IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

JOHNS HOPKINS ALL CHILDREN'S HOSPITAL, INC.,

Appellant,

v.

Case No. 2D2024-0382
L.T. Case No. 2018-CA-005321

MAYA KOWALSKI, et al.,

Appellees.

ON APPEAL FROM THE TWELFTH JUDICIAL CIRCUIT,
CIVIL DIVISION,
IN AND FOR SARASOTA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT, JOHNS HOPKINS ALL CHILDREN'S HOSPITAL, INC.

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Plaintiffs' factual recitation exceeds what the "light most favorable" standard allows and contradicts the evidence on several crucial points. It also continues to blame JHACH for DCF and the dependency court's actions related to Maya's custody, sheltering, and access to visitors, outside food, and gifts.

ARGUMENT

I. The evidence does not support the Estate's suicide/IIED claims.

Because Plaintiffs' brief argues the same legal points to support the IIED claims of Mrs. Kowalski (Arg. I) and Maya (Arg. III) JHACH replies on the relevant law for both here.

Despite urging deference, Plaintiffs acknowledge that "the question of whether conduct is in fact outrageous is one of law." (AB.55). They further agree that this Court's deference is constrained to the *reasonable* inferences that can objectively be drawn from the *evidence*. (*See* AB.55-56).

Lacking competent evidence to support either IIED claim, Plaintiffs offer a watered-down legal standard, unhelpful caselaw, and heated rhetoric.

Plaintiffs' brief omits the key phrases "utterly intolerable in a civilized community" and "beyond all possible bounds of decency" from the controlling standard for conduct sufficiently "outrageous" to support Florida IIED claims. *See Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 515 (Fla. 2d DCA 2014). Plaintiffs urge the Court to apply only Restatement comment d's guidance—from 1965—of whatever makes an average person say, "Outrageous!" (AB.59). But, because "outrage" pervades modern discourse, Plaintiffs' recitation understates Florida's "particularly high" standard for IIED liability. (IB.53-55).

Plaintiffs also cite unhelpful cases for inferring outrageous conduct from the trial evidence. Many involve violations of the sacrosanct duties related to handling human remains, something Florida recognizes as unique. *See Mellette v. Trinity Memorial Cemetery, Inc.*, 95 So. 3d 1043, 1048 (Fla. 2d DCA 2012) (noting courts' "special deference" to grieving families' feelings in cases with "rights involving dead bodies"). (*See* AB.55-56). But no Florida cases support IIED liability for (1) sheltering a child from parents reasonably suspected of abuse or (2) a non-patient's suicide.

A. Plaintiffs identify no outrageous conduct towards Mrs. Kowalski and resort to unpreserved conspiracy theories.

Plaintiffs fail to identify evidence that JHACH acted "beyond all possible bounds of decency." Without distinguishing JHACH conduct directed towards Mrs. Kowalski, Maya, or both, they claim that JHACH acted outrageously in a "three-month effort to break Maya and her family." (AB.57). Apparently for Mrs. Kowalski's claim, they fault JHACH's actions related to child protection and the DCF sheltering order:

- threatening Maya's parents with arrest, (AB.57);
- knowing that Mrs. Kowalski was emotionally fragile, (AB.61);
- having power over the Kowalskis, (AB.61); and
- showing a "callous attitude" in private text messages between providers, (AB.62).

Plaintiffs similarly criticize Ms. Bedy's conduct:

- not delivering one of several dresses and a birthday card, (AB.58);
- interrupting calls to re-direct Mrs. Kowalski away from improper topics and to speak English, (AB.15); and

- not facilitating calls between Maya and her mother for ten days before the suicide, (AB.58).

The evidence of JHACH's actions towards Mrs. Kowalski does not support IIED liability for her suicide.

No one could reasonably find from the evidence that JHACH personnel thought that Mrs. Kowalski was appropriately treating Maya for CRPS but pretended otherwise to upset her. The trial court found that JHACH providers "to their core believed that Maya was not safe" with her mother. (A.185).

So Plaintiffs characterize good-faith child-sheltering efforts as outrageous conduct intended "to drive an emotional wedge between mother and daughter." (AB.51-52, 58, 77-78). But any parent suspected of abuse could describe a sheltering entity as "driving an emotional wedge" between them. Pediatricians' good-faith participation in child-abuse investigations is not "utterly intolerable in a civilized community."

Nor can Plaintiffs save their IIED claims with new conspiracy theories. Plaintiffs now argue that JHACH sought to *force confessions* from Maya and her mother that Maya's illness was a "charade," (AB.51, 57, 61, 76, 78), a liability theory not even

mentioned at trial. This Court should not consider liability theories first raised on appeal. *See Hunter v. Emplrs. Mut. Liability Co. of Wis.*, 427 So. 2d 199, 199 (Fla. 2d DCA 1982).

