IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

JOHNS HOPKINS ALL CHILDRENS 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

INITIAL BRIEF OF APPELLANT, JOHNS HOPKINS ALL CHILDRENS HOSPITAL, INC.

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PRELIMINARY STATEMENT

A. Abbreviated Names

The brief uses these references:

The Appellant, Johns Hopkins All Children's Hospital, Inc., is "JHACH" or "All Children's."

Appellee Jack Kowalski, individually, is "Mr. Kowalski." Appellee Maya Kowalski is "Maya." Appellee Jack Kowalski, as Personal Representative of the Estate of Beata Kowalski, is "the Estate." Collectively, they are "the Kowalskis" or "Plaintiffs." Beata Kowalski is "Mrs. Kowalski." Kyle Kowalski, Maya's younger brother, is "Kyle."

B. Citations to the Record

The unredacted record on appeal is cited as (R.**) and the unredacted transcript as (T.**). Critical portions of the record are attached as an appendix (A.2-344).

NATURE OF THE CASE

This appeal involves three judgments, totaling $208 million, stemming from ten-year-old Maya Kowalski's hospitalization at JHACH from October 2016 to January 2017. Because DCF and JHACH suspected medical child abuse by Maya's mother, Beata Kowalski, the last 91 days of Maya's 97-day hospitalization were under court-ordered DCF supervision at JHACH and Mrs. Kowalski did not enter the hospital.

The trial court correctly ruled that JHACH properly reported suspected medical child abuse and was not responsible under Section 39.203(1)(a), Florida Statutes, for the DCF proceedings or for keeping Maya hospitalized. (R.53120-53121). Yet, Plaintiffs repeatedly asked the jury to find JHACH liable for hospitalizing Maya and enforcing the shelter order.

The first judgment is based on Mrs. Kowalski's suicide, alone in her Venice home, three months into Maya's hospitalization and one day after a dependency-court hearing where the judge did not allow her to hug Maya. (R.51584). Minutes after the hearing ended, Mrs. Kowalski drafted a suicide note. (R.96589-96590). Despite JHACH healthcare providers' limited contact with Mrs. Kowalski for

almost three months before her suicide, Plaintiffs' Eighth Amended Complaint included a wrongful-death claim based on intentional infliction of emotional distress (IIED), alleging that JHACH committed intentional, atrocious conduct causing Mrs. Kowalski extreme emotional distress that caused her suicide. (R.71798-71804). The jury awarded $108,653,676, which the judge remitted to $66,153,676. (R.121139-112140)(A.19-22).

JHACH has found no reported case that has gone to verdict on such a claim. JHACH maintains that it should not have gone to verdict here. JHACH also maintains that no evidence established its "extreme and outrageous conduct" or conduct done intentionally or recklessly to cause Mrs. Kowalski's emotional distress or suicide. If Florida courts are to recognize an IIED-suicide claim for remote plaintiffs, they should require proof of truly atrocious conduct intended to cause severe emotional distress and suicide. And, because suicide claims present serious public-policy issues, the standards for such claims should come from the Legislature.

The second judgment is for Mr. Kowalski and includes claims for fraudulent billing and Maya's pre-majority medical expenses. (R.121139- 121140). He claimed that JHACH fraudulently billed his

insurer for treatments that were not provided. (R.71793-71796). JHACH maintains that Mr. Kowalski failed to prove the elements of fraud, including damages. In closing arguments, Plaintiffs suggested that the jury could award only nominal damages for fraud. (T.10218). Plaintiffs also argued, over objection, that non-economic damages could be measured hourly for each component of those damages and spread among all claims. (T.9139-43, 10169-71, 10219-21). The jury awarded $5 million for fraud, which the judge, at Plaintiffs' request, reduced to $2. (R.121139)(A.17-18). JHACH maintains that it was entitled to a directed verdict, and the award shows the passion and prejudice that fueled every jury award.

The jury also awarded Mr. Kowalski $1,513,500 for Maya's medical bills relating to her intentional-tort claims. (R.121140)(A.5-16, 23-24). JHACH maintains that Plaintiffs presented no evidence of physical injuries, treatment, or bills for these claims. The court denied all posttrial relief. (R.115455-115457).

The third judgment is Maya's totaling $143,284,000 (R.95860-95880)(A.5-16, 23-24)—including $50 million in punitive damages. (R.95887-95893)(A.25-31). This judgment involves one medical-

negligence and six intentional-tort claims. (R.95860-95880, R.95887-95893). JHACH maintains that it did not receive a fair trial on these claims, in part, because of the prejudice created by allowing jurors to hear evidence related to the first two judgments. The trial court denied post-trial motions on these issues. (A.32-175, 176-192).

STATEMENT OF THE CASE AND FACTS

In the summer of 2015, Mrs. Kowalski took Maya to at least five different hospitals complaining of Maya's shortness of breath, asthma, coughing, and generalized weakness and pain. (R.5725-5736, 109958). Maya spent several days in a Chicago hospital and a month in Tampa General. (T.3121, 3132). Providers at both hospitals documented concerns about Mrs. Kowalski's interactions with Maya and diagnosed a psychiatric component to Maya's condition. (R.119307, 119310, 119696-119698). Another outpatient provider who saw Maya wondered what role "family dynamics" played in Maya's health condition. (R.118823). None of the providers suspected that Maya had Complex Regional Pain Syndrome (CRPS)[1] or suggested high-dose ketamine as a potential treatment.

