit (another division) and then to a ward (yet another division), each division needed a physician overseer trained in quality assurance and performance improvement to assure her safety and care within that division. [Tr.5872] He saw no evidence of that structure, or anyone trained to oversee their colleagues’ activities to assure the safety of patients like Maya. [*Id.*]

***Jack Kowalski***

Jack testified Beata had a “rough” life in Poland. [Tr.3100-03] She came to the United States during high school, speaking no English, but she completed high school and college. [*Id.*] He described

her as “determined” and, because of her background in Poland, “blunt.” [Tr.3101-03]

He testified Maya was in severe pain when he brought her to the Hospital’s emergency room on October 7, 2016. [Tr.3199-3200] He gave the ER personnel the same medical history for Maya he had previously given to many other Hospital physicians. [*Id.*] Jack wanted to leave the Hospital the next day, but he and Beata were told they would be arrested if they tried to leave with Maya. [Tr.3206-08]

On October 9, Beata told Hospital personnel they wanted to leave with Maya for a scheduled appointment with one of Maya’s regular physicians, but the Hospital again threatened them with arrest. [Tr.3209-10, 3266-68]

Between October 7 and 13, Jack repeatedly told Hospital personnel the family wanted to transfer to Nemours Hospital in Orlando, which treats CRPS [Tr.3271-72], but Jack refused to agree to the Munchausen by Proxy diagnosis that Hospital staff inserted in the required transfer form. [Tr.3272, 3277-78, 3280, 4215] Agreeing to that diagnosis would have affected Beata’s nursing license. [Tr.3280]

When Jack was told he must leave Maya and leave the Hospital because of the first dependency court order, his stress was “extremely high.” [Tr.3270-71, 4222-23] He described how the next day he drove for an hour back to the Hospital to visit Maya, but Bedy turned him away. [Tr.3284, 3287] He was denied access to Maya many times during her Hospital stay. [Tr.3289] The Hospital did not involve the Kowalskis in decisions about Maya’s medical treatment. [Tr.3300-01]

Jack described Bedy’s behavior towards him and Maya, including Bedy advising him to divorce Beata. [Tr.3308-09, 4207-08, 4212-13] He was outraged when he learned that Bedy told Maya that Beata was in a mental institution and that she (Bedy) would become Maya’s mother. [Tr.4207-08]

Jack advised the Hospital, through correspondence to Dr. Katzenstein, of his concerns about Bedy. [Tr.9599; R.105899] Beata, through her attorney, was copied on the letter. [*Id.*]

Jack described his, Maya and Kyle’s condition after their experience with the Hospital. He shared how they have stayed in the house where Beata committed suicide because the neighborhood is their support system and that is where the children have friends. [Tr.5402] But staying has been very difficult; they changed every

room and never go in the garage (where Beata committed suicide).

[*Id.*]

During their marriage, Beata took the lead in the children's activities and education, cooked, treated the children's colds and flus, paid the bills, and shared driving the children to school and extracurriculars. [Tr.5404-08] Jack described how now "there's so much of a void." [Tr.5404] The family also lost Beata's income and insurance, diminishing the family's lifestyle. [Tr.5418-19]

Jack described how he misses his wife's companionship [Tr.5408-09] and that he is angry about her suicide. [Tr.5423]

He cannot give Maya "mom and daughter talks" [Tr.5403] and he fears taking his children for medical treatment for minor injuries, because being accused of child abuse "changes your life." [Tr.5405-06, 5425] Jack does not seek medical care even though he now has high blood pressure and PTSD. [Tr.5410] He suffers from sleeplessness, headaches, stomach aches, vomiting, and eczema. [Tr.5416-17] He quantified his suffering (as did Kyle and Maya) in terms of hours per day. [Tr.5414-15, 5426, 5393-94]

Maya and Kyle now have less interest in activities [Tr.5408] and both are doing online school because they do not want to face other children. [*Id.*]

**Scott Richards, M.D.**

Dr. Richards was the Kowalskis' expert witness psychiatrist engaged to opine on the reasons for Beata's suicide. [Tr.5823]

He is licensed in psychiatry in six states, including Florida, and has been board certified since 1993. [Tr.5828-29] His practice deals with threatened suicide, suicide ideations, and unsuccessful suicides. [Tr.5829]

Dr. Richards has assessed between 12,000 and 15,000 people for suicide-related issues and has identified certain "risk factors." [Tr.5832-33] From his review of the records, including Maya's hospital records and deposition testimony, he identified suicide risk factors in Beata's background, including:

- her upbringing in a repressive and controlling communist regime and losing her father to that regime. [Tr.5833-34]; and
- her "somewhat rigid and strict" Catholic upbringing." [*Id.*]

Dr. Richards said Beata was a person for whom control over her own life was important. [Tr.5834-37] What brought her to the point of suicide was her sense that she had lost control over her life and her children. [Tr.5837]

Beata “suddenly had an impulsive behavior” when she sacrificed herself for her family and “the maternal instinct had a significant effect on Beata’s impulsively taking her life.” [Tr.5838, 5840]

Beata’s suicide “was the result of an irresistible impulse to do that on that evening.” [Tr.5842] “Beata’s perception of the Hospital’s conduct and others, particularly Bedy, was a substantial factor in creating that irresistible impulse.” [*Id.*]

The Hospital’s treatment of Maya was a substantial factor in bringing about Beata’s suicide. [Tr.5842, 5855-56]

***Robert Tremp***

Mr. Tremp is certified in rehabilitation and lifecare planning. [Tr.5608] His opinions relate only to Maya’s diminished earning capacity. [Tr.5606-07, 5629]

Maya's need for long-term care arises from her CRPS and her PTSD conditions, a "perfect storm" of the two conditions "chas[ing] each other." [Tr.5610-11, 5617]

Before Maya's trauma at the Hospital, there was "nothing to stop her to maximize her wages" because her CRPS was being well managed. [Tr.5616]

Maya was on track to achieve a doctoral-level education, with annual earnings in the range of \$97,000 [Tr.5611-13, 5616] and lifetime earnings (from age 28 to ages 65 or 70) in the \$3,000,000 to \$4,000,000 range. [Tr.5614-15] After her experience at the Hospital, Maya is not the same person she would have been absent that experience. [Tr.5663]

Because of her PTSD, Maya's potential earnings have been reduced. [Tr.5617-18, 5627-28]

Mr. Tremp provided his opinions to Dr. Bifulco to include in Maya's lifecare plan. [Tr.5608]

***Kristi Kirby***

Ms. Kirby is an economist who quantified the economic damages suffered by Jack, Maya and Kyle, based in part on Mr. Tremp's information and opinions. [Tr.5544, 5548-49, 5557] These

damages included Maya's diminished future earning capacity and her past and future medical expenses, as well as Jack, Maya and Kyle's wrongful death damages. [Tr.5550, 5556-59, 5571-73] The wrongful death damages include Beata's lost past and future financial support to the family and the lost past and future value of Beata's household services. [*Id.*]

Ms. Kirby calculated Jack's total past medical expenses for Maya's care to be \$885,293.81. [Tr.5556; R.104991-105888] Using Dr. Bifulco's lifecare plan, she calculated Maya's future medical expenses as up to \$10,247,747 [Tr.5573] and lost future earnings up to \$5,079,783. [Tr.5556-60]

Ms. Kirby calculated the loss of Beata's past financial support to the family as \$266,070 [Tr.5567-69] and the future lost support as up to \$387,606. [Tr.5570-71] The past lost value of Beata's household services is \$221,195 [Tr.5569] and the lost value of future household services is up to \$579,857. [Tr.5571]

***Maya Kowalski***

Maya testified that before the onset of her CRPS, her health was generally "really good" [Tr.4238] and that she had a high pain

tolerance. [Tr.4239] She once broke her arm riding her bicycle and tolerated the pain for days without complaining. [Tr.4238-39]

Maya described the onset of her CRPS symptoms in 2015, which eventually caused excruciating pain in her legs. [Tr.4247-49] Her symptoms included pain spreading to her mid-section and arms, constipation, sensitivity to touch, skin lesions, dystonia, temperature changes in her limbs, tinnitus and muscle weakness confining her to a wheelchair. [Tr.4250-52, 4255-56, 4258, 4261-62; R.129361; R.129362]

Maya said Dr. Kirkpatrick diagnosed her CRPS in the fall of 2015 based on her multiple symptoms, especially “the burning pain.” [Tr.4265-67] After Maya had tried water therapy, psychological counseling, and opioids, Dr. Kirkpatrick administered a Ketamine infusion [Tr.4268-69], which helped more than any previous therapy. [Tr.4273-74] Dr. Kirkpatrick also referred the Kowalskis to Dr. Fernando Cantu Flores in Mexico for intensive Ketamine therapy. [Tr.4280] Maya underwent a “Ketamine coma” in Mexico in October 2015, with follow up “boosters” in Mexico and in the U.S. later in 2015. [Tr.4286-90]

Dr. Cantu told Maya the intensive Ketamine sedation had a “50% chance of death.” [Tr.4281] She was willing to take this risk because the pain was so severe. [*Id.*] She learned during this time that CRPS can be fatal. [Tr.4283]

Maya felt much better after the Ketamine sedation and boosters. [Tr.4288-89] By Christmas 2015, she was still in a wheelchair, but her lesions were better, her feet were straighter, and she moved her arms and legs better. [Tr.4291-93]

Her improvement continued during the spring and summer of 2016, although she still used a wheelchair. [Tr.4294-97] She also continued with water therapy and tried hyperbaric chamber treatments and immune system stimulation. [Tr.4298-99, 4302] Video shows Maya was able to practice scuba diving in a pool by April and pull herself out of the pool without help by August. [Tr.1845, 4137-38; 4294-95; 4806-07; PX.2698, PX.2691 (Evidence R.48584)]

In the fall of 2016, the stress of returning to school in a wheelchair triggered a CRPS relapse and Maya continued Ketamine treatments under Dr. Hanna’s care. [Tr.4302-04] She also suffered severe constipation requiring emergency room visits. [Tr.4304-05]

On October 7, 2016, Maya was readmitted to the Hospital's emergency room. [Tr.4324] The burning pain had returned, "more amplified than" before, lesions were returning, and dystonia was more prevalent. [*Id.*] She also had "excruciating pain" in her stomach. [Tr.4325]

The Hospital transferred Maya from the ER to the pediatric intensive care unit (PICU) where doctors held her down to insert a tube through her nose, causing her to scream, cry and thrash about. [Tr.4327-28]