B. Plaintiffs fail to show necessary intent.

Plaintiffs provide no basis for reasonably inferring intent to traumatize Mrs. Kowalski. Nor do they point to evidence from which a jury could infer recklessness as a proximate cause of her distress.

Plaintiffs emphasize that no per se rule requires that outrageous conduct occur in the plaintiff's presence to support an IIED claim. (*See* AB.63-64). JHACH recognized that. (*See* IB.61). But Plaintiffs ignore that, for remote plaintiffs, outrageous conduct must be "*clearly* directed at the plaintiff through a third person." *Habelow v. Travelers Ins. Co.*, 389 So. 2d 218, 220 (Fla. 5th DCA 1980) (emphasis added). In both *Liles*, 148 So. 3d at 516, and *Mellette*, 95 So. 3d at 1045, the defendants violated the grieving plaintiffs' express instructions on handling their loved ones' remains—the *Mellette* defendant even "assur[ing] [the widow] that the body could not be moved" without her consent.

Here, Plaintiffs do not specify outrageous JHACH conduct "clearly directed" at Mrs. Kowalski, who did not enter the hospital

after mid-October. Instead, they argue that jurors might "reasonably infer" it from the "outrageous conduct described above." (AB.63). That is insufficient evidence of truly outrageous conduct "clearly directed" at Mrs. Kowalski.

C. The evidence does not support suicide liability.

Plaintiffs argue that a rigorous standard for suicide liability in the absence of any special duty would make such lawsuits rare. (AB.68). Exactly. They *should* be rare because suicide ordinarily breaks the causation chain. (IB.51-52, 61-63). Making mere "substantial factor" causation grounds for Florida suicide liability should come only from the Legislature.

Unable to reconcile Dr. Richards's inconsistent testimony about a carefully planned but "irresistible" suicide, Plaintiffs argue waiver. (AB.66-67). This ignores that the trial court had granted the motion to exclude Dr. Richards's testimony but reversed itself—over objection—only hours before he testified. (T.5779-83). Putting waiver aside, the record and Dr. Richards's testimony disprove his opinion that the suicide was impulsive and irresistible. (IB.65-68).

D. Plaintiffs cannot establish harmless error under *Special*.

Plaintiffs argue that emotional evidence of Mrs. Kowalski's suicide and her children's grief somehow did not affect the jury's verdict on non-suicide claims. The jury's awards of tens of millions of dollars for the other claims—far beyond what even Plaintiffs asked for—prove otherwise. But JHACH does not need to prove that inadmissible suicide evidence affected the verdict. Instead, Plaintiffs must prove "no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Because they cannot, the entire judgment must be vacated.

II. Plaintiffs admit having no evidence of insurance fraud.

Plaintiffs' brief concedes a core point about Mr. Kowalski's insurance-fraud "damages": "**No damages** in the form of increased co-pays, premiums or deductibles **were proven**" at trial. (AB.73) (emphasis added). With no proof—and *Plaintiffs* asking for only $1—the jury awarded $5 million for increased co-pays, premiums, or deductibles. This conspicuous refusal to follow instructions merits judgment on this claim and a new trial with an unbiased jury on any remaining claims. Remittitur to $2 does not cure this error.

Besides damages, fraud's other elements cannot be inferred without sufficient evidence. Plaintiffs apparently concede that (1) no expert witness opined that CRPS codes misstated any fact and (2) JHACH provided the treatments described on the bills. Lacking evidence that anyone prepared a bill knowing that it contained a false statement, Plaintiffs offer no contrary argument.

Instead, they declare it a "plain truth" that JHACH's billing contained a "gross falsehood" and contend that the first four elements of Mr. Kowalski's insurance-fraud claim can all be *inferred* because $500,000 worth of Aetna bills contained a CRPS code and Aetna paid $300,000. (AB.71-73).

These are not reasonable inferences. Jason Bankert, who oversees JHACH's medical-billing coding, gave unrebutted testimony that JHACH providers do not assign diagnostic codes; certified coders assign CPT or HCFA codes after reviewing the services. (T.8618). Mr. Bankert reviewed Maya's October 7th history and physical and identified twelve assigned codes based on the services provided. The CRPS code was one of the twelve, partially because Maya's outpatient physicians diagnosed CRPS. (T.8619-20, 8643).

Plaintiffs' cited authority requires that "evidence in the record, and the trial court's factual findings, *clearly establish* that all of the elements of fraud were proven." *Townsend v. Morton*, 36 So. 3d 865, 868 (Fla. 5th DCA 2010). Nothing here "clearly establishes" *any* element of fraud. A jury might reject a defendant's explanation of evidence, but it cannot create its own evidence.