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[1] CRPS, formerly reflex sympathetic dystrophy (RSD), is a brain-based central-nervous-system disorder that presents as an array of symptoms characterized by severe regional pain with no apparent cause. (T.2441-2442, R.93426-93430). Patients experience agonizing pain in the affected limb along with an extreme sensitivity to touch, called allodynia, which makes any contact with an affected limb unbearable. (T.4721). Reduced blood supply to affected areas can also cause CRPS lesions. (T.7616-7617).

That fall, Mrs. Kowalski learned of CRPS from one of her own patients. (T.4715, 4808-4809). She took Maya to Dr. Anthony Kirkpatrick, who diagnosed Maya with CRPS and started high-dose ketamine treatments. (T.4780, R.102510, 102569-102579). Within two months, Mrs. Kowalski flew Maya to Mexico to be placed in a five-day ketamine coma, a procedure that their physician in Mexico warned them had a 50 percent chance of death. (T.3476-3477, 3720-3725, R.98754, 97472, 97494, 97501, 97503-97504, 97528). In December 2015, an immunologist documented his concerns that Mrs. Kowalski may have Munchausen by proxy,[2] but he did not report his concerns to DCF. (R.118959). Over the next ten months, Maya received 55 high-dose ketamine infusions at a Florida pain clinic from Dr. Ashraf Hanna. (T.8714). By October 6, 2016, Maya was malnourished, "screaming," and "crying from pain." (R.118714)(T.8711). Dr. Hanna had reached "the maximum" dosage

[2]Munchausen by proxy refers to a psychiatric disorder that the Diagnostic and Statistical Manual of Mental Disorders calls "factitious disorder imposed on another," also called "medical child abuse." (R.5963-5991). Traditional factitious disorder patients feign their own illnesses, but Munchausen by proxy patients create or exaggerate medical problems for another person—a "proxy." In most cases, the "proxy" is a child for whom a caregiver seeks unnecessary medical treatment. (R.5966).

of ketamine to no avail. (T.8710, 8712). Having "failed to help" Maya, (T.8710), and with "nothing else" to try, (T.8712), he advised Mrs. Kowalski to take Maya to JHACH for "continuous infusion." (T.8710)

The next day, Mr. Kowalski brought Maya to JHACH's emergency room. (R.109943). For reasons explained below, JHACH providers suspected child abuse. *See infra* at 11-12. They contacted DCF, which petitioned for and received a shelter order, prompting Maya's sheltering at JHACH. (R.12336-12348, 12382-12389). Mrs. Kowalski committed suicide on January 7, 2017. (T.2928). The dependency court returned Maya to her father's physical custody within days, (R.40741), and closed its case in April. (R.12577). In 2018, Mr. Kowalski filed the suit that led to this trial. (R.297-337).

Procedural History

Plaintiffs' initial complaint alleged that JHACH, Suncoast Center (a DCF contractor that investigates child abuse), Pinellas County Child Protection Team (CPT) medical director Dr. Sally Smith, and Catherine Bedy, a JHACH social worker, falsely reported suspected child abuse in bad faith and conspired to separate Maya from her family and cause Mrs. Kowalski's suicide. (R.297-337).

Five years later, the operative Eighth Amended Complaint had abandoned a multi-agency conspiracy to falsely report suspected child abuse and sought to hold JHACH solely responsible for removing Maya from her parents' custody and all subsequent events. (R.71725-71814). Suncoast Center and Dr. Smith moved for judgment based on immunity, (R.43457-43504), but settled in 2022 before their motion was decided. (R.69851-69852).

In January 2022, JHACH won summary judgment on several claims based on Chapter 39 immunity. (R.53102-53132). But the trial court interpreted Chapter 39, which immunizes *all* good-faith conduct authorized by Chapter 39, as immunizing only good-faith *reporting* of suspected child abuse. *See* Arg. V, *infra*, at 80.

The court found that JHACH's October 2016 reporting was immune because it had "more than reasonable cause to believe that [Maya] was being abused by her parents." (R.53121). The court's application of immunity to only reporting conduct still resulted in summary judgment on five counts: false reporting, civil conspiracy, malicious prosecution, intentional interference with a parent-child relationship, and one count of negligent hiring. (R.53102-53132).

Immediately before trial, Plaintiffs voluntarily dismissed Catherine Bedy. (R.92276-92277). When trial began in September 2023, Maya had eight remaining claims, the Estate had two, and Mr. Kowalski had one. Maya's three false-imprisonment claims were based on: (1) her hospitalization from October 7 through October 13, 2016; (2) her 48 hours in a patient room with video monitoring; and (3) JHACH staff photographing her skin condition on January 6, 2017. (T.2652-2653). Maya's medical-negligence claim was based on her medical treatment by JHACH while sheltered. (T.1538-1539). Maya's two battery claims were based on allegations that Ms. Bedy (1) "hugged and kissed," (T.1558-1559), her without consent and (2) held her down when photographing her skin condition. (T.1560).