Later, while Maya was in the PICU, Dr. Smith entered her room wearing a white lab coat with "colored squares" across the chest. [Tr.4331-32] Dr. Smith did not explain who she was but asked her father questions. [*Id.*]

Hospital personnel never explained the Patient's Bill of Rights to Maya. [Tr.4342-43; R.103928-99]

Hospital personnel told Maya her symptoms were in her head. [Tr.4343-45] Bedy told Maya her mother was in a mental institution. [*Id.*]

Maya (and Jack) testified that the loss of Beata was "very hard" and "extremely difficult" on them, impacted the family's "bonding

time,” and created “a void” in the family. [Tr. 5379-80, 5391-94, 5402-04, 5495-96] Maya quantified her suffering in terms of hours per day. [Tr. 5517-19]

***Eli Neuberger, M.D.***

Dr. Neuberger was the Kowalskis’ expert witness on the standard of care Hospital treating physicians owe their patients. [Tr.5350-51] He told the jury the Hospital’s efforts to show the Kowalskis were lying about Maya’s condition were “preposterously conceived and cruelly executed.” [Tr.5352]

The Hospital diverged from the standard of care requiring treating physicians “to conduct a systematic and rigorous differential diagnosis in which all alternatives were seriously considered and honestly represented.” [Tr.5350-51]]

***Closing Arguments and Verdict***

The Kowalskis’ counsel used a per-hour formula to assist the jury in determining appropriate noneconomic damages for each of their claims. [Tr.10222-31] Their counsel also told the jury to use its discretion in allocating compensatory damage awards among the separate claims, and the Hospital did not object. [Tr.10223-25]

Hospital counsel offered no alternative formula or method to calculate noneconomic damages, saying only that jurors should “use your common sense.” [Tr.10296] Hospital counsel suggested “a tune-up on physical therapy” for Maya for \$15,000 for one year, and psychotherapy for “30 to \$57,000,” or even “\$200,000 in therapy.” [Tr.10298-300] The Hospital offered no expert testimony to support these figures – only figures based on “what [Hospital counsel] would suggest.” [Tr.10298]

Likewise, on the wrongful death claim, Hospital counsel simply suggested “numbers from \$500,000 to a million or a million and a half, even per person, would be something that would be fair and adequate . . .” [Tr.10300] Overall, Hospital counsel said “[a]nd in terms of totals for this, 3 million, 4 million, I think that would be more than fair . . .” [Tr.10300]

Again, Hospital counsel gave the jury no explanation or methodology for how he calculated these figures [Tr.10296-10307] and he gave no method or formula to apportion damages among the claims. [*Id.*]

The Hospital used only 42.5 hours of its allotted 61.5 hours of trial time. [Tr.6391, 9081-82, 9542]

The jury returned a verdict on each count in the Kowalskis' favor [R.95860-95880] and a separate verdict awarding punitive damages. [R.95887-93]

### ***Post-Trial Proceedings***

The Hospital filed a Renewed Motion for Directed Verdict, Motion for New Trial, and Motion for Remittitur. [R.96932-97075] The Kowalskis responded [R.100077-165] and the trial court heard argument on these filings. [R.101425-26]

The trial court's Order on Posttrial (sic) Motions (the "Posttrial Order") remitted portions of the jury's awards, but otherwise denied the Hospital's post-trial motions. [R.115442-58 (AA-2)]. Final Judgment was rendered January 19, 2024. [R.121137-142]

The Hospital timely filed this appeal on February 15, 2024. [R.121189-96]

### **SUMMARY OF THE ARGUMENT**

The Hospital's conduct, intended to force the Kowalskis to confess to medical child abuse, was outrageous and intentionally or recklessly inflicted severe emotional distress on Beata, causing her suicide. The conduct included terminating Maya's prescribed

medication to treat her CRPS, falsely imprisoning and battering Maya, and inflicting multiple psychological indignities on Beata and Maya designed to drive a wedge between them.

The Hospital fraudulently billed the Kowalskis' insurer over \$500,000 for CRPS treatment while denying Maya had that illness. The insurer relied on these bills, paying over \$300,000 for CRPS treatment. The bills contributed to Beata's severe emotional distress, supporting the remitted fraud judgment for \$2.

The same Hospital conduct that intentionally or recklessly inflicted severe emotional distress on Beata also inflicted distress on Maya, causing her permanent psychological and physical injury, including aggravation of her CRPS and PTSD, requiring treatment for the rest of her life.

The Hospital falsely imprisoned Maya between October 7 and 13, 2016, when, without legal authority, it refused to release her to her parents.

Chapter 39 protects children from abuse, not child abusers, as the jury found the Hospital to be in this unique case. The Hospital's tortious conduct (false imprisonment, battery, medical negligence and intentional infliction of emotional distress) abused Maya and her

family. The trial court correctly ruled that Chapter 39 immunized the Hospital for reporting suspected child abuse but not for its tortious conduct. The Amici briefs do not assist the Court in addressing the Hospital's tortious conduct.

The noneconomic damages awards were within the jury's discretion and were reviewed by the trial court under the factors of section 768.74. This Court should defer to the trial court's decisions to approve some awards and remit others.

The Hospital failed to preserve its challenges to the economic damages awards. While this Court can remit any such award that exceeds the evidence, such an award does not support the Hospital's requested remedy of a new trial on all damages.

The punitive damages awards were based on intentional or reckless tortious conduct against Maya (false imprisonment and battery) by Hospital employees. This conduct was participated in, condoned and ratified by the Hospital's Risk Management Department, which was overseen by senior Hospital personnel, and which reported to the Hospital's chief legal officer, who then reported to the Hospital's CEO. Each award was below the statutory cap of section 768.73(a)(1).

## **ARGUMENT**

The Final Judgment comes to this Court with a presumption of correctness, and the Hospital bears the burden to show reversible error. *Harrison v. Harrison*, 909 So. 2d 318, 319 (Fla. 2d DCA 2004)

The pretrial and posttrial orders show the trial court's careful and thorough analysis of the applicable law and its application to the issues. After dismissing with prejudice or granting summary judgment in the Hospital's favor as to 21 claims – in several instances based on Chapter 39 immunity – the court conducted a fair and balanced trial on the remaining claims.

The Hospital maintained throughout that it did nothing wrong, the Kowalskis were not injured (at least not badly), it was only following DCF orders, and the jury and the trial court simply did not understand its case.

The Hospital now doubles down on these contentions, showing it still does not get how atrocious its conduct was. [E.g., R.115442-58]. It seeks to relitigate factual issues the jury decided against it, such as whether it engaged in extreme and outrageous conduct or whether it was deceptive in its billings. [R.95873-75; *see, e.g.* IB.53/70] Contrary to how appellate courts view facts after a verdict,

the Hospital either construes disputed facts in its favor or simply proclaims there was “no evidence.” [See, e.g. IB.15/19/33-34/46/98-99]

None of these assertions is correct. The Hospital’s arguments should be rejected, and the Final Judgment affirmed.

**I. THE TRIAL COURT CORRECTLY UPHELD THE JURY VERDICT FOR THE IIED AND WRONGFUL DEATH CLAIMS FOR BEATA**

**Standard of Review**

Denial of a motion for new trial that asserts insufficiency of the evidence is reviewed for abuse of discretion. *Smith v. Llamas*, 109 So. 3d 1185, 1187 (Fla. 2d DCA 2013)

For the tort of intentional infliction of emotional distress, “the question of whether conduct is in fact outrageous is one of law.” *Mellette v. Trinity Mem. Cemetery, Inc.*, 95 So. 3d 1043, 1048 (Fla. 2d DCA 2012); *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592, 595 (Fla. 2d DCA 2007).

To determine if the “outrageousness” standard has been met, this Court “must evaluate the testimony in the light most favorable to the nonmoving party and every reasonable inference deduced from the evidence must be indulged in favor of the nonmoving party.”

*Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 515, (Fla. 2d DCA 2014) (citations and internal punctuation omitted). “If there are conflicts in the evidence or different reasonable inferences that may be drawn . . . the issue is factual and should be submitted to the jury.” *Id.* at 516 (citation omitted).

Where significant facts are disputed, whether “outrageous” conduct is intended to cause a person emotional distress, or recklessly does so, is a question the jury may infer from the evidence. *Winter Haven*, 148 So. 3d at 516; *Smith v. Telophase Nat’l Cremation Soc’y, Inc.*, 471 So. 2d 163, 166 (Fla. 2d DCA 1985).

A denial of a summary judgment motion that asserts no genuine issues of material fact is reviewed *de novo*. *Fla. Birth-Related Neurological Inj. Comp. Ass’n v. Michael*, 98 So. 3d 64, 67 (Fla. 2d DCA 2010). All issues of fact should be construed in a light most favorable to the nonmovant. *Nance v. Ball*, 134 So. 2d 35, 37 (Fla. 2d DCA 1961).

Orders admitting expert witness testimony under *Daubert* are reviewed for abuse of discretion. *Miller v. State*, 379 So. 3d 1109, 1122 (Fla. 2024).

## **Merits Argument**

### **A. The evidence showed the Hospital engaged in conduct sufficiently “outrageous” to prove an IIED claim**

As the Kowalskis asserted below [*see, e.g.* R.93488-92, 121787-88] the outrageous conduct proving this claim is the three-month effort to break Maya and her family via the campaign mounted by Hospital personnel to force a mother to confess to medical child abuse and force her seriously ill ten-year-old daughter to confess to a “charade” and implicate her mother.

The trial court characterized the Hospital’s efforts as “purposefully designed to destroy Maya’s relationship with her mother.” [R.115451]

These efforts – none of which were required or authorized by Chapter 39 – include:

- Maya’s false imprisonment between October 8 and 13 when the Hospital kept her in its facility without authority from DCF or any other agency and under the baseless threat of Jack and Beata’s arrest;
- Maya’s false imprisonment between October 18 and 20 within the Hospital – without any authority from the dependency court – to expose her “charade” by secret video recording;
- Maya’s false imprisonment and battery within the Hospital – without any authority from the

dependency court – on January 6, 2017 to photograph her;

- The Hospital treating team’s termination of Maya’s prescribed medications – against her parents’ wishes – which caused Maya’s physical deterioration and permanent physical and psychological injury;
- Bedy advising Jack to divorce Beata;
- Bedy’s multiple batteries of Maya and other emotionally damaging behaviors toward an alone ten-year-old child (needlessly isolating Maya, cruelly lying to Maya that her mother was in a mental institution and that Bedy would become her mother, and callously denying Maya loving gestures from her family, such as a birthday card and a Christmas dress) all of which the jury reasonably inferred as intended to drive an emotional wedge between mother and daughter; and
- The Hospital’s senseless refusal to allow Maya and Beata to communicate during what became the last ten days of Beata’s life, contrary to the shelter orders requirements.