Instead of conceding the point, Plaintiffs argue that judgment on Mr. Kowalski's insurance-fraud claim should be affirmed on the "alternative ground" that the bills harmed *Mrs. Kowalski* and her suicide harmed Mr. Kowalski. (AB.73-74). Only Mr. Kowalski brought an insurance-fraud claim. No authority suggests that a Florida jury is "entitled to consider" a spouse's suicide as proximately caused "billing fraud damages." (AB.74). The argument is meritless.

Mr. Kowalski's $5 million award, regardless of remittitur, lacks *any* relevant damages, and he concedes that his still-intact $1.5 million award for past medical damages has no supporting evidence of medical treatment or medical bills, Sec. VI.A.1, *infra* at 29-32. So JHACH is entitled to judgment on Mr. Kowalski's claims and a new trial for any surviving claims.

III. The evidence did not support Maya's IIED claim.

A. Plaintiffs identify no outrageous conduct towards Maya and try to infer it from conspiracy theories.

Good-faith action to protect children is neither "utterly intolerable in a civilized community" nor "beyond all possible bounds of decency"—even if overzealous or negligent. Indeed, Chapter 39 immunity was enacted "to protect those who might be overzealous in protecting children from potential abuse." *Floyd v. Dep't of Child. & Fams.*, 855 So. 2d 204, 206 (Fla. 1st DCA 2003).

1. Weaning Maya from extreme doses of ketamine is not outrageous or "especially outrageous."

Much of Plaintiffs' brief depends on the false premise that Maya's health "steadily improved" through 2016 until JHACH reversed her progress by refusing to administer "prescribed" ketamine doses. Although the record indicates that Maya improved in the *spring* of 2016, (R.115503-05; T.1841-42, 2823), undisputed evidence shows that, in early October, after 55 ketamine infusions of increasing dosages over eight months, Maya reported constant, extreme pain. (T.8714). Dr. Hanna testified that when he gave Maya her last ketamine infusion on October 6, 2016, her pain was a "10 over 10" and she was "screaming" and "crying from pain." (T.8711).

Maya testified that when she arrived at the JHACH ED the next day, she was "in excruciating pain," she "had lesions coming back," and she was "in extremely bad condition because of the [CRPS] relapse." (T.4324-25, 4350).

Undisputed evidence indicated that after receiving five ketamine infusions days before her October 7 JHACH admission, Maya had gone three days without eating or drinking, could not sleep due to pain, nausea, and vomiting, weighed 60 pounds, and rated her quality of life as "zero." (T.4437-8; R.112643, 116735, 116940-41, 116948-49).

When Maya was admitted to JHACH, Dr. Hanna no longer "prescribed" high-dose ketamine infusions. He told Mrs. Kowalski on October 6th that he could do nothing more. (T.8710). Despite giving Maya the "maximum" amount of ketamine he felt comfortable administering, he had "failed to help her" and it was time to "send her to another facility." (T.8710).

Dr. Hanna said that Maya's abdominal pain could have been ketamine-induced bile-duct inflammation, and he recommended taking Maya to JHACH's ED to "maybe get liver function" testing. (T.8709-10, 8712, 8716). "We failed to really treat her," Dr. Hanna

said, “and I wanted to see if there’s anything else going on, to do some investigations for her.” (T.8716).

Weaning Maya from dangerous levels of ketamine cannot support IIED liability.

2. JHACH did not refuse to transfer Maya to another facility or insist on parental agreement with diagnosis.

JHACH never refused to transfer Maya to another facility nor insisted that the Kowalskis “agree” to a Munchausen by proxy diagnosis. (*See* AB.6, 12). JHACH doctors quickly recognized that they did not have the physical-therapy and psychological resources that Maya needed and repeatedly recommended transfer. (T.2210-11, 2534-35, 3006, 9354-55). Plaintiffs cite the documentation that Mrs. Kowalski “requested transfer to Nemours” on October 9th after Dr. Malik told her of the plan to reduce Maya’s pain medication. (AB.6; R.109988-89). Dr. Malik “began the process of referral” and agreed that “transfer to an [sic] higher[-]level care institution that can better undertake a pain evaluation, concomitantly with a psychiatric evaluation” would help. (R.109988-89).

Mr. Kowalski testified that JHACH gave the Kowalskis a transfer form to send Maya to Nemours. (T.3272). He claimed that

signing the transfer form would admit child abuse, so the Kowalskis refused to sign. (T.3272, 3280). But no one told them that signing a transfer form meant they agreed with the insurance codes or admitted abuse. They chose not to transfer Maya.

3. Restrictions at JHACH do not support IIED liability.

Plaintiffs conflate JHACH and DCF action. They blame JHACH for restricting Maya's access to her mother, other visitors, and outside gifts and argue that JHACH violated its patients-rights policy. No reasonable view of the evidence supports this.