Mrs. Kowalski's Estate and Maya each brought an IIED claim based on allegations that JHACH intentionally separated them, disparaged Mrs. Kowalski to Maya, suggested that Ms. Bedy could be Maya's mom, and mistreated Maya intending to cause both of them emotional distress. (T.1539-1541, 1558-1561). The Estate's wrongful-death claim was based on Plaintiffs' claim that JHACH's IIED caused Mrs. Kowalski's suicide. (T.1540). Mr. Kowalski separately alleged fraudulent billing. (T.1539).

Maya's first week at JHACH
October 7-13, 2016

Maya's first false-imprisonment claim arises from her JHACH hospitalization from October 7 through October 13. (T.2651-2652).

On October 7, 2016, Mr. Kowalski brought Maya to the emergency room at JHACH for severe abdominal pain. (R.109943-109949, T.6274-6279). Maya had previously visited JHACH, but this visit raised new alarms. (T.6276-6294, R.109958-109959). When Mrs. Kowalski arrived, she demanded that doctors administer 1,500 mg of ketamine, (T.6286, 5292, R.109943), more than ten times the maximum dose permitted by the JHACH ER, (T.6294), for CRPS. (T.6293-6294, R.109943). Maya was admitted to the PICU, where Mrs. Kowalski argued to place Maya in a ketamine coma infused at 10 mg/kg/hr. (T.6559, 6567, 6593). Mrs. Kowalski also insisted that Maya be given high-dose ketamine, propofol, and Precedex without appropriate monitoring. (T.8444-8449). When anesthesiologists and pediatricians advised Mrs. Kowalski that they could not administer ketamine as she demanded, (T.6293-6295, 6566-6567, 8455-8456, 8473-8474; R.109943), Mrs. Kowalski suggested that hospice be consulted so Maya can receive enough

medication to die. (T.9049-9050, R.112644). She also wanted JHACH doctors to place an intrathecal pump to infuse pain medications directly into Maya's spinal cord, a procedure typically reserved for intractable cancer pain. (T.6495-6497). Maya was not terminally ill. (T.9050).

Mrs. Kowalski's behavior and the inconsistencies between her descriptions of Maya's condition and the clinical observations led JHACH to call the Department of Children and Families (DCF) hotline on October 7. (T.2997, 2999, 3002; R.111956). DCF did not open an investigation, (R.111956), because the Kowalskis were not refusing JHACH's treatment on October 7. (T.3014, R.53110, 103828). As they continued gathering concerning information, JHACH staff contacted CPT medical director Dr. Sally Smith on October 8. (T.5192, 6573-6574, 8442-8445, 8474-8475, 8230-8232, 8474-8475; R.111955). After consulting Dr. Smith, staff reasonably suspected medical child abuse and, on October 9, reported the case to DCF, as mandated by Chapter 39 of the Florida Statutes. (T.8232, R.61598-600, 111954).

DCF opened an investigation that Dr. Smith participated in. (T.5195). During the investigation, Mrs. Kowalski wanted to take

Maya out of the hospital against medical advice. (T.6504, R.109988, 111952). JHACH facilitated a phone call involving Mrs. Kowalski and Nemours Children's Hospital specialists on October 9, 2016. (T.7531). The Nemours pain-management specialist agreed to see Maya in its outpatient CRPS clinic but refused to administer high-dose ketamine or place an intrathecal pain pump. (T.7532-7536). JHACH knew that Maya's port would make it easy for Mrs. Kowalski, an infusionist nurse, to administer ketamine infusions outside of a doctor's office setting. (T.7751). Mr. Kowalski testified at trial that JHACH refused to discharge Maya to her parents and that he was threatened with arrest if he would not agree to keep Maya at JHACH, (T.3208), but contemporaneous medical and other records reflect that, after multiple interactions involving the Kowalskis, DCF, CPT, and JHACH providers, the Kowalskis agreed to keep Maya at the hospital for continued treatment. (R.111949-111951, 97704-97705, 98803-98804, 109998-110003, 110016-110018).

Although Chapter 39 contemplates faster State action, DCF petitioned the dependency court for a shelter order on October 13, 2016. (R.12336-12348). That same day, the dependency court

entered a shelter order placing Maya in state custody. (R.12336-12348). The order and its subsequent iterations permitted telephone/video contact between Mrs. Kowalski and Maya, which until December 27, 2016, had to be supervised. (T.8368-377). Mr. Kowalski and Kyle were allowed supervised visitation. (T.8368-8377).

From October 13th forward, the dependency court's shelter order overrode any less-restrictive hospital policies and procedures. (T.8369, R.96383). JHACH had a duty to keep Maya in the hospital, obey court orders, and cooperate with DCF. (T.8365-8377, 7761).

For the first false-imprisonment count, covering October 6 through October 13, the jury awarded Maya $2,496,000 in economic damages, $3 million in non-economic damages, and $15 million in punitive damages. (T.10444).