[AB.5-7/10/13-14/16-19; R.115445-46]

The evidence showed Beata knew about this tortious conduct [Tr.3308-09, 3397-400, 3541, 4207-09, 5888-89, 9599], and it was the jury’s province to infer this medical blackmail was intended to expose Beata’s “charade.” *S & S Toyota, Inc. v. Kirby*, 649 So. 2d 916, 919 (Fla. 5th DCA 1995) (intent to defraud ordinarily proved by circumstantial evidence; courts willing to infer that intent); *Asinmaz*

*v. Semrau*, 42 So. 3d 955, 959 (Fla. 4th DCA 2010) (intent to harm in defamation case can be inferred); *Paul v. Holbrook*, 696 So. 2d 1311, 1312 (Fla. 5th DCA 1997) (“jury could reasonably infer” intent to batter based on circumstantial evidence).

The Restatement of Torts defines the outrageous conduct needed to prove this tort as:

Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, “Outrageous!”

Restatement (Second) of Torts § 46 Cmt. d (1965); *see also Mellette*, 95 So. 3d at 1049.

Especially outrageous – and emotionally painful for Beata – was the Hospital’s refusal to provide Maya’s prescribed medication and her worsening condition. [Tr.3309, 3399-400, 9049-50]

Beata told Hospital personnel Maya needed her prescribed medication. [Tr.3972-73, 6293-94, 6566-67, 7774, 9049-50]

Maya deteriorated and Beata knew. [Tr.3309-10, 3282-83, 5155, 5889]

In assessing the outrageousness of this conduct, the Court may consider (as could the jury) that Dr. Dees, a member of Maya’s

Hospital treatment team, who discussed Maya's medications with Beata (including removing Maya's port), acknowledged she was "not, like, a registered expert" on CRPS. [Tr.7774-75, 7780-81]

The Court may also consider Dr. Newberger's expert opinion that the Hospital's treatment team "diverged from the accepted standard of care for hospital treating physicians to conduct a systematic and rigorous differential diagnosis in which all alternatives were seriously considered and honestly represented." [Tr.5333, 5350-51] *See Winter Haven*, 148 So. 3d at 510 (expert opined that hospital's post-autopsy disposal of organs was outrageous).

As the psychologist appointed by the dependency court to evaluate Maya ultimately concluded in her report, a diagnosis of Conversion Disorder was "contraindicated" and "[t]here was no evidence presented to this evaluator to support such a diagnosis . . ." [R.104016] The psychologist also noted that "Maya was warehoused for nearly 90 days without medical treatment for her pain syndrome . . ." [*Id.*]

Beata's evaluation by this same psychologist completed one month before Beata's death similarly concluded there is "no evidence

that Beata has ever suffered from mental health problems.”  
[R.104033]

Yet for months, the Hospital tried to force mother and daughter to confess that the child’s painful illness was a “charade.”

Outrageous! – more so than the conduct in either *Winter Haven* or *Mellette*.

But there is more. Hospital personnel knew Beata was under significant stress, emotionally fragile concerning Maya’s health, and even contemplating suicide. [Tr.6567-69, 6588-89, 6591-92; R.111173; R.105897] After Beata’s death, a Hospital physician said she had “predict[ed]” her suicide. [R.105897] *Liberty Mutual*, 968 So. 2d at 595-96, citing Restatement (Second) of Torts, Cmt. f (“knowledge of a person’s particular susceptibility to emotional distress is relevant to determining whether the conduct is sufficiently extreme and outrageous . . .”).

Another factor is the “unequal position of the parties . . . where one asserts and has the power to affect the interests of the other.” *Liberty Mutual*, 968 So. 2d at 596; see also *Gallogly v. Rodriguez*, 970 So. 2d 470, 472 (Fla. 2d DCA 2007). The power here was entirely with the Hospital when it threatened Jack and Beata with arrest, videoed

and photographed Maya without parental input or consent, and made medical treatment decisions without parental input or consent - contrary to the shelter orders. [R.96381-90]

Yet another factor is the lack of legal or other justification for the Hospital's conduct. *Liberty Mutual*, 968 So. 2d at 596. None of its tortious conduct was required or authorized by dependency court orders [see R.96381-90] or by Chapter 39, as discussed below. [AB.81-96]

Finally, there is the callous attitude of some Hospital personnel to the Kowalskis' circumstances. Dr. Teppa-Sanchez suggested Maya might be better off without her mother. [R.105897] In her text response to Dr. Smith's insinuation that one of Maya's treating physicians should have trouble sleeping at night, Dr. Major responded "LOL!" [R.103990 (AA-3)], an abbreviation commonly understood to mean "Laughing Out Loud." See *Merriam-Webster.com*. Dr. Smith's text to Dr. Major two days after Beata's suicide ends with nothing more than "Craziest case ever!!!" [R.103991]

One can infer that Hospital personnel considered this ordeal just another case, not a family tragedy they created due to their vendetta against a family for questioning the "care" they provided.

**B. The evidence showed the Hospital acted with intent or recklessness to cause Beata emotional distress**

Munchausen by Proxy, the Hospital's posited diagnosis for Beata [see, e.g. Tr.5934-36, 6284-85, 6287; R.109926; R.109995], is a disorder involving both a parent and a child. [Tr.5923-24, 5935-36, 6284-87] The "charade" Hospital personnel were determined to expose was, they believed, perpetrated by Beata and Maya. [See Tr.5934-35, 6284-87, 7223-24; R.103985; R.103989] The jury could reasonably infer the outrageous conduct described above was directed at *both* Beata and Maya.

That conduct provides a basis for Beata's intentional infliction claim, even though she was "miles away" when the conduct occurred. [IB.60] See Restatement (Second) of Torts, § 46(1); see also *Winter Haven*, 148 So. 3d at 509–10 (plaintiff not present during disposal and incineration of her deceased mother's organs after autopsy); *Mellette*, 95 So. 3d at 1045 (plaintiff not present during disinterment of husband's body).

It was the jury's province to determine whether the Hospital intended its conduct, directed at both mother and daughter, to cause Beata emotional distress, or recklessly caused this distress.

[R.96351-52; *see also* Fla. Std. Jury Instr. (Civ.) 410.7; *see also* R.96355–56]

And because the conduct was directed at both mother and daughter, it differs greatly from the conduct in the Hospital's cited case authorities, where the complained-of conduct was not directed at those plaintiffs. *See M.M. v. M.P.S.*, 556 So. 2d 1140 (Fla. 3rd DCA 1989); *Habelow v. Travelers Ins. Co.*, 389 So. 2d 218 (Fla. 5th DCA 1980). [IB.60–61]

**C. The evidence showed the Hospital is liable for Beata's suicide**

The trial court's IIED jury instructions follow the Florida Standard Jury Instructions, except for the suicide element for which there is no standard instruction. [Tr.10087-90; R.96354-57] *See* Fla. Std. Jury Instr. (Civ.) 410.2 – 410.8.

The trial court's suicide causation instruction stated that for the Hospital's conduct to be a legal cause of Beata's suicide, it must either:

1. create in Beata Kowalski an uncontrollable impulse to commit suicide; or
2. be a substantial factor in bringing about the suicide.

[R.96356]

The instruction's first prong followed the only Florida case addressing the mental state that the defendant's conduct must create for the defendant to be liable for the decedent's suicide. *See Nelson v. Seaboard Coast Line R. Co.*, 398 So. 2d 980 (Fla. 1st DCA 1981).

*Nelson* held that while "suicide absent insanity is a new and independent agency which breaks the causal connection between the wrongful act and death . . . where the suicide is committed in a state of insanity in response to an *uncontrollable impulse*, recovery may be had if the mental state of the deceased was caused by the defendant's wrongful act." *Id.* at 982 (emphasis added, citation omitted).

The trial court's causation instruction defined an "uncontrollable impulse" as "a mental state that prevented Beata Kowalski from appreciating the nature of the act of suicide or controlling her conduct." [R.96356] This is functionally equivalent to *Nelson's* language that the defendant's conduct must have "dr[iven] the deceased beyond the point where he could rationally decide against killing himself." 398 So. 2d at 982.

Although the Hospital wanted a suicide causation instruction such as it asks for in this appeal, it also said "Johns Hopkins does not object to the basic concept relied upon in *Nelson* . . . which

Plaintiff has earlier described as an ‘uncontrollable impulse.’” [R.91673-74; *see also* Tr.9734 (Hospital counsel proposes using *Nelson* language)] The Hospital also proposed using either “uncontrollable impulse” or “irresistible impulse.” [R.91677-78; *see also* R.93733]

*Nelson’s* reliance on *Tate v. Canonica*, 180 Cal. App. 2d, 898, 901-10 (1960), shows its holding was based on common law tort principles, not on the Federal Employer’s Liability Act and its “relaxed standard of causation” as the Hospital contends. [IB.62] *Nelson*, 398 So. 2d at 982.

The Hospital also told the trial court it objected to the “substantial factor” prong of the court’s suicide causation instruction because “it confuses causation of damages and causation of the tort.” [Tr.9735] But the Hospital did not explain below (and does not here) why attentive jurors could not understand and apply those separate causation instructions as they were expected to understand and apply all the instructions. The objection is not preserved. *Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010).

Evidence of the Hospital’s conduct supports the verdict under either prong of the trial court’s causation instruction. Dr. Richards

testified that Beata's losing control over her children's health, potentially losing her husband and the Hospital denying her priest's visit to Maya ("an overwhelming situation for someone with her religious background") were part of what brought Beata "to the point that she suddenly had an impulsive behavior." [Tr.5837-38, 5841]

Beata's learning the extent of Bedy's mistreatment of Maya was "a significant factor for Beata Kowalski's suicide." [Tr.5841-42]

Dr. Richards acknowledged the dependency court proceedings, which separated Maya from her family, was also a factor. [Tr.5849-51] Beata's suicide notes say as much, but they also refer to factors arising from the *Hospital's* treatment of Maya, such as Beata's awareness of Maya's suffering and the "physical deconditioning, worsening of her CRPS that eventually will lead to her slow, painful death." [R.103944-47]

Dr. Richards concluded there were "multiple different, if you will, factors involved" and that "[t]he majority of those factors came from Johns Hopkins." [Tr.5852]

The Hospital had an opportunity to cross-examine Dr. Richards but chose not to raise what it now asserts was an absence of scientific or other support for his opinions. [IB.66; Tr.5845-52] In his direct

testimony, Dr. Richards tried to discuss relevant research he and others had done, but the Hospital objected on bolstering grounds. [Tr.5839]

The trial court instructed the jury the Hospital was not responsible for Beata's separation from Maya after October 13 [R.96381-82], gave this instruction during trial and included it in the closing package of instructions. [Tr.8367, 10185-86]

The Hospital has given no reason to believe the jury did not follow this instruction and limit its consideration of the factors that caused Beata's suicide to those caused by Hospital personnel, not the dependency proceedings.