Maya testified that Ms. Bedy was "constantly" interrupting to re-direct Mrs. Kowalski away from improper topics and remind her to speak English. (T.4351-52, 5502-03). Maya also testified that she had no video calls with Mrs. Kowalski after December 27, 2016. (T.9673-74).

Mr. Kowalski testified that Maya did not receive a birthday card from her mother, and Maya testified that a Christmas dress was never delivered. (T.4211-12, 4390-92). A church parishioner testified that, when she visited Maya unannounced, a "darkness" appeared in the room and the "dark force" prevented her from giving Maya a large religious icon. (T.2110-13).

Plaintiffs imply that these restrictions were part of Maya's "torture" by JHACH in violation of its own policies. (AB.15-16). But Charlotte LaPorte, the DCF social worker assigned to Maya's case, gave unrebutted testimony that *DCF's* implementation of the dependency-court order restricted visitors and gifts and required supervising Maya's phone calls with her mother with parameters to speak English only and not discuss Maya's pain or medical treatments. (T.6105-07). Ms. LaPorte also said that, because she had a full case load and scheduling conflicts, she had Ms. Bedy supervise some calls to give Mrs. Kowalski and Maya more time to speak. (T.6113-14).

Ms. LaPorte and Ms. Bedy explained that DCF policy also required reviewing all written materials before delivery to Maya. (T.8857-58, 6115-16). Mrs. Kowalski sent letters and cards to Ms. LaPorte, who would review, scan, and email them to Ms. Bedy for delivery to Maya. (T.6116-17); *see* R.139025-28 (scanned birthday card).

4. No other JHACH conduct supports IIED liability.

Plaintiffs fault JHACH for various other actions related to child protection and the DCF sheltering order, none of which could reasonably be considered "beyond all possible bounds of decency":

- treating Maya's symptoms as a "charade," a word used only in CPT Director Dr. Sally Smith's Nov. 5, 2016 text message, (AB.57-58, 61);
- keeping Maya at JHACH from October 7 through 13, (AB.57);
- recording her in the EEG room for two days, while placing her toilet out of reach and not timely helping her use it, (AB.57, 76);
- photographing her skin condition on January 6, 2017, (AB.57-58);
- showing a "callous attitude" in various private text messages between providers, (AB.62); and
- not providing sufficient cognitive therapy or court-ordered family therapy, which JHACH was not staffed to provide, (AB.78, T.7288, 7384-85, 9355).

Plaintiffs similarly criticize other conduct by Ms. Bedy:

- "isolating" Maya, (AB.58);

- saying that Mrs. Kowalski was in a mental institution and Ms. Bedy could be her mother, (AB.58); and
- hugging and kissing Maya and placing her on her lap to comfort her, (AB.58).

Plaintiffs also resort to unsupported mischaracterizations of JHACH conduct:

- engaging in "medical blackmail" to force confessions from Maya and her mother, (AB.58);
- not being rigorous, serious, or honest when diagnosing Maya, (AB.60); and
- "warehousing" Maya for nearly 90 days without medical treatment for CRPS, (AB.60).

Finally, Plaintiffs contend that it was legally "outrageous" that JHACH personnel were not "registered" CRPS experts (AB.59-60)—ignoring that no such certification exists and JHACH staff included certified pediatric-pain-management experts. Individually and together, the evidence does not support IIED liability for Maya.

Plaintiffs apparently concede that the EEG-room video (1) never shows Maya soiling her sheets and (2) shows staff transferring her to the commode four times with Maya declining two

other offers. Instead, they argue that JHACH played only excerpts—not all 40 hours—of the video in court. (AB.76).

JHACH's relative power and Plaintiffs' syllogism about "tortious conduct" being unprotected do not save their IIED claims. Plaintiffs' cited cases involve objectively appalling abuses of power: police officers running a drug and prostitution ring out of a plaintiff's business and an insurance company intentionally hastening a patient's death by delaying an ordered double-lung transplant. (*See* AB.61). Honest disagreements about a complex medical diagnosis and overzealous application of a child-sheltering order cannot compare.

Plaintiffs similarly try to conjure outrageous conduct through their experts' subjective characterizations of DCF and JHACH conduct. An opinion that Dr. Smith acted "with cruelty" is not evidence of cruelty. (T.5288). Dr. Newberger's barbs about physicians' seriousness or honesty cannot change what they actually did. (*See* AB.49, 60). And the false statement from the Kowalskis' retained psychologist that Maya was "warehoused for nearly 90 days *without medical treatment* for her pain syndrome" is not evidence of non-treatment. (*See id.* at 60 (emphasis added);

contra IB.17, 25). Because "the question of whether conduct is in fact outrageous is one of law," (AB.55), this Court must focus objectively on the conduct itself.