Maya's move to an EEG Room
October 18-20, 2016

Maya was transferred from the PICU to the seventh-floor pediatric unit on October 14, where she remained during her court-ordered sheltering. (T.6546, R.109928-109929). On October 18, at pediatric hospitalist Dr. Paola Dees's request, Maya was moved to

another seventh-floor room, one equipped with video-monitoring, to collect data on her pain level and physical capabilities for both clinical and diagnostic reasons. (T.7752-7754). Maya stayed in the EEG room for approximately 48 hours, leaving the room at least twice for physical therapy. (R.97112-17; Ex. 3085).

There is no evidence that Maya knew she was being recorded or that her clinical treatment changed while in the EEG room. (T.7752-7753). Yet, her second false-imprisonment claim sought recovery for her two days there. (T.2653).

At trial, Maya claimed that, in the EEG room, JHACH staff intentionally placed the portable toilet just out of her reach and did not answer her calls for assistance. (T.4361-4363). A nurse testified that a patient needing assisted transfer must have the toilet placed out of reach to allow the nurse to safely position herself to transfer the patient. (T.9483-9484).

Maya and Mr. Kowalski testified that Maya defecated in her bed because she was unable to reach the toilet and nurses would not help her. (T.3316, 3319-3321, 4361-4363). But the video footage, which was entered into evidence in its entirety with short clips shown to the jury, does not show Maya being forced to

defecate in her bed, and nothing but her testimony indicates that that ever happened. (R.97112-97117; Ex. 3085). Instead, the full footage shows Maya being assisted to the commode at least four times, (R.97114-97116), and declining at least two additional offers to toilet. (R.97114-97115). It also shows Maya receiving physical therapy, painting her nails, playing with her stuffed animals, and eating chocolate cake and ice cream. (R.97112-97117). The video does not depict any injury during this 48-hour period. (R.97112-97117).

For this second false-imprisonment count, the jury awarded $1.4 million in economic damages, $3 million in non-economic damages, and $10 million in punitive damages. (T.10444-10445).

Maya's medical care from October through December

Beginning in early October and throughout Maya's hospitalization, JHACH told Maya's parents and the dependency court that it did not have the specialized care best suited for Maya's complex medical needs, and it repeatedly sought to transfer her to a more appropriate facility. (T.6575-6576, 6489-6490, 8461; R.111675-111677, 111679-111682). On October 8, JHACH began to initiate transfer of care to Nemours Children Hospital, which has

inpatient psychiatric and rehabilitation services and a specialized outpatient CRPS clinic (T.6497-6499). Nemours accepted Maya, (R.111684-111697, 119442-119447), but the Kowalskis refused the transfer because the paperwork contained a diagnosis of Munchausen by proxy based, in part, on Dr. Smith's opinion.[3] (T.3271-3272). Despite JHACH's efforts over the next three months, Maya remained at JHACH. (R.111675-111677, 111679-111682).

From October to the end of December, Maya continued receiving medical treatment, including physical, occupational, and psychological therapies, which were appropriate for both CRPS and Munchausen's by proxy. (R.111761-111906, 113672-113760). JHACH sheltered and cared for Maya while the dependency proceedings continued. (R.109926-113781). The shelter orders were modified over time but continued to control what JHACH could do for Maya and ordered that she could not be discharged from JHACH without the approval of the dependency court. (T.8366-8377).

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[3] Dr. Smith suspected that Mrs. Kowalski had conversion disorder or "Munchausen by proxy," reviewed Maya's vast medical records, and wrote two reports detailing those suspicions. (R.5712-5714, 5716-5760).

Plaintiffs claim that JHACH's refusal to give Maya high-dose ketamine infusions was medical negligence, (T.2485, 2495-2496, 2534-2536, 10190-10191), even though Plaintiffs could not show that any other hospital in the United States uses the extraordinary amount endorsed by Plaintiffs' experts. (T.2518, 2527, 3755, 7404-7407, 7437, 7461-7462, 7589-7592, 7597-7599). They also argued that JHACH negligently failed to provide sufficient psychotherapy and obtain a pediatric-neurology consult. (T.2152, 2165, 2168, 2173-2175, 10204-10205, 10216-10217). For the medical-negligence claim, the jury awarded Maya $26.7 million in damages ($4.7 million economic, $22 million non-economic). (T.10449-10450). It was not asked to award punitive damages for this claim. (T.10620-10622).

Maya's allegation of unwanted touching

JHACH social worker Ms. Bedy was involved in Maya's care in the PICU, and she was assigned to continue working with Maya on the seventh floor. (T.3961).

One of Maya's battery claims is based on her allegations that Ms. Bedy hugged, patted, kissed, and put Maya on her lap without Maya's consent. (T.4066, 4376-4377). This happened in the hospital

chapel and at other times during Maya's stay. (T.4376-4377). Maya claimed that these touches were offensive, (T.4378), but offered no evidence that this contact caused physical injury or necessitated medical treatment.

For this battery count, the jury awarded $19 million in damages ($8 million economic, $11 million non-economic). (T.10448-10449). The trial court did not allow punitive damages on this claim. (T.6400).