Finally, the Hospital's "more stringent standard" for IIED-suicide causation, which it asks this Court to create for Florida [IB.62-63], is unworkable. How could a jury separate a defendant's intent to "cause emotional distress" from its intent to cause "suicide?" How is one form of intent different from the other? The Hospital does not say. But only in the rarest case is an IIED defendant likely to express that the victim's suicide was the defendant's goal. As a practical matter, the Hospital's proposed standard would limit IIED-

suicide claims to circumstances where the defendant confesses intent to cause suicide, effectively eliminating those claims.

The Hospital's proposed standard is also unnecessary to prevent an "avalanche of lawsuits." [IB.63] Because the proof to establish negligence in *Nelson* was less than the proof required to establish the intentional tort here, one would expect the avalanche from suicide claims to have begun 43 years ago when *Nelson* was decided. There has been no "avalanche."

**D. The IIED claim did not deprive the Hospital of a fair trial**

The Hospital acknowledges it should receive a new trial on the entire case because of the "emotional impact" of the evidence supporting this claim *only* "if the suicide claim should not have been tried." [IB.69] For the foregoing reasons, it was proper for the Kowalskis to present this evidence.

Moreover, any harm from error on this claim does not metastasize to the entire case. The Hospital gives no reason to suppose the jury did not follow the standard instruction that "each [claim] is separate from the others . . . [and] you should consider the evidence as it relates to each claim separately . . ." [R.96370] *Special*

*v. West Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014), limits the new trial remedy for error to the claim in which the error was committed. See *Philip Morris USA Inc. v. Duignan*, 370 So. 3d 978, 984 (Fla. 2d DCA 2023) (no new trial for strict liability and negligence claims despite error in fraud claims because “negligence and strict liability are separate and independent causes of action from the fraud claims.”).

## **II. THE FINAL JUDGMENT ON THE INSURANCE FRAUD CLAIM SHOULD BE AFFIRMED**

### **Standard of Review**

A denial of a directed verdict motion that asserts insufficiency of the evidence is reviewed *de novo* using the same test the trial court applies to rule on the motion. *Fell v. Carlin*, 6 So. 3d 119, 120 (Fla. 2d DCA 2009); *Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014).

If any reasonable view of the evidence could sustain the verdict in favor of the nonmovant, the Court must affirm the denial of the motion. *Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017); see also *Estate of Canavan v. Nat'l Healthcare Corp.*, 889 So. 2d 825, 826-827 (Fla. 2d DCA 2004) (directed verdict evaluated by viewing evidence

and all inferences of fact in light most favorable to nonmoving party).

A denial of a summary judgment motion is reviewed under the standard stated in Section I.

### **Merits Argument**

The evidence showed the Hospital rejected Maya's CRPS diagnosis and removed Maya from her medications prescribed to treat CRPS. [AB.4/10-11] Hospital personnel accused Beata of medical child abuse and believed Maya was acting out a "charade" by faking CRPS symptoms. [AB.12-13]

Yet the Hospital's bills to the Kowalskis' insurance carrier, Aetna – for more than \$500,000 – included a CRPS diagnostic code, in many instances as the top line or "focal point" diagnosis code. [AB.14-15; R.104991-5888; Tr.3432-41, 5553-55, 8619-21, 8637-39, 8656]

Jason Bankert, the Hospital's "executive director of revenue cycle" [Tr.8583-8661] confirmed that code number G90.59 on these bills represents a CRPS "diagnosis code." [Tr.8619-21]

Aetna paid more than \$300,000 of the Hospital's bills. [AB.14-15]

From this evidence, the jury reasonably inferred the first four elements of this tort. [IB.71] *See Bacon & Bacon Mfg. Co. v. Bonsey Partners*, 62 So. 3d 1285, 1287-88 (Fla. 2d DCA 2011) (elements of fraud could be inferred from circumstantial evidence); *Townsend v. Morton*, 36 So. 3d 865, 868 (Fla. 5th DCA 2010) (elements of fraud proven from evidence requiring inference).

The jury's finding is supported by the trial court's proper instruction on each element of fraud. [Tr.10078-81; R.94962-64] *See R.J. Reynolds Tobacco Co. v. Prentice*, 290 So. 3d 963, 966-67 (Fla. 1st DCA 2019) (failure to give proper jury instruction supports conclusion that jury was misled, but instruction directing jury to determine whether plaintiff relied on misstatement would have been adequate for a finding of reliance), *op. approved of*, 338 So. 3d 831 (Fla. 2022).

The Hospital complains it was prejudiced when the trial court permitted the Kowalskis to "rail against [the Hospital's] 'fraud' against its patients" and argues allowing this claim into the trial "cannot stand." [IB.75] Yet the documentary evidence is indisputable that the Hospital used the CRPS billing code for \$500,000 of bills,

and the jury was entitled to reject the Hospital's attempted explanation. [See Tr.8583-8652]

The plain truth is the Hospital was caught in a gross falsehood directly at odds with the purported justification for all the abuse it inflicted on the Kowalskis. From that, the jury reasonably found the Hospital "fraudulently misrepresented a material matter in its invoices." [R.95873]

This was the Hospital's second gross falsehood the jury heard, the first being the Hospital's deliberate effort to conceal its "immediate jeopardy" status through misleading expert witness testimony. [AB.25-26]

No damages in the form of increased co-pays, premiums or deductibles were proven at trial, but the judgment on this claim should be affirmed on an alternative ground.

On the damages element for billing fraud, the Eighth Amended Complaint alleged "[i]n billing for . . . a diagnosis that JHACH never accepted" the Hospital added to "a chain of events that ultimately and directly led to the suicide of Beata Kowalski . . ." [R.71725-814 (Compl. ¶ 203)]. The complaint also alleged generally "Plaintiffs were injured through the fraudulent billing of their insurer." [*Id.*, ¶ 206]

Billing the Kowalskis' insurer for an illness the Hospital insisted Maya did not have contributed to the severe emotional distress inflicted on Beata. Her communications with Aetna show her concern to correct the billing/diagnosis discrepancy [R.99279; R.99285; R.99287], and one of her final laments in her suicide notes was that her family was "in bankruptcy." [R.103946-47]

The jury heard evidence that the stress inflicted by the Hospital led to Beata's suicide, and its verdict on Beata's estate's IIED claim shows it accepted that evidence. [R.95876] Jack's loss of Beata would have reasonably supported a verdict of five million dollars for billing fraud, but the Kowalskis agreed to remit the verdict to two dollars because they had sought damages only for "deductibles or co-pays incurred" and "difficulty of finding insurance in the future" [R.95874], damages which were not proven. [R.115455]

The jury was entitled to consider Jack's loss of Beata as billing fraud damages because, the evidence and pleadings fully support this argument. The stress the billing fraud caused Beata was also relevant to her estate's IIED-wrongful death claim. This Court can affirm the Final Judgment for billing fraud for the remitted amount of two dollars [R.121139] under this alternative ground. *See Dade*

*Cnty Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999) (“It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court.”).

The Hospital’s argument that it was prejudiced by spending “valuable trial time” addressing this claim [IB.73] is specious. It rested its defense with almost 1/3 of its allotted trial time unused.

Finally, in response to the Hospital’s motion for summary judgment, the Kowalskis submitted evidence of this billing/diagnosis discrepancy and amounts they had paid toward their deductible and increased premiums as a result. [R.86687-99]

Construing all factual issues most favorably to the nonmovants, the trial court properly denied the Hospital’s summary judgment motion on this claim. [R.87939-42]

### **III. THE TRIAL COURT CORRECTLY UPHELD THE JURY VERDICT FOR MAYA’S IIED CLAIM**

#### **Standard of Review**

The standard of review for this claim is the same standard stated in Section I, *supra*. [AB.55-56]

## **Merits Argument**

The Hospital contends that “no evidence supports Maya’s IIED claim” because there was no evidence of outrageous conduct and no evidence of conduct “intended to cause distress or recklessly disregarded the likelihood of emotional distress.” [IB.76]

The same evidence and arguments supporting Maya’s IIED claim support the IIED-wrongful death claim for Beata because the evidence showed the Hospital’s outrageous conduct was directed at both Maya and Beata. [AB. 15-18]

The jury reasonably inferred from this evidence that the Hospital intended its conduct to force Maya to confess to a “charade” and caused the emotional distress she testified to. [Tr.4344-46, 4356-60, 4364-65, 5474-92, 5511-19, 9671; R.103989]

The Hospital argues its facility “was no dungeon” [IB.78], pointing to several seemingly pleasant moments for Maya over the course of her long confinement there (although not when she was forced to soil herself in bed). [IB.77-78] The Hospital says the secret video shows no soiling in bed [IB.15-16], but the jury was entitled to reject that assertion (based on the four short video clips the jury was shown), given the billing and immediate jeopardy falsehoods. The

Hospital says Maya's CRPS lesions were "apparently self-inflicted," [IB.19] although Maya testified otherwise. [Tr.4373-74] This is yet another example of the Hospital construing disputed facts in its favor.

The verdict shows the jury rejected the Hospital's sanitized version of what happened to Maya based on the nine weeks of evidence it heard. So did the trial court. In its Posttrial Order, the trial court took particular note of the Hospital's battery assertion that Maya "claims that Ms. Bedy told her that she wanted to be her mother" and its argument that even if Bedy's statement were false, it was not a battery and did not rise to the level of extreme emotional distress. [R.115450] The court viewed this as minimizing Maya's testimony and stated:

This paragraph is an artful dodge of the evidence because JHACH then ignores the evidence that JHACH purposefully was trying to emotionally alienate Maya from her mother. Telling Maya her mother was dangerous, telling Maya repeatedly that someone else was going to be her mother, was wrong. The Court understands that the healthcare providers at JHACH to their core believed that Maya was not safe in Beata Kowalski's presence. And the law permitted them to share those concerns in the abuse hotline report to the Dependency Court. They should have kept their actions there. But there was evidence they did not. And there was evidence from which the jury could find JHACH's hubris in engaging in conduct to Maya's face that

JHACH purposefully designed to destroy Maya's relationship with her mother.