B. Plaintiffs fail to show intent to commit legally outrageous acts against Maya.

Plaintiffs provide no basis for reasonably inferring intent to traumatize Maya. Nor do they point to evidence from which a jury could infer recklessness as a proximate cause of Maya's distress. Instead, they cite cases with undisputed evidence allowing obvious inferences: inferring fraud when a used-car dealer sold a car as "low mileage" knowing that the rolled-back odometer reading was "inaccurate"; inferring harmful intent when a customer destroyed her jeweler's business by wrongly accusing him of diamond theft "without any proof whatsoever"; and inferring offensive touching when a man twice massaged a female co-worker's shoulders, which she immediately rebuffed. (AB.58-59).

Plaintiffs try to wring bad intent from unflattering excerpts of private text messages between physicians who saw Maya. Repeating *ten* times that Dr. Sally Smith's text referred to Maya's symptoms as

a "charade," they ignore that Dr. Smith was then acting as the CPT Director investigating suspected abuse.

Other text messages do not support IIED liability. The private December 2016 text message suggesting that Dr. Hanna should have trouble sleeping and the "LOL" response suggest no bad intent and, if anything, reaffirm that JHACH physicians viewed Maya's ketamine regimen as dangerous. And Dr. Teppa-Sanchez's January parking-garage-text reaction to the suicide shows no outrageous intent.

The texts reflect each physician's sincere belief that Maya was being medically abused by her mother and needed help. Yet Plaintiffs repeatedly used them to inflame the jury in opening, (T.1600), in closing, (T.10210, 10313, 10611), and through trial, even with witnesses who had never seen the texts. (T.4180, 4213, 4898-99, 4903-04, 6601, 6608, 6699, 6710, 7827, 9512).

Plaintiffs fail to specify the conduct that JHACH directed at Maya that is "utterly intolerable in a civilized society" and "beyond all possible bounds of decency." Section III.A, *supra* at 10-18, shows that no JHACH conduct meets that rigorous standard.

IV. The evidence did not support the first false-imprisonment claim.

Plaintiffs have no basis to argue that it was "unreasonable and unwarranted" for physicians to shelter Maya until DCF acted when the physicians believed that returning a child with a port, (T.7751), to a nurse-infusionist mother suspected of medical abuse created imminent danger. That does not present a jury question, and it requires judgment for JHACH on the first false-imprisonment claim.

Nor can JHACH's actions through October 13 be "unlawful." Plaintiffs argue that section 39.395 requires healthcare providers to return a child to the parents after 24 hours if *DCF* is slow to act even if they believe that doing so would put the child in imminent danger. (AB.78-81). And if doctors fail to return the child to what they consider a life-threatening situation, they will face false-imprisonment liability. Plaintiffs' rule would risk lives by chilling good-faith action by a class of front-line professionals that the Legislature found well-positioned to detect and stop child abuse.

Plaintiffs' narrow construction of Section 39.395 conflicts with the legislature's decades-long encouragement of action to protect

children. Physicians who shelter a child in good faith should be immune even when the State moves slowly.

V. The Court's Chapter 39 errors require a new trial on all remaining issues.

A. Plaintiffs cannot defeat Chapter 39 immunity by calling JHACH an "abuser" or its conduct "tortious."

Plaintiffs flip Chapter 39 on its head when arguing that JHACH's good-faith child-protection activities lose immunity if Plaintiffs simply label the actions "abusive" or "tortious." (AB.82-83). Plaintiffs correctly identify child protection as a "paramount goal" of Chapter 39 and emphasize that Chapter 39 "*does not protect against failing to carry out the protective measures*," when the defendant has a duty to act. (AB.83). They also recognize that *HRS v. Yumani*, 529 So. 2d 258 (Fla. 1988), protects JHACH from "liability for carrying out protective measures" and that *Floyd* does not extend Chapter 39 immunity to those who fail to act when they should. (AB.83).

Plaintiffs subvert these legal principles when arguing that JHACH's actions to protect Maya *from* abuse enjoy no immunity—even after a trial-court finding that JHACH providers "to their core believed that Maya was not safe" with her mother, (A.185)—because

JHACH had a duty to cease its actions to stop *itself* from "abusing" Maya. Stated differently, JHACH's failure to stop *its own* child-protection activities constitutes a failure to fulfill its child-protection duties under *Floyd*.

Chapter 39 immunity would vanish if courts accepted this rhetorical shell game. JHACH's tortious "inaction" cannot be its "failure" to stop its own actions to protect a child.

Arguments that Chapter 39 cannot authorize "tortious conduct," (*see* AB.62), ignore that Chapter 39 immunizes much of the conduct that Plaintiffs presented to jurors as "outrageous"—including *all* of Dr. Sally Smith's challenged conduct. Plaintiffs cannot foil Chapter 39 immunity by implying to jurors that JHACH's enforcement of the sheltering order and cooperation with the child-abuse investigation was "tortious."