The January 6, 2017, photograph sessions

Maya's third false-imprisonment claim and her second battery claim are based on being photographed by JHACH staff on January 6 before she left for the courthouse. (T.2653; R.129576-129599). Only days after attending a late-December dependency-court hearing that referred to CRPS lesions, Maya displayed linear, apparently self-inflicted, excoriations on her forehead and hands, which JHACH photographed, on January 1 and 5, 2017. (R.110054, 110378-110382, 129531, 129646)(A.336-337).

Concerned about self-mutilation, JHACH providers and risk management believed that it was important to document Maya's skin condition again before she left the hospital on January 6.

(T.4001-4004, 8865-8866; R.105933-105937). That day, while Maya was in a private room, wearing her bra and shorts, Ms. Bedy and a JHACH nurse photographed her skin using a hospital camera. (T.4001). Maya testified that Ms. Bedy and the nurse held her down, and it is undisputed that Maya was upset that the January 6 photos were taken. (T.4003, 4378, 4393-4395, 4397).

Maya's recollection of this event differs from that of JHACH staff. Maya maintains that only one photo session occurred, and she was forced to change bras between photos while exposed to Ms. Bedy. (T.4395-4396, 4447, 4500). JHACH witnesses testified that photos were taken before and after court to document any change in Maya's skin condition, and Maya's nurse testified she would normally protect her patient's modesty when changing clothes. (T.8392-8395). The photos remained on the camera that was secured in a hospital cabinet afterwards and never shown or distributed to anyone, except in this litigation. (T.4394, 8867; R.96607-99608).

For the January 6 photos, the jury awarded over $52 million. It awarded $15,188,000 in false-imprisonment damages ($188,000 economic, $15 million non-economic) plus $12 million in battery

damages ($4 million economic, $8 million non-economic) (T.10446-10447) plus $25 million in punitive damages, finding a specific intent to harm Maya. (T.10621-10622).

The January 6th dependency-court proceeding, Mrs. Kowalski's suicide, and Maya's recovery

At the January 6th dependency-court hearing, the court ordered that Maya remain at JHACH and set a February trial date. (R.40739). At the end of the hearing, Maya's lawyer asked whether Maya could see and hug Mrs. Kowalski. (R.51584). The court denied the request. (R.51584).

Within minutes, Mrs. Kowalski drafted a suicide note. (R.96589-96590). She committed suicide the next day, alone at her Venice home, leaving two notes and multiple drafts. (T.2927; R.103944-103947). In one, she wrote that she could no longer "take the pain" of "being away from Maya and being treated like a criminal." (R.103944). She expressed frustration at watching Maya "suffer in pain" while the "state of Fl and the judge" tied her hands. (R.103944). Her second note blamed the dependency judge for "taking the side of" JHACH and DCF and allowing them to destroy Maya and the Kowalski family. (R.103946). She expressly criticized

the judge's refusal to let her see Maya in court and said he allowed JHACH to treat court orders like "toilet paper" and keep Maya in a prison akin to a Nazi camp. (R.103946-103947). Mrs. Kowalski expressed hope that the dependency judge would ensure that JHACH and the State "reimburse [her] family" and that Dr. Smith and another doctor lose their medical licenses. (R.103947).

Days later, at a January 12 hearing, the dependency court allowed Maya to resume living with Mr. Kowalski, while remaining in DCF's custodial supervision, but prohibited any additional ketamine treatments. (R.40741).

Since early 2017, Maya's physical health has dramatically improved. (T.9535). Through physical therapy—without ketamine—Maya has worked to regain her physical strength and resume walking, running, and ice skating, going years without any CRPS symptoms. (T.3538-3539, 9535). Maya testified that she had no CRPS flare-ups in sixth, seventh, or eighth grade. (T.9535). She exercises daily, typically starting her day with a 90-minute walk then yoga. (T.9535). She has also done "very intense cardio" and weight training. (T.9537). In 2022, she testified that she enjoys cardio and swims and bikes. (T.9540).

Maya's IIED claim

Plaintiffs argued that JHACH's conduct toward Maya exceeded all possible bounds of decency, was shocking, atrocious, and utterly intolerable in a civilized community, and was intended to cause her emotional distress. (T.10211-10215). Plaintiffs did not specify which incident(s) substantiated an IIED claim but pointed to several of Maya's interactions with Ms. Bedy, including the January 6 photographs. (T.10212).

For IIED, the jury awarded Maya $10.5 million in damages ($3 million economic, $7.5 million non-economic). (T.10453). The jury was repeatedly instructed that any awards should be separate and non-duplicative.

The Estate's IIED/wrongful-death claim

Plaintiffs claimed that JHACH's treatment of Maya and the family was intended to, and did, cause Mrs. Kowalski emotional distress. (T.1540). Again, their theory is not that one major incident was done intentionally, but rather several lesser events created the distress. (T.10188, 10208-10211). Almost every event occurred outside Mrs. Kowalski's presence and appears related to Maya's IIED claim. (T.10210-10212, 10214-10215).