[R.115450-51]

In addition to the conduct described at AB.14-19 as to Maya, the Hospital added its failure to provide the court-ordered family therapy with her father and brother and provided only minimal cognitive behavioral therapy, a recognized treatment for CRPS. [AB.11-12] It was the jury's province to infer this too was done to force Maya to confess.

Viewing the evidence in the light most favorably to Maya, the trial court did not err in denying the Hospital's directed verdict motion on this claim.

#### **IV. THE TRIAL COURT DID NOT ERR IN DENYING THE HOSPITAL'S MOTION FOR DIRECTED VERDICT AS TO THE FIRST CLAIM FOR FALSE IMPRISONMENT**

##### **Standard of Review**

The standard of review for this claim is the same standard described in Sections II and III.

##### **Merits Argument**

As the Hospital acknowledges, "proof of false imprisonment requires, among other things, an unlawful detention that "is

unreasonable and unwarranted *under the circumstances.*” (emphasis added) [IB.78]. Here the evidence was sufficient for a jury to decide the Hospital’s detention of Maya that first week was unreasonable and unwarranted under the circumstances when, with no shelter order or other lawful authorization, it refused to discharge Maya to her parents and threatened to arrest her parents if they left with her. [AB.5-7]

The two reasons the Hospital gives for why the evidence at trial was insufficient to go to the jury fail. First, without record citation, the Hospital states it “obtained Maya’s parents’ consent for her to stay at [the Hospital] through October 13th.” [IB.78] This misstates the facts. There is no record evidence that Maya’s parents consented to the Hospital detaining her. The evidence is that over those six days, the Hospital rejected or ignored their repeated pleas to discharge Maya and threatened to have them arrest her parents if they tried to leave with her. [AB.5-7]

Second, the Hospital claims section 39.395, gave it the “legal authority” to detain Maya from October 7 through 13. [IB.78-79] This statute authorizes healthcare providers to “detain [a] child without the consent of the parents,” § 39.395, but this authorization is

limited to circumstances where “returning the child to” parental custody “presents an imminent danger to the child’s life or physical or mental health.” *Id.* The record contains no such evidence.

This statutory authorization is also limited in time. The statute requires healthcare providers to “immediately notify” DCF and directs that if DCF determines “that the child should be detained longer than 24 hours, [DCF] shall petition the court. . . as quickly as possible and not to exceed 24 hours. . .” § 39.395, Fla. Stat.

Here, that did not happen until the October 14 shelter order, retroactively effective to October 13, was issued. [Tr.8368; R.96382] Until then, the Hospital had no legal authority to withhold Maya from her parents.

The Hospital knew it had no legal authority to hold Maya because a Hospital physician’s October 11 entry in Maya’s medical record states there was “no documented DCF hold in the record.” [R.109987-88]

With no express legal authority to detain Maya beyond 24 hours, the Hospital argues “it is reasonable to interpret the statute as giving licensed physicians discretion not to return a child to an

apparently life-threatening situation because DCF failed to act.”  
[IB.79-80]

The statute gives no such discretion to healthcare providers, but if it did, the decisive question is still one of fact: was the Hospital’s exercise of its discretion to detain Maya “unreasonable and unwarranted under the circumstances.” [IB.79]. The jury answered that question and found this six-day detention with no shelter order was both unreasonable and unwarranted *under the circumstances*. [R.95861]

Finally, it is notable that the trial court only ruled “[the Hospital] had reasonable cause to direct its employee to twice call the DCF abuse hotline” and therefore was statutorily protected in making the reports to DCF. [R.53121-23; R.54049] It did *not* rule Maya was in a “life-threatening situation because DCF failed to act,” as the Hospital insinuates. [IB.80] That fact too was for the jury.

The trial court did not abuse its discretion in denying the Hospital’s directed verdict motion on this claim.

## **V. THE TRIAL COURT CORRECTLY INTERPRETED AND APPLIED CHAPTER 39**

The Hospital argues Chapter 39 immunity shields it from liability for its tortious acts against Maya and her family. That argument is meritless.

### **A. Chapter 39 immunity protects abused children, not child abusers like the Hospital**

The Legislature's paramount concern in enacting Chapter 39 was to protect children from harm and assure the system "intrude[s] as little as possible into the life of the family." § 39.001(1)(a) & (b), Fla. Stat. Courts are directed to interpret this chapter's provisions "liberally . . . [and] *in conformity with its declared purposes.*" § 39.001(12) (emphasis added).

To that end, Chapter 39 provides limited immunity to those using good-faith efforts to adhere to its requirements. As the statute states:

"Any person, official or institution participating in good faith in any act *authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect to the department . . . shall be immune from any civil or criminal liability which might otherwise result by reason of such action.*"

§ 39.203(1)(a), Fla. Stat. (emphasis added).

But the statute warns that Chapter 39 does not “grant immunity, civil or criminal, to any person suspected of having abused, abandoned, or neglected a child, or committed any illegal act upon or against a child.” § 39.203(1)(b), Fla. Stat.

Immunizing the Hospital for its own abusive and tortious acts would violate this express language by harming the very class the statute protects -- children. *See Dept. of Health and Rehab. Servs. v. Yumani*, 529 So. 2d 258, 261-62 (Fla. 1988). As *Yumani* notes, the immunity was designed to protect an institution from “liability for carrying out the protective measures of [Chapter 39’s predecessor] on behalf of the protected class, *it does not protect against failing to carry out the protective measures.*” *Id.* at 262 (emphasis added).

*Floyd v. Dep’t of Child. & Fams.*, 855 So. 2d 204, 206 (Fla. 1st DCA 2003), reached the same conclusion. Yet the Hospital truncates – and thereby mischaracterizes – a statement in *Floyd* to argue the immunity also protects institutions that are “overzealous” in protecting children. [IB.83] *Floyd* actually said the immunity “was intended to protect those who might be overzealous in protecting children from potential abuse; *it was not intended to protect those*

*who fail to fulfill their duty to protect children.” Id. at 206 (emphasis added).*

**B. The trial court correctly applied the Chapter 39 immunity to shield the Hospital from liability for reporting suspected child abuse and for acts authorized or required by Chapter 39**

### **Standard of Review**

Whether the trial court correctly interpreted Chapter 39 and the immunity afforded under section 39.203 is reviewed *de novo*. *Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 323 (Fla. 2022).

### **Merits Argument**

The Hospital argues the trial court wrongly immunized it only for claims related to its reporting of alleged abuse, but not for other acts authorized under Chapter 39. [IB.84-86] This is incorrect.

In its pre-trial Immunity Order [R.53102-32], the trial court found the Hospital was entitled to immunity for reporting suspected abuse and for any civil claim arising from the reporting. [R.53119-21] It then analyzed each of the Kowalskis' other claims to assess if immunity applied. [R.53120-30] The five additional claims for which the Immunity Order granted the Hospital summary judgment show

the court understood immunity applies to *all* acts authorized or required by Chapter 39 – not just the act of reporting. [R.53130]

In its analysis of Count II (false imprisonment), the trial court recognized that section 39.395 authorizes a child’s detention without parental consent – an act distinct from the Hospital’s reporting requirement. [R.53123] But the court held the Hospital’s refusal to discharge Maya exceeded the statutorily authorized detention period and that section 39.203(1)(b) “precludes immunity to any reporter for its own abusive conduct, including ‘any illegal act upon or against a child.’” [*Id.*]

In its analysis of Count VI (negligent infliction of emotional distress), the trial court interpreted Chapter 39 as immunizing the Hospital from liability for acts separating Beata from Maya (acts of “investigation, shelter, removal of custody, and prohibiting visitation”) because these acts “logically could occur from a report to the abuse hotline.” [R.53124] But acts depriving Maya of “religious materials,” “access to her chosen priest,” “interference with [Beata’s] phone and FaceTime calls” with Maya, and interference with orders for Jack and Kyle’s visitation rights were not immunized because

‘[t]his conduct has nothing to do with the action of making the abuse report.’ *Id.*]

The trial court also applied the full scope of Chapter 39 in its Posttrial Order. [R.115442-58] The court found each of the Hospital’s actions (which included intentional torts, medical negligence, and fraud) were not immunized because they did not “‘otherwise result’ from [the Hospital’s] *participation in the Chapter 39 process.*” [R.115445-46 (emphasis added)]

The trial court noted “[t]he Court also suspects the trial transcript will confirm the Court excluded much more of Plaintiffs’ efforts to present Chapter 39 materials than the Court excluded from [the Hospital’s] requests.” *Id.*]

The trial court did not limit its interpretation of Section 39.203 to just reporting of suspected child abuse.

**C. The evidence established the actions of the Hospital’s employees and apparent agents are not subject to Chapter 39 immunity**

**Standard of Review**

An appellate court defers to findings of fact unless clearly erroneous. Applying law to facts is reviewed *de novo*. *Jarrard v. Jarrard*, 157 So. 3d 332, 338 (Fla. 2d DCA 2015).

## **Merits Argument**

The trial court protected the Hospital from every claim based on reporting suspected child abuse and good faith participation in any act authorized or required by Chapter 39. [R.53102-32] The only claims presented to the jury were those based on conduct outside the scope of Chapter 39 and as carved out by Section 39.203(1)(b).

Based on the jury's factual findings, the trial court did not abuse its discretion in refusing to immunize the Hospital from liability under section 39.203(1)(a). The jury *rejected* the Hospital's sanitized version of the "facts" and found the Hospital:

- Falsely imprisoned Maya *three* times [R.95861; 95863; 95865];
- Battered Maya *twice* [R.95867; 95869];
- Committed medical negligence [R.95871-72];
- Fraudulently billed Maya's insurance carrier for CRPS [R.95873-74];
- Intentionally inflicted emotional distress on Maya and Beata; [R.95875; 95879] and
- Wrongfully created in Beata an uncontrollable impulse to commit suicide. [R.95875]

[R.95860-95880] Chapter 39 did not authorize or protect any of these acts – especially when committed by healthcare providers, to whom vulnerable people look for care.