Nor can Plaintiffs get traction with arguments that Chapter 39 reporting immunity does not cover self-reporting child abuse. JHACH was not self-reporting when it contacted DCF with its concerns about Maya. An accused abuser cannot dissolve Chapter 39 immunity by calling child-protecting activities "abuse." This, too, would dissolve Chapter 39 immunity in sheltering cases.

B. The court failed to enforce JHACH's immunity for authorized acts.

Plaintiffs ignore the trial court's plainly incorrect rulings that section 39.203(1) immunizes "only those claims that 'otherwise result' from the report to the hotline." (R.53119). Despite quoting the trial court's limitation of immunity to acts that "'logically could occur from a report to the abuse hotline,'" (AB.85 (citing R.53124)), Plaintiffs insist that "the court understood immunity applies to *all* acts authorized or required by Chapter 39." (AB.84-85). It did not.

The trial court's omnibus ruling on the motions in limine regarding Chapter 39 immunity repeatedly misinterpreted it. On false imprisonment, the trial court said "section 39.203(1)(a) immunity flows for any civil liability that may result by reason of the report." (R.53123). The negligent infliction of emotional distress count also survived because the conduct supporting it "has nothing to do with the action of making the abuse report." (R.53124). The court granted summary judgment on the civil-conspiracy count because it sought damages "associated with conduct tied directly to the hotline report and direct consequences of such report[.]"

(R.53123-24.) Plaintiffs' cherry-picked quotes from the trial court's Chapter 39 rulings do not reflect what the court did.

Plaintiffs' brief also ignores that section 39.303(3) expressly authorizes Dr. Sally Smith to, among other things, investigate Maya's case, diagnose and evaluate her, and develop a treatment plan with "any professional involved with the child" who requests CPT assistance. (*See* IB.89-90; A.241-42; §§ 39.303(3)(a)-(f), Fla. Stat.). The rulings that made JHACH liable for whenever Dr. Smith is "impacting or directing" Maya's care or "appears to be providing medical care and treatment" are clear legal errors. (T.5448-49, 7339).

The court's erroneous interpretation of section 39.203(1) immunity was both too narrow and too broad. The statute immunizes good-faith actors from *liability* that results from any authorized *act*. Yet, the trial court tried to immunize JHACH from liability that resulted from any *action* that resulted from good-faith *reporting* (only one of many authorized acts). *See*, *e.g.*, R.53125, 53126 (immunizing JHACH's "commencement of the dependency action" because it "flowed directly from the hotline reports" but not immunizing JHACH's ketamine reduction because medical

treatment "does not flow from, the hotline reports"). The court got lost in its misinterpretation of the statute, which immunizes liability that flowed from authorized actions—not actions that flowed from authorized reporting.

C. Without necessary apparent-agency evidence, JHACH was tried for Dr. Sally Smith's authorized acts.

Plaintiffs apparently concede that (1) they knew by October 11, 2016, that Dr. Sally Smith was a CPS investigator and (2) there was no evidence that they (i) authorized JHACH to do anything because they thought that Dr. Smith was its agent or (ii) changed their position in reliance on any belief that she was. (IB.87). That leaves no room for jurors to reasonably find that Dr. Smith provided negligent medical treatment that Chapter 39 did not authorize before October 11. This defeats the apparent-agency claim.

Even if Dr. Smith was JHACH's apparent agent, her conduct is still immune. The record disproves Plaintiffs' argument that Dr. Smith's involvement in Maya's case had "nothing to do with her involvement on the CPT or with any act authorized or required by Chapter 39." (AB.88-89). The *only* reasonable inference to be drawn from the evidence was that Dr. Smith was involved in Maya's case

because she was investigating medical child abuse for the ongoing dependency proceeding.

D. JHACH did not invite the court's error.

A fair trial was impossible after the court held pre-trial that none of JHACH's "substantial participation or conduct *within* the confines of the dependency court action" was immune or inadmissible. (R.53127) (emphasis added). Yet, Plaintiffs argue that the glaring error can be overlooked on appeal because JHACH "invited" the error by raising evidence at trial that touched on the dependency proceedings. (AB.91-92). Boxed in by the trial court's erroneous interpretation of Chapter 39, JHACH introduced evidence to minimize the improperly admitted evidence's prejudicial impact. This does not implicate the invited-error doctrine or waive JHACH's Chapter 39 arguments. *See Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202-03 (Fla. 2001).

This is especially true where JHACH received a definitive pre-trial ruling on the issue. *Cf.* § 90.104, Fla. Stat. ("If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

E. Instructions to ignore immune conduct were futile.

After citing *Special* once in Section I of their brief, Plaintiffs ignore the controlling standard where it matters most. (*See* AB.69-70, 92-94). Plaintiffs cannot show "no reasonable possibility that the [Chapter 39] error contributed to the verdict." *Special*, 160 So. 3d at 1256. While jurors are generally presumed to follow a trial court's instructions, there are limits to what an instruction can reasonably accomplish. *See Crumbie v. State*, 16 So. 3d 898, 896 (Fla. 1st DCA 2009) (holding "the curative instruction was not likely to be effective in persuading the jury to disregard the [improper implication]").