Plaintiffs further claimed that JHACH was liable for Mrs. Kowalski's suicide. (T.10210-10211). The claim's rarity prompted significant debate over the proper standard of proof for suicide causation. (T.9793-9813). The court instructed the jury on two causation theories, and it found liability under both. (T.10354-10355, 10451).

For this wrongful death, the jury awarded the Estate $3,653,676. (T.10451-10452). As survivors, Mr. Kowalski was awarded $68 million, and Maya and Kyle were each awarded $20 million. (T.10452-10453).

Mr. Kowalski's fraudulent-billing claim

JHACH's bills to Aetna, the Kowalskis' insurer, contain up to a dozen diagnostic codes, including G90.50 for CRPS (sometimes misidentified "G90.5D," T.3434). (R.71793-71796). Plaintiffs deem this code "fraudulent," claiming that CRPS treatment was (1) never provided and (2) more expensive than what was provided. (R.71793-71795). Mr. Kowalski alleged that he and Aetna detrimentally relied on the G90.50 code, causing him to pay higher co-pays and deductibles. (R.71796). He also alleged that the "fraudulent" bills

would make it more difficult and expensive for him to obtain future insurance. (R.71796).

Plaintiffs' witnesses agreed that the physical, occupational, and psychological therapies JHACH provided were appropriate—regardless of whether Maya had CRPS or psychogenic pain. (T.2208-2209, 3985, 4360, 4441, 5212, 7416, 9396, 2759).

At trial, Mr. Kowalski read excerpts from nearly 900 pages of "Aetna Health Insurance records." (R.104991-105888; T.3434). These Aetna records are not JHACH medical bills. But they establish that Aetna neither rejected nor adjusted a bill due to improper coding. (T.3432-3434)(A.291-298). They also show that no co-pay or deductible was ever applied to pay a JHACH bill. (R.105622-105798)(A.291-298). There is no evidence that Aetna ever claimed a bill misrepresented anything. In its own case, JHACH showed that it billed only for therapies and services it provided. (R.97531-97535).

In closing, Plaintiffs invited jurors to award $1 in "nominal damages," unless jurors could find "evidence involving an increase in insurance or any copays." (T.10218). Instead, the jury returned a

$5 million verdict. (T.10450). The judge relied on this verdict to remit the amount to $2.

Plaintiffs presented evidence that JHACH "took Maya," "prosecuted" the Kowalskis, and should not have reported suspected Munchausen's

Plaintiffs moved in limine to exclude any mention of DCF and the dependency-court proceedings. (R.91694-91697). JHACH explained that the court's ruling on Chapter 39 immunity and apparent agency made the DCF proceedings vital context for JHACH's actions. (R.121669-121674)(A.338-341, 342-344). The court denied the motion but cautioned that "this trial is not a rehash of the dependency proceedings[.]" (R.121675).

Despite this admonition, and despite the court's ruling that JHACH was not liable for reporting suspected child abuse, at trial Plaintiffs blamed JHACH for Maya's sheltering and litigated the propriety of DCF's child-abuse investigation. JHACH repeatedly objected to Plaintiffs' attempts to suggest it was liable for DCF actions and was overruled. (T.1887-1889, 2110, 2131, 3285, 3544-3545, 3855, 4465-4466, 4583-4584, 5424-5425, 5503-5504). JHACH unsuccessfully moved three times for a mistrial based on Plaintiffs' improper statements. (T.3361-3362, 4403-4404, 4421-

4422). The third time, the court threatened to grant a mistrial and sanction Plaintiffs if they did not stop implying that JHACH was liable for taking Maya. (T.4421-4423). Plaintiffs' arguments contained three themes:

1. JHACH "took" Maya

A core theme of Plaintiffs' case was that JHACH destroyed the Kowalski family by "taking" a little girl away from her mother and "warehousing the child" for 97 days. (T.1600). When Ms. Bedy testified, Plaintiffs accused her of failing to appreciate "how serious it is to take a nine-year-old girl away from her family." (T.3971).

Family members testified to the emotional toll that Maya's sheltering caused, although it was the State, not JHACH, that ordered Maya's sheltering. (T.1801, 3281-3282). On the first day of testimony, Mr. Kowalski's brother recounted an October 2016 phone call with Mr. Kowalski: "he says, They took custody of Maya. They took her away from us," leaving everyone "in shock." (T.1801).

Mr. Kowalski testified how painful and "extremely stressful" it was to have a child held in a hospital and "not knowing that she's ever going to see us again." (T.3281-3282).

When Maya testified about her emotional harm from JHACH's conduct, she also focused on her sheltering. (T.5488, 5518). She told jurors, "most of my depression would be revolving around my mom's death and then being taken away, being held at [JHACH]. And I constantly think about those three and half months." (T.5488). She described Octobers as difficult because it "was the month that I was taken." (T.5518).