The Hospital understandably tries to separate itself from Dr. Smith. In arguing the facts do not support the jury’s finding that Dr. Smith was its apparent agent, the Hospital improperly seeks to usurp the jury’s role because issues of apparent agency are questions of fact for the jury to decide. *See Roessler v. Novak*, 858 So. 2d 1158, 1161-62 (Fla. 2d DCA 2003); *Luebbert v. Adventist Health Sys./Sunbelt, Inc.*, 311 So. 3d 334, 337–38 (Fla. 5th DCA 2021)

The Hospital says the trial court “deemed” Dr. Smith to be its apparent agent [IB.46] but this was a jury finding. [R.95871] It also ignores that Dr. Smith entered Maya’s room wearing a Hospital security badge and lab coat with the Hospital’s distinctive logo, and that Maya and Jack testified nurses accompanying Dr. Smith gave them the impression she was “a doctor or medical person within the hospital.” [Tr.3269-71,4331-32, 9595-97]

The Hospital also ignores that Dr. Smith was deeply involved in Maya’s treatment long after the act of reporting suspected child abuse – a role having nothing to do with her involvement on the CPT

or with any act authorized or required by Chapter 39. Dr. Smith agreed with the Hospital team's decision to remove Maya from all her medications, issued her own instructions for allergy and other tests, created the multidisciplinary Hospital team to coordinate Maya's care and treatment, and consulted with other Hospital physicians about removing Maya's port. [AB.11]

The Hospital also contends apparent-agency liability cannot exist where there is no detrimental reliance due to lack of choice or otherwise. [IB.87-88] This, too, is incorrect. A patient seeking medical treatment from a hospital "and receiving treatment from a physician working there is sufficient" to show reliance and detriment. *Roessler*, 858 So. 2d at 1165 n. 3.

The Hospital implicitly admits this issue is not about the law and the evidence supporting Dr. Smith's agency status, but about her failure to "present well as a witness." [IB.91]

The trial court did not abuse its discretion in upholding the jury's finding that Dr. Smith was the Hospital's apparent agent.

Finally, the Hospital ignores the abundant evidence that *other* Hospital agents – people indisputably not involved with the CPT, DCF or the dependency court – were involved in the conduct that injured

the Kowalskis. These included the members of the Hospital treatment team (Drs. Dees, Vose and Behar-Posey), Bedy, the nurse who assisted Bedy on January 6, 2017, and the Risk Management Department. The verdict form confirms the jury found intentional tortious conduct and medical negligence by Hospital employees *other than* Dr. Smith. [R. 95860-80 (*see, e.g.*, 95871: “Excluding and not considering the conduct of Dr. Sally Smith, were one or more healthcare providers [of Hospital] negligent in the medical care of... Maya Kowalski? Yes”)] Those acts are not immune under Chapter 39, and the Final Judgement should be affirmed whether or not Dr. Smith was the Hospital’s apparent agent.

**D. The Hospital received a fair trial and is not entitled to a new one based on evidentiary rulings**

**Standard of Review**

The trial court’s decisions on whether to admit or exclude evidence are reviewed for abuse of discretion. *Fla. Peninsula Ins. Co. v. Newlin*, 273 So. 3d 1172, 1173 (Fla. 2d DCA 2019).

**Merits Argument**

The Hospital argues the trial court’s admission of evidence related to the dependency proceeding and Dr. Smith’s involvement

resulted in an unfair trial. [IB.92-96] This argument is premised on this Court finding the trial court misinterpreted and misapplied Chapter 39. As demonstrated above, neither premise is true.

The Hospital also invited any error.

Before trial, the Kowalskis moved to exclude all evidence related to potential Chapter 39 immunity issues. [R.91694-97] The Hospital objected to excluding this evidence; the trial court agreed and denied the Kowalskis' motion. [R.91827-28]

During trial, the Hospital successfully admitted evidence, over objection, that touched on or directly implicated Chapter 39. One example was an email from Beata to her priest referencing a dependency court hearing the Hospital argued showed Beata's "state of mind going into the [dependency] court hearing." [Tr.9436, 9439] Another example was a DCF employee's email to Beata, advising her what the shelter orders allowed her to discuss on her telephone calls with Maya. [Tr.6074-76]

The Hospital cannot show the trial court abused its discretion in admitting or denying evidence touching on Chapter 39 issues when it invited any error by introducing its own evidence concerning the dependency proceedings. *See Fuller v. Palm Auto Plaza, Inc.*, 683

So. 2d 654, 655 (Fla. 4th DCA 1996) (quoting *Gupton v. Village Key & Saw Shop*, 656 So. 2d 475, 478 (Fla. 1995)).

The Hospital argues it objected because it believed evidence about the dependency proceedings would conflate the Hospital and the dependency court and confuse the jury. [IB.93-95]

But inconsistent arguments at trial and on appeal cannot be the basis for reversal. *See, e.g., Harper ex rel. Daley v. Toler*, 884 So. 2d 1124, 1135 (Fla. 2d DCA 2004) (party may not ordinarily take one position at trial and then take an inconsistent position on appeal).

**E. The trial court’s instructions to the jury ameliorated any prejudice to the Hospital**

The Hospital’s final Chapter 39-based argument is that the trial court’s instructions were insufficient to remedy the purported prejudice. [IB.96-97] Yet the Hospital told the court that jury instructions *could* sufficiently ameliorate jury confusion on this issue. In opposition to the Kowalskis’ Motion in Limine regarding Chapter 39 evidence and argument, the Hospital argued “that a jury instruction both immediately prior to opening arguments and at the end of the case would be the better solution,” waiving this issue on appeal. [R.90186-90; R.91827-28]

Even absent waiver, the jury instructions were sufficient. Florida law presumes jurors follow a trial judge's instructions unless there is evidence to the contrary. *See Miner v. McKesson Corp.*, 784 So. 2d 1156, 1159 (Fla. 2d DCA 2001); *see also Sutton v. State*, 718 So. 2d 215, 216 n. 1 (Fla. 1st DCA 1998).

The Hospital presents no such evidence here. The trial court gave substantial Chapter 39 instructions at opening and closing, and during each party's case-in-chief. [Tr.1535-36, 2651-53, 3378-79, 8366-77, 10051-54; R.95946-47; 95961; 96381-90; 96312; 96315]

The jury instructions explained the Hospital was not liable for reporting the Kowalskis to DCF or for the Hospital's actions in furtherance of its Chapter 39 obligations, including holding Maya for the duration of the dependency court proceedings. [*Id.*]

These instructions told the jury the Hospital was not responsible for separating Maya from her parents and keeping her at the Hospital; removed any doubt that the Hospital had no discretion to release Maya; addressed witness testimony suggesting the Hospital took Maya; and directed the jury that Jack's claims against the Hospital were not tied to Hospital conduct under the dependency court's orders. [*Id.*]

At the close of trial, the court again instructed the jury on the dependency court proceedings and the scope of Maya and Jack's claims against the Hospital, making it clear what the Hospital was *not* responsible for. [Tr.8367, 10051, 10053-54; R.96312-15]

These instructions cured any potential prejudice to the Hospital by correcting any possible misconceptions the jury may have had. *See Nubiola v. State*, 655 So. 2d 1255, 1256 (Fla. 3d DCA 1995) (noting curative instructions are "sufficient to dissipate any improper inference" made at trial).

The Hospital's circular and unsupported argument that the verdict's size proves the instructions were ineffective is also unavailing. The trial court independently concluded most of the awards were not excessive and remitted those that were. [R.115443] The punitive damage awards were less than the statutory maximum would allow. [R.95887-93] *See* § 768.73(a)(1), Fla. Stat. The court found the verdicts were not the product of "passion" and "this jury did not go off the rails." [*Id.*]

**F. The Amici briefs fail to account for the egregious facts in this case and therefore are not helpful to the Court**

Neither Amicus brief addresses the Hospital's abhorrent

conduct or its “immediate jeopardy” status from CMS, which the Hospital was caught trying to misrepresent at trial. The briefs therefore do not help this Court assess how the unique facts in *this* case affect the Amici’s policy arguments. *See Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 524 (Fla. 4th DCA 1996) (an amicus brief should focus only on that additional information that “the amicus believes will assist court”).

Surely the Amici are not suggesting their members should be immunized for intentional tortious acts or medical negligence, as the jury found for this Hospital.

The American Academy of Pediatrics and the Children’s Hospital Association (“AAP/CHA”) amicus brief addresses the history of mandatory reporting laws, statutory immunity, and their importance in preventing child abuse. [AAP/CHAAB.1-2] The Kowalskis largely agree with its observations about mandatory reporting laws and the goals of Chapter 39, but the brief fails to apply those principles to the facts or outcome of this case.

The Florida Hospital Association’s (“FHA”) amicus brief interprets Chapter 39’s language [FHAAB8-15] to benefit its member,

the Hospital, and ignores all authority contrary to its position, including *Floyd* and *Yumani*, which found immunity did not apply.

FHA criticizes the trial court for violating Chapter 39's plain language, then argues for a novel "presumption of good faith" that is nowhere found in that language. [FHAAB16-20] Nothing in Chapter 39 authorizes this Court to apply this presumption and FHA fails to articulate how the proposed presumption would be relevant to, or affect the outcome of, this case. The trial court found the Hospital had reasonable cause to report the Kowalskis for suspected child abuse [R.53115-21] and limited the Kowalskis' claims to acts outside the scope of Chapter 39 or excluded from its immunity. [R.53121-32] Those rulings required no presumption.

The rest of FHA's brief is largely speculation.

FHA speculates that if the Final Judgment is approved, providers will be afraid to report suspected abuse. [FHAAB10-11] That would be an odd concern to arise from this case where a provider was immune from reporting suspected child abuse. [R.53102-32]

FHA contends the Kowalskis' counsel crossed the line with his opening statement that they would prove the Hospital wrongly

accused Jack and Beata of child abuse. [FHAAB19] If so, the Hospital failed to object on that basis. [Tr.1556-67] Moreover, that remark and any others disputing the existence of child abuse did not change the ruling immunizing the Hospital from reporting the suspected abuse. Nor was the presence or absence of child abuse an element of any claim on which the jury found the Hospital liable. And FHA ignores the Hospital also arguably crossed the line when it introduced evidence touching on the dependency court proceedings. See section D.

Finally, given the jury's findings about the Hospital's outrageous conduct, the injuries the Hospital inflicted on the Kowalskis, and the trial court's pointed statements about the Hospital in its Posttrial Order [R.115442-58], this Court should give FHA's entire brief the same weight it should give FHA's insinuation that this case is just "retaliatory litigation." [FHAAB-10] None.