And the presumption dissolves when the jury shows that it has disregarded instructions. *See Miner v. McKesson Corp.*, 784 So. 2d 1156, 1159 (Fla. 2d DCA 2001). Here, the inflamed jury obliterated any presumption that it followed instructions by (1) awarding Mr. Kowalski $5 million in *nonexistent* insurance-fraud damages after Plaintiffs asked for $1 and (2) repeatedly awarding economic damages that exceeded Plaintiffs' requests and lacked evidentiary support. *See* Arg. VI, *infra* at 28-32.

Plaintiffs cannot destroy Chapter 39 immunity by presenting upsetting evidence of immune conduct and asking jurors whether it was tortious. Plaintiffs still cannot articulate their liability theory without criticizing immune conduct. Evidence of good-faith child sheltering is immune precisely because, if allowed to do so, sympathetic or angry jurors will call it "medical negligence," "false imprisonment," and "intentional infliction of emotional distress."

VI. Plaintiffs were awarded excessive compensatory and punitive damages.

A. The compensatory damages were excessive.

Plaintiffs urge deference to the jury and trial-court decisions on compensatory damages. (AB.97-98). But the abuse-of-discretion standard "is not a rubber stamp," especially for amounts "so excessive" that they carry "an implication of passion." *Miami-Dade Expressway Auth. v. Tropical Trailer Leasing, LLC*, 250 So. 3d 751, 764 (Fla. 3d DCA 2018); *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 270, 277 (Fla. 2018). Here, the unreasonable, excessive damages reflect that an inflamed jury rejected the court's instructions to apply the law to the evidence.

1. Plaintiffs concede that their economic-damages award was excessive.

Plaintiffs concede that economic damages exceeded what Plaintiffs' economics expert, Kristy Kirby, called the upper limit or "worst-case scenario" for damages, (AB.102-03, 105; T.5573):

Type of Economic Damages	**Dr. Kirby's Upper Limit**	**Jury Award**
Past medicals	$885,294	$1,513,498
Lost future earnings	$5,079,783	$7,700,000
Future medical and psychological expenses	$10,247,000	$16,084,000

The jury's awards to each family member repeatedly exceeded the supporting evidence.

For Maya, Plaintiffs still cite no evidence that JHACH's "intentional torts" caused her physical injury, required medical treatment, or generated a medical bill. Plaintiffs point to Dr. Brewerton's testimony that aggravating Maya's CRPS caused permanent psychological and physical injury. (AB.104). But Dr. Brewerton never connected Maya's injuries to any intentional torts. Instead, he connected them to her entire hospitalization, most of which enjoys good-faith immunity. (*See* IB.81-83; 92-96; Sec. V, *supra* at 21-28). Indeed, Dr. Brewerton's opinion that *accusing Mrs. Kowalski* of child abuse "devastated Maya, causing her stress and

psychological and physical pain" blames Maya's injury on immune conduct—not false imprisonment, battery, or IIED. (AB.33).

To defend the indefensible, Plaintiffs claim waiver, arguing that JHACH "failed to meet the specificity required to preserve its complaints." (AB.104) (citing *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010)). But JHACH challenged the economic damages as excessive and sought "remittitur as to each of the three plaintiffs and as to each of the claims submitted to the jury[.]" (R.96932). JHACH also asked for a new trial for claims that remittitur would not remedy. (R.96933). *Aills* requires nothing more.

Remittitur is an inadequate remedy here. A new trial is necessary when, as here, "(1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice." *ITT Hartford Ins. Co. v. Owens*, 816 So. 2d 572, 575 (Fla. 2002). By repeatedly exceeding Plaintiffs' bright-line upper limits of damages supported by the evidence, the jury showed that passions drove their deliberations, requiring a new trial.

2. The noneconomic damages were excessive.

The noneconomic damages admittedly exceeded the evidence by tens of millions of dollars. Mr. Kowalski's wrongful-death

noneconomic-damages award was reduced by $26 million and Maya's and Kyle's awards by $250,000 each. (R.115454). Plaintiffs insist that the remaining noneconomic-damage awards were somehow immune from improper animus towards JHACH and reasonable. (AB.102). But the amounts themselves reflect systemic prejudice of inflamed passions.