2. Sally Smith and JHACH "prosecuted" Maya and wrongly accused her parents of abuse.

Plaintiffs also told jurors that JHACH, through Dr. Sally Smith, the CPT medical director who was not employed by JHACH, (T.5221), falsely prosecuted Maya's parents for medical child abuse. In the second sentence of their opening statement, Plaintiffs promised to prove that "from October 7th through the end of the year," JHACH was "wrongfully accusing Beata and Jack Kowalski of child abuse." (T.1556). Plaintiffs told jurors that JHACH "continued to accuse the Kowalskis, Jack and Beata, of being child abusers" and of abusing Maya via "Munchausen by proxy." (T.1560).

Mr. Kowalski testified about the indignity of being accused of—and investigated for—potential child abuse. He told jurors how

offended he was to be questioned by Dr. Smith and that he never gave Dr. Smith permission to enter Maya's room unsupervised or look at her medical records on October 8, 2016. (T.3445, 3447).

Plaintiffs' expert pediatrician Dr. Newberger described Dr. Smith as "taking a prosecutorial role of gathering information within the hospital" to prove "that Beata was a perpetrator." (T.5297-5298). He deemed Dr. Smith "a prosecutor who had no business being a member of the hospital team," and who "took a prosecutorial and punitive role," directing Maya's case. (T.5344-5345). Dr. Newberger questioned Dr. Smith's motivations, accusing her of acting "with cruelty, with opacity of sympathy, and with a propensity to blame" Mrs. Kowalski "as a perpetrator." (T.5288).

3. Healthcare providers should hesitate to report child abuse if they are uncertain.

Although Florida criminalizes the failure to report a reasonable suspicion of child abuse or neglect, § 39.205(1), Fla. Stat., Plaintiffs suggested that healthcare providers should hesitate to report their reasonable suspicions of child abuse, especially Munchausen by proxy. Maya's pediatrician Dr. Wassenaar warned jurors that the

"consequences are high if you get it wrong" and that if "you accuse somebody of it and it's not the case, it's a terrible thing." (T.2030).

Plaintiffs elicited testimony from Dr. Newberger that Munchausen's by proxy "requires a rigorous and careful approach" and is "not a diagnosis that you make casually, because a mother has been accused of something, and a child has been accused of something." (T.5353-5354).

JHACH's implementation of the shelter order as evidence of intentional and malicious conduct

After the trial court interpreted Chapter 39 immunity as covering reporting only, (R.53121, 89282), Plaintiffs blamed JHACH for DCF's decision to remove Maya from her parents' custody and conduct a child-abuse investigation. (T.10188-10189, 10199-10209). Plaintiffs also used JHACH's implementation of the dependency-court shelter order as evidence that JHACH intentionally mistreated Maya and Mrs. Kowalski. (T.10210-10211).

The dependency court gave JHACH discretion to implement the shelter-care orders according to its visitation policies and procedures and to make decisions regarding visitation, deliveries, and telephone and computer use that facilitated Maya's treatment.

(R.96381-96390, 12385-12386, 12408-12409, 12417-12419, 12582-12583). Because Maya's mother was being investigated for medical child abuse, the dependency court restricted Mrs. Kowalski's in-person visitations and video calls. (T.3968). DCF personnel limited Maya's telephone and internet use and prohibited consumption of outside food. (T.6984-85, 6180-6181).

Yet, the court permitted Plaintiffs to point to the court-ordered restrictions and JHACH's judgments in applying them as evidence of JHACH's intentional misdeeds. (T.3284-3301). Plaintiffs' opening statement told jurors that "Maya was kept from her family and friends," "denied access to her priest," and "denied the comfort of her friends and family throughout her stay" at JHACH. (T.1559). "If she wanted to talk to her mom, it had to be on a supervised call," and she "could only see her dad and her brother on prearranged and monitored situations." (T.1593).

Restrictions on visitors, most food deliveries, and some toiletries were presented as evidence of JHACH's intentional cruelty. (T.3305, 4353-4354). But Lindsey Masica, a child-protection investigator unaffiliated with JHACH, testified that all of Maya's visitors had to pass a DCF background check, and she—not

JHACH— prohibited razors because of safety concerns and restricted communion and non-hospital food because of concerns that it may contain liquid ketamine. (T.6984-6985). DCF family support interventionist Tori Niehus testified that she, not JHACH, confiscated cheesecake from Maya's hospital refrigerator, along with all other food, communion wafers, a cell phone, and an iPad, because "Child Protection Investigator supervisors advised us that no outside food was allowed." (T.6180-6181).

Maya's failure to receive one of several dresses delivered to JHACH was also presented as evidence of cruel mistreatment. (T.3307, 4391). Mr. Kowalski and Maya both testified that a "Christmas dress" did not get to Maya on time, with Maya telling jurors that it was "probably rotting in Cathy Bedy's office." (T.3307, 4391).

Plaintiffs suggested that not putting a name plate on Maya's door was JHACH's attempt to dehumanize her. (T.3288). After Mr. Kowalski testified that Maya was "not listed as a patient" on her door or the public registry, Plaintiffs' counsel asked him whether Maya "became a nonentity." (T.3288). Maya testified that multiple nurses would not tell her "why I didn't have a name" on her door.