## **VI. THE COMPENSATORY AND PUNITIVE DAMAGES VERDICTS**

### **A. The Court should defer to the jury and to the trial court on the amounts of noneconomic damages and economic damages**

#### **Standard of Review**

After a jury awards damages, the trial court must review the

amount for excessiveness or inadequacy “in light of the facts and circumstances which were presented to the trier of fact.” § 768.74(1), Fla. Stat.

Yet this statutory review is not intended to displace the discretionary authority historically given to juries. *See* § 768.74(6), Fla. Stat.; *see also Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 276 (Fla. 2018) (“Because of the inherent difficulty in measuring these kinds of [noneconomic] damages, this court has determined that ‘the jury, guided by its judgment in everyday life experience, is in the best position to make a fair assessment of these damages.’”) (citation omitted); Fla. Std. Jury Inst. (Civ.) 502.2 (“[T]here is no exact standard for fixing the compensation”).

“A trial judge is not free to behave as a super-juror by disregarding a jury’s verdict simply because the judge would have rendered a different one had it been the judge’s choice to make.” *Meyers v. Shontz*, 251 So. 3d 992, 999 (Fla. 2d DCA 2018) (citations omitted).

This Court reviews a trial judge’s decision denying a new trial or a remittitur of damages for “a clear showing of abuse of discretion.” *Aills v. Boemi*, 41 So. 3d 1022, 1027 (Fla. 2d DCA 2010).

Economic damage awards must be supported by competent substantial evidence. *Trelles v. Le Basque Holdings, LLC*, 274 So. 3d 503 (Fla. 3d DCA 2019); *Fernalld v. ABB, Inc.*, 315 So. 3d 1221, 1223 (Fla. 4th DCA 2021).

## **Merits Argument**

### **1. Noneconomic Damages**

The jury rejected the Hospital's narrative that its conduct was benign and the Kowalskis suffered no significant injury – if any injury at all. [See IB.98-101; Tr.10298-300] The Hospital ignores this.

The Hospital ignores that the jury found its conduct to be intentionally tortious and outrageous, as well as medically negligent.

The Hospital ignores the competent substantial evidence that a ten-year-old child was permanently injured, physically and psychologically, resulting in her need for life-long medical care and her greatly reduced capacity for future earnings and enjoyment of life. [AB.33-34/45]

The Hospital ignores that the jury found its outrageous conduct caused the suicide of an innocent wife and a mother. Jack spoke poignantly about the family's suffering from their loss of Beata [Tr.5402-15; 5423-26] and the jury viewed video evidence of the

family's life together before October 2016. [PX.2660; PX.2661; PX.2686; PX.2692; PX.2693; PX.2695; PX.2698 (Evidence R.48584)]

To assist the jury in awarding noneconomic damages, the Kowalskis properly used a “mathematical formula of calculable value” in closing argument. *See Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365-66 (Fla. 1974); *see also Subaqueous Servs., Inc. v. Corbin*, 25 So. 3d 1260, 1269 (Fla. 1<sup>st</sup> DCA 2010) (per hour formula allowed). [AB.49; *see also* R.93793-802] The Hospital cites no Florida case suggesting the formula was improper. [IB.102]

The Hospital could have proposed its own formula but chose not to. Instead, the Hospital relied on its glib assertion that Maya needed only a minimal “tune up on physical therapy” and that the jury could randomly pick other numbers, up to “3 million or 4 million,” for Beata’s wrongful death, without explaining how it reached those figures. [Tr.10298-307; AB.49-50]

The Hospital now asks this Court to rescue it from those critical mistakes.

In approving most of those awards, but remitting some, the trial court carefully exercised its statutory duty under section 768.74. As the trial court observed in its Order on Posttrial Motions:

- “JHACH disagreed that she had CRPS, and the jury was presented evidence that health care providers at JHACH believed she was faking it. And there was evidence that JHACH treated her, or more precisely, declined to treat her, accordingly.”
- “[T]here was evidence that JHACH, by its conscious indifference, sentenced Maya to even more extreme, debilitating pain that she will have to endure throughout her entire life than she otherwise would have had had JHACH correctly treated her.”
- “JHACH continues with its quest to immunize its [intentional tortious] conduct even though that conduct does not remotely result from its call to the DCF abuse hotline or its participation in Dependency Court proceedings.”
- “In its Motion, JHACH either ignores or minimizes ample evidence of its misconduct. Having sat through the entire trial, the Court rhetorically wonders what JHACH’s definition would be of an extraordinary action.”
- “Just because the Court remitted a few jury awards, it does not follow that the entirety of the jury verdicts were improper or the product of passion. They were not. The reader should not lose focus that this case was qualitatively different than most other cases, in terms of novel issues, the juxtaposition of a Dependency Court proceeding, immunities, the vast number of disputed evidence, the parties’ conduct in 2016-2017, damages sought, disagreements between counsel, length of verdict form, and consumption of judicial resources, just to name a few.”

[R.115442-443]

The record shows the trial court took great care in navigating

these complex considerations. The Kowalskis take exception to the Hospital's pejorative statement that the trial court "did not use such care here" in conducting its post-trial review. [IB.103]

The Hospital invites this Court to throw out nine weeks of evidence and the combined judgments of the jury and the trial court based on that evidence.

This Court should decline that invitation.

## **2. Economic Damages**

Using the standard instruction, the trial court instructed the jury that "[a]lthough these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party." [Tr.10099; R.96314] *See Fla. Std. Jury Instr. (Civ.) 601.4.*

The jury was also instructed that "it is possible that separate claims may result in overlapping damages. Your verdict should not award damages twice for the same loss, injury, or damage even if they result from different claims." [Tr.10100; R.96370]

Economist Kristi Kirby calculated that Jack incurred \$885,293.81 in past medical expenses for injuries the Hospital caused Maya (including the amounts billed to Aetna). [AB.44-45] The

jury's awards for Jack's past medical expenses are in the responses to verdict form questions 4, 9, 14, 19, and 24, totaling \$1,513,498. [R.95860-80]

Ms. Kirby calculated Maya's future lost earnings to age 81, based on the work of Mr. Tresp, to be in ranges up to \$5,079,783. [AB.45] The jury's awards for Maya's future lost earnings are in the responses to verdict form questions 28 and 47, totaling \$7,700,000. [R.95872, 95879] (Question 47 includes past and future medical expenses for Maya's IIED claim although these categories were not separated from lost future earnings.)

Ms. Kirby calculated expenses for Maya's future medical and psychological care, based on Dr. Bifulco's work, to be in ranges up to \$10,247,000. [AB.45] The jury's awards for Maya's future care are in the responses to verdict form questions 2, 7, 12, 17 and 22, totaling \$16,084,000. [R.95861-69]

The Hospital has not challenged the multiple claims/overlapping damages jury instructions. [IB.98-103] Nor has it challenged the testimony of Ms. Kirby, Mr. Tresp and Dr. BiFulco as competent substantial evidence supporting the economic damages. [*Id.*] The testimony of these witnesses and Dr. Brewerton

supports the reasonableness and necessity of the expenses. [AB.30-34/43-45]

Instead, the Hospital claims “there is no evidence that Maya sustained any physical injury or needed treatment” from the Hospital’s intentional torts [IB.98-99] and suffered no adverse effects from the Hospital’s decision to wean her from Ketamine. [IB.100] As it did below, the Hospital ignores the expert medical testimony, especially from Dr. Brewerton, that Maya has suffered permanent psychological injury and physical injury by aggravation of her CRPS. [AB.31-34]

In the Final Judgment, by stipulation of the parties, the trial court reduced Maya’s compensatory damages by \$2,500,000 based on a prior settlement. [R.121140]

The Hospital complained generally in its posttrial motions that some categories of economic damages were excessive. [R.96993, 97001,97005-6, 97013, 97042] But it failed to present a specific analysis comparing the evidence with the awards, as done above. [*Id.*] The Hospital thus failed to meet the specificity required to preserve its complaints. *Aills*, 29 So. 3d at 1108 (preservation requires party

to have made “the specific contention asserted as legal ground for the objection, exception, or motion below.”).

Even if preserved, the proper remedy on appeal is remittitur by this Court of the specific excess amounts. *See Morgan & Morgan P.A. v. Pollock*, 306 So. 3d 1251, 1253-55 (Fla. 2d DCA 2020). The Hospital has not sought remittitur, but a new trial “on all damages.” [IB.103]

*If* this Court finds the issue was preserved, and *if* it overlooks that the Hospital has sought the wrong remedy in this appeal, this Court has the power to order remittitur of the amounts by which the economic damage awards exceeded the evidence, *supra*, and instruct the trial court to enter an amended judgment for the remitted amounts, if the Kowalskis consent to those amounts. *See Morgan*, 306 So. 3d at 1253-55.

If that were the Court’s ruling, the Kowalskis would accept the above amounts of economic damages shown in the evidence in an amended judgment.

**B. The jury was entitled to find the Hospital liable for punitive damages**

**Standard of Review**

Although the Hospital acknowledges the directed verdict standard of review for punitive damages is the same as for other claims, its description of facts continues to ignore that one evaluates “a directed verdict by viewing the evidence and all inferences of fact in the light most favorable to the nonmoving party.” *Estate of Canavan*, 889 So. 2d at 826-827 (reversing directed verdict on punitive damages). [IB.104]

The clear and convincing standard of proof does not change the standard of appellate review. “[T]he appellate court's function is not to conduct a de novo proceeding or reweigh the evidence by determining independently whether the evidence as a whole satisfies the clear and convincing standard, but to determine whether the record contains competent substantial evidence to meet the clear and convincing evidence standard.” *City of Orlando v. Moore*, 351 So. 3d 41, 44 (Fla. 1st DCA 2022).

The jury was instructed on the clear and convincing standard, and the Hospital asserts no error in that instruction. [Tr.10062] The

Hospital makes the perfunctory claim that there was no clear and convincing evidence of any employee’s intentional or grossly negligent conduct. [IB.105] This argument ignores the evidence summarized above that the jury heard for nine weeks.

The Hospital also ignores its own position that its conduct is not viewed by the person’s subjective view but by how the jury evaluated conduct toward a suffering ten-year old child. The jury could reject the claimed good intentions of Bedy and others and consider, for example, that they were simply trying to gather “proof” that they were right – proof that was never put in Maya’s medical records.

**1. The punitive damages claims were proven by clear and convincing evidence**

There is no credible doubt that the conduct of the Hospital’s personnel was intentional, or at least reckless, and that the jury was entitled to find the conduct caused grievous harm to Maya.