A jury cannot award *any* amount it wants for noneconomic damages, regardless of the evidence. *See Odom*, 254 So. 3d at 276. Noneconomic damages must "bear[] a reasonable relation to the amount of damages proved and the injury suffered." § 768.74(5)(d), Fla. Stat. The still-intact noneconomic awards are objectively unreasonable. For example:

Claim	**Non-economic damages award**
False Imprisonment: Jan. 6	$15,000,000
Battery: Jan. 6	$8,000,000
Battery: Unwelcome Affection	$11,000,000

These amounts—two for the same brief incident, totaling $23 million, plus $11 million for unwelcome affection—shock the conscience. *Owens*, 816 So. 2d at 575; *cf. Normius v. Eckerd Corp.* 813 So. 2d 985, 986, 989 (Fla. 2d DCA 2002) (affirming $110,000

false-imprisonment damages are excessive, where plaintiff was restrained for 10 to 15 minutes and "partially disrobed").

Because jurors were instructed to consider each claim separately, the "formula" from Plaintiffs' closing also disrupted reasonable calculation of noneconomic damages. Although not improper *per se* to use "a 'mathematical formula of calculable value' in closing argument," formula use "obviously is not unfettered." (*See* AB.100). It *is* improper when reasonable-sounding hourly figures are stacked into massive awards with no "reasonable relation to the amount of damages proved and the injury suffered." § 768.74(5)(d), Fla. Stat. Nor can the jury be invited to divide among various torts a "gross amount" of Maya's pain and suffering—most of which JHACH cannot be liable for. (T.10213).

A new trial is needed for any remaining claims.

B. The evidence did not support JHACH liability for punitive damages.

1. The punitive-damages award was not proven by clear and convincing evidence.

Without contesting the controlling standards for awarding punitive damages—"clear and convincing evidence" of *intentional* misconduct or *gross* negligence—Plaintiffs observe merely that the

jury was properly instructed. (AB.106, 109). Plaintiffs then defend the punitive-damages awards with vague references to "the evidence summarized above that the jury heard for nine weeks" and provocative adjectives, adverbs, and innuendo. (*See* AB.107, 109 (arguing that "failure to stop this horrific treatment of a ten-year-old girl was certainly gross negligence")).

Inflammatory rhetoric cannot substitute for "clear and convincing evidence," which must be "precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue." (T.10603). Plaintiffs never specify which evidence meets that standard to support *three* punitive-damages awards. And allegations of wrongdoing "cannot without more be converted into a claim for punitive damages simply by labelling them as 'grossly negligent.'" *See Cleveland Clinic Fla. Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 706 (Fla. 4th DCA 2023). Plaintiffs' refusal to identify the "clear and convincing evidence" of *intentional* misconduct or *gross* negligence by JHACH employees, as section 768.72(2) requires, concedes that they cannot do so.

From there, Plaintiffs rush to section 768.72(3)—which applies *only after* section 768.72(2) has been satisfied—suggesting that Risk Management Department employees "directed and approved the conduct for which the jury awarded punitive damages." (AB.107-08). But none of Plaintiffs' evidence regarding the Risk Management Department, is clear and convincing evidence that JHACH, as a corporate entity, "directed and approved the conduct for which the jury awarded punitive damages." (AB.107-09).

There was no evidence that employees in the Risk Management Department—let alone any specific employee involved in Maya's care—are "managing agents" of JHACH to establish direct corporate liability for punitive damages. A "managing agent" must be "an individual like a 'president [or] primary owner' who holds a 'position with the corporation which might result in his acts being deemed the acts of the corporation.'" *Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019). Without this evidence, the punitive-damages awards cannot stand.

Beyond that, none of Plaintiffs' cited evidence shows that the Risk Management Department:

- was involved in deciding to keep Maya hospitalized from October 7-13 (versus being kept apprised of the clinical team's decisions);
- directed or approved any "intentional restraints" related to Maya's 48 hours in the EEG room; or
- directed or approved conduct amounting to battery or false imprisonment when authorizing a licensed social worker to photograph Maya's skin condition.

Evidence that an employee in the Risk Management Department asked to be kept "up to speed" and was "fairly involved in this case, maybe not initially in October, but after a few months" (T.3960-62), is not sufficiently "precise, explicit, [or] lacking in confusion," (T.10603), to establish that any JHACH "managing agent" ratified the specific conduct for which the jury awarded punitive damages. *Oriolo*, 357 So. 3d at 707.

2. Florida's statutory mandates for hospitals do not render JHACH liable for punitive damages as a matter of law.

Plaintiffs' argument, that the punitive-damage awards should be affirmed because JHACH "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)," is waived. (*See* AB.110). It was first raised in posttrial motions and never ruled upon. *See Century-National Ins. Co. v. Frantz*, 369 So. 3d 739, 746 (Fla. 2d DCA 2023).

The theory also lacks merit. The statute does not supplant a plaintiff's burden to prove, by clear and convincing evidence, each of section 768.72's necessary conditions for punitive damages.

CONCLUSION

JHACH seeks the relief requested in its Initial Brief.

Respectfully submitted,

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