Bedy and other Hospital personnel falsely imprisoned and battered Maya – at the Hospital’s direction. The Hospital describes stripping and holding down a then 11-year-old girl as “unpleasant” to try to diminish the trauma the jury obviously found Maya endured. [IB.107] The Risk Management Department directed and approved

the conduct for which the jury awarded punitive damages. [AB.13/19-21] The Risk Management Committee (which provides direction and oversight to the Risk Management Department) included multiple senior management personnel of the Hospital, including vice presidents, the Hospital chief of staff, and senior counsel. [R.105930-105932] And “the ultimate authority and responsibility” for the Risk Management Department “rests with the governing body of All Children’s [the parent entity].” [*Id.*]

So, the Hospital cannot blame these actions on low level employees. The document demonstrating the Risk Management Department’s structure and composition was in evidence for the jury to consider [*Id.*] This evidence refuted the Hospital’s key defense to punitive damages: that the Hospital itself did not participate in, condone or ratify the conduct. [IB.105]

To the contrary, the Hospital was liable for punitive damages under both a “traditional” punitive damage analysis under section 768.72, and its interpretive caselaw, and Florida statutory law on hospital management and control.

The Hospital also makes a distracting argument when it refers to a mid-trial attorney discussion with the trial court during which

the Kowalskis' counsel argued Hospital "doctors" were senior enough to be considered "managers" if they chaired a Hospital committee. [IB.106; Tr.6060-61; R.105986-94] The Hospital's brief then argues "this Court has clearly ruled otherwise," citing to a later trial transcript page where the trial court agreed to instruct the jury at the end of the case on this Court's definition of a "manager." [IB.106; Tr.9765] Neither the cited transcript page nor any case the Hospital cites shows this Court having ruled on the issue of physicians' committee service. [*Id.*]

More importantly, the jury was instructed on and entitled to hold the Hospital responsible under each section 768.72(3) subpart it cites. [IB.105; Tr.10060-10061] "Risk" directing the actions against Maya and her family would be knowing participation by the Hospital. For any actions "Risk" did not direct, the jury could find it knowingly condoned or ratified those because, as Bedy testified, Risk directed her to keep it "up to speed" on Maya's status [Tr.3961] and was "fairly involved in this [Maya's] case." [Tr.3962]. And the failure to stop this horrific treatment of a ten-year old girl was certainly gross negligence. As such, the Hospital could be found liable under section 768.72(3).

As the Kowalskis argued below, the Hospital was also liable for everything that happened as a matter of law under Florida’s statutory mandates for hospitals (this applies to all the tort claims). [R.100119-126]. The Kowalskis’ response to the Hospital’s posttrial motion contained a detailed analysis of its liability as an entity under both Florida Statutes and by its voluntary agreement to participate in federal programs. [R.100119-126]. That detailed analysis establishes the Hospital’s liability. The Hospital offered no response in the trial court and has not in its brief.

As that analysis shows, the Hospital violated Florida and federal mandates, and these violations confirmed its liability for the false imprisonment and battery torts. [R.100119-126] The jury found the Hospital liable based on factual findings, but the Hospital’s voluntary agreement to abide by these standards also made it liable as a matter of law.

**2. There was no error in charging the jury on “specific intent”**

The Hospital recognizes this is “not about capping damages” – because the punitive awards did not exceed the statutory limits. [IB.109; R.95887-93] But it claims it was harmed by the jury

considering what turned out to be an academic “specific intent” verdict form question, even though it articulates no prejudice. That the jury answered a final question ultimately having no impact on the punitive damages amounts the Kowalskis were awarded is the epitome of a question that caused no harm. [R.95887-93]

This instruction exemplified the judge’s cautious approach to this nine-week trial, trying to reduce the chances of needing a second trial.

The Hospital complains specific intent was not pled but that confuses and conflates the Florida statutory provisions. [IB.108] Sections 768.72(1) and (2) specify pleading requirements for punitive damages and do not mention specific intent. Section 768.73 addresses proof for different levels of punitive damages and mentions specific intent in section 768.73(1)(c). The Hospital cannot claim ignorance of the statutory requirement for a specific intent finding if punitive damages might exceed the statutory caps.

Then the Hospital claims it argued specific intent for punitive damages should have been submitted to the jury in the Phase 1 verdict. [IB.108; Tr.10481-10483]

The Hospital did argue specific intent must be submitted to the jury in Phase 1, citing footnote 10 in a “Longwood” case [R.97343-97345] *See Lawnwood Med. Ctr. Inc. v. Sadow*, 43 So. 3d 710, 720, n10 (Fla. 4th DCA 2010). But footnote 10 shows that jury was instructed on specific intent in *Phase 2*. The Hospital’s argument lacks legal support.

The trial court observed the intent evidence was the same evidence, with “a little extra evidence in Phase 2.” [Tr.10436; R.97345] The court reassured the Hospital: “You're going to be able to put on the evidence that you wish to put on.” [Tr.10436; R.97345] The Hospital has not shown it was prevented from putting on any evidence. Nor has it shown it asked for a continuance.

The Hospital says the judge accepted that Hospital “providers” believed Maya was not safe with her mother. [IB.109, citing R.115451] But it then ignores that he next found “there was evidence from which the jury could find JHACH’s hubris in engaging in conduct to Maya’s face that JHACH purposefully designed to destroy Maya’s relationship with her mother.” [R.115451]

The employees' "belief" that Maya was not safe does not insulate the Hospital from the actions toward Maya and her mother that it directed, condoned and ratified.

Finally, the Hospital refers to due process but does not explain how that was denied. [IB.109] The trial court said the Hospital could put on the evidence it wanted, and the Hospital did not request a continuance. The Hospital knew of the specific intent aspect (because it argued specific intent).

### **3. The punitive damages awards were not excessive.**

The Hospital's argument assumes the compensatory damages are excessive. That is wrong, as discussed above. The Hospital cites the case on the standard for excessive punitive damages that it cited below. [IB.110; R.96959] But nowhere does it purport to engage in the required three-part analysis, including "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." [R.96959] The Hospital rightly treats this issue as a throwaway.

## **CONCLUSION**

For the foregoing reasons, all amounts in the Final Judgment should be affirmed.

Dated: September 27, 2024

Respectfully submitted,

/s/Michael G. Tanner

Michael G. Tanner

Florida Bar No. 261300

Primary E-mail:

mtanner@gunster.com

Secondary E-mail:

awinsor@gunster.com

Kenneth B. Bell

Florida Bar No. 347035

Primary E-mail:

kbell@gunster.com

Secondary E-mail:

awinsor@gunster.com

Justin T. Delise, Esq.

Florida Bar No. 1039356

Primary E-mail:

jdelise@gunster.com

Secondary E-mail:

dtompkins@gunster.com

Gunster, Yoakley & Stewart, P. A.

1 Independent Drive, Suite 2300

Jacksonville, FL 32202

(904) 354-1980; Fax: (904) 354-2170

Gregory A. Anderson, Esq.

Florida Bar No. 398853

Jennifer C. Anderson, Esq.

Florida Bar No. 594946

Anderson Glenn, LLP

10751 Deerwood Park Blvd.

Suite 105

Jacksonville, Florida 32256

ganderson@asglaw.com

janderson@asglaw.com

btullius@asglaw.com

rwilliams@asglaw.com

Raymond T. Elligett, Jr., Esq.  
Florida Bar No. 261939  
Amy S. Farrior, Esq.  
Florida Bar No. 684147  
Buell Elligett Farrior & Faircloth, P.A.  
805 W. Azeele Street  
Tampa, Florida 33606  
elligett@belawtampa.com  
pisciotti@belawtampa.com  
farrior@belawtampa.com

*Counsel for Appellees Maya Kowalski and  
Jack Kowalski*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being served on September 27, 2024, by email through the Florida Courts E-Filing Portal addressed to the following counsel of record:

Ethen R. Shapiro, Esq.  
C. Howard Hunter, Esq.  
David W. Hughes, Esq.  
Hill Ward Henderson  
P.O. Box 2231  
Tampa, Florida 33601-2231  
ethen.shapiro@hwhlaw.com  
howard.hunter@hwhlaw.com  
david.hughes@hwhlaw.com  
dee.loach@hwhlaw.com

*Co-Counsel for Appellant*

Chris W. Altenbernd, Esq.  
Banker Lopez Gassler, P.A.  
501 E. Kennedy Blvd.,  
Suite 1700  
Tampa, Florida 33602  
service-caltenbernd@  
bankerlopez.com

Eleanor H. Sills, Esq.  
Banker Lopez Gassler, P.A.  
111 North Calhoun Street  
Tallahassee, Florida 32301  
service-esills@bankerlopez.com

*Co-Counsel for Appellant*

Patricia D. Crauwels, Esq.  
Eastmoore Crauwels &  
DuBose, P.A.  
1626 Ringling Blvd.,  
Suite 300  
Sarasota, Florida 34236  
pat@ecd.law  
alison@ecd.law  
lorrie@ecd.law  
pleadings@ecd.law

*Co-Counsel for Appellant*

Derek M. Stikeleather, Esq.  
Carrie J. Williams, Esq.  
M. Peggy Chu, Esq.  
Goodell, Devries, Leech &  
Dann, LLP  
One South Street, 20<sup>th</sup> Floor  
Baltimore, MD 21202  
dstikeleather@gdldlaw.com  
cwilliams@gdldlaw.com  
pchu@gdldlaw.com  
bbb@gdldlaw.com

*Co-Counsel for Appellant*

Christine R. Davis, Esq.  
Davis Appeals, PLLC  
200 2<sup>nd</sup> Ave. S., Suite 347  
St. Petersburg, FL 33701  
cdavis@davisappeals.com

*Counsel for The American  
Academy of Pediatrics and  
The Children's Hospital  
Association*

Andrew S. Bolin, Esq.  
Bolin Law Group  
1600 East 8<sup>th</sup> Avenue  
Suite A133-A  
Tampa, Florida 33605  
ASB@bolin-law.com  
ZGJ@bolin-law.com  
CJO@bolin-law.com

*Counsel for Florida Hospital  
Association*

/s/ Michael G. Tanner  
Michael G. Tanner

## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY this brief complies with the type size and style requirements of Rule 9.045, Florida Rules of Appellate Procedure. The font is 14-point Bookman Old Style. The word count is 19,893. On July 11, 2024, the Court granted Appellees permission to use up to 20,000 words in this answer brief. It has been calculated by the word-processing system and excludes the content authorized to be excluded under the rule.

/s/ Michael G. Tanner  
Michael G. Tanner