(T.4339). Ms. Bedy had to explain, over Plaintiffs' objection, that this is standard practice for DCF-sheltered children, who also are not identified in the public-visitor registry. (T.8826-8827). This prompted a juror to ask Ms. Bedy, "Why would the hospital take the child's first name off the door?" (T.8917).

The purported conspiracy to drive Mrs. Kowalski to suicide by abusing Maya

Plaintiffs claimed that JHACH falsely accused Mrs. Kowalski of medical child abuse and that JHACH administrators and Maya's healthcare providers hatched a campaign of harassment and intimidation to intentionally push Mrs. Kowalski to commit suicide. (T.10201, 1561, 1597, 10201-10202, 10210).

Plaintiffs contended that JHACH, indignant that Mrs. Kowalski had "challeng[ed] them," (T.10201), knowingly drove her to suicide by fabricating evidence of abuse to separate her from Maya and disparaging her to Maya to make Maya misperceive her mother as abusive and mentally ill. (T.1561, 1597, 10201-10202, 10210).

For evidence, they pointed to: (1) JHACH's mandated report of suspected child abuse, (T.5986); (2) Ms. Bedy allegedly asking Mr. Kowalski if he ever considered divorcing Mrs. Kowalski, (T.5984);

(3) Ms. Bedy's alleged statement to Maya that her mother was in a "mental institution" and Ms. Bedy could be Maya's mother, (T.5988-5990); (4) JHACH's supervision of Mrs. Kowalski's calls with Maya, (T.5990); (5) the failure to timely deliver the "Christmas dress," (T.5986-5987); and (6) photographing Maya's skin condition before she left JHACH for a court proceeding. (T.3397-3398, 3541, 5994).

Plaintiffs argued that JHACH knew that this conduct would cause Mrs. Kowalski's suicide. (T.4902-4903). Their evidence is one private text message between two doctors after the suicide, wherein a doctor who had not treated Maya for three months said she sadly predicted Mrs. Kowalski's suicide and recalled that "another mother" had "done the same thing." (T.4902-4903).

Plaintiffs called psychiatrist Dr. Scott Richards to opine on why Mrs. Kowalski committed suicide and why JHACH was responsible. (T. 5823, 5836-5837). After initially excluding Dr. Richards's testimony, the trial court reversed itself hours before he took the stand. (T.5780-5783). Although Dr. Richards never met Mrs. Kowalski, he presented a "postmortem psychological evaluation," on the causes of her suicide. (T.5836). He opined that Mrs. Kowalski felt a loss of control "based on the events that

occurred during [Maya's] hospitalization," and believed that this was particularly distressing to Mrs. Kowalski as a devout Catholic raised in communist Poland. (T.5834, 5837).

This loss of control, Dr. Richards opined, triggered Mrs. Kowalski's "maternal instinct," creating an "irresistible impulse" to commit suicide. (T.5840). He testified that Mrs. Kowalski "ma[d]e a deal with God" and put herself "in front of the bullet[.]" (T.5838). She was faced with a "Sophie's choice" and committed suicide as an act of "altruistic surrender." (T.5851,5838).

JHACH evidence of reporting suspected child abuse and enforcing the shelter order

After three weeks of the jury hearing that JHACH stole Maya from her family, imprisoned her, and drove her mother to suicide as part of a grand conspiracy to destroy the Kowalski family, JHACH put on its defense. (T.5911). To defend the reasonableness of its suspicion of Munchausen by proxy and its refusal to uncritically accept the CRPS diagnosis, JHACH introduced Mrs. Kowalski's history of seeking medical treatment for Maya and the prior providers who harbored suspicions about potential abuse. JHACH presented the following chronology:

1. Maya's 2015 asthma complaints and her providers' first concerns.

Mrs. Kowalski took Maya to Doctors Hospital of Sarasota ER for coughing on June 15, 2015, and again on June 16, 2015. (R.116597, 116628). Maya was transferred to JHACH on June 16, 2015, for "mild persistent asthma with acute exacerbation," and discharged within 24 hours (R.108739-108740).

Within a week of Maya's discharge, Mrs. Kowalski visited Dr. Hugh Windom, a JHACH allergist and immunologist, who noted that Maya's cough "sounds like a habit cough[.]" (R.118820). "Something doesn't fit here," he continued, "[s]omething is really not right. This is not just asthma." (R.118820).

When Maya returned a week later, Mrs. Kowalski reported that Maya's asthma "flared" after they left the prior appointment, prompting Mrs. Kowalski to administer 40 mg of the steroid prednisone plus eight albuterol inhaler puffs. (R.118822). Dr. Windom was "disappointed" to hear that Maya "ended up on a week of high dose oral steroids" because her oxygenation never fell below 96%. (R.118823). Dr. Windom told Mrs. Kowalski not to give Maya steroids if her oxygenation was above 94% and noted: "Her parents

were arguing about taking her to the ER, so I wonder what role family dynamics are playing." (R.118823).

Three days later, Mrs. Kowalski took Maya to the Sarasota Memorial Hospital ER for shortness of breath and cough. (R.101639). Mrs. Kowalski reported giving Maya 40 mg prednisone, despite a 96% oxygenation level. (R.101639-101642). The records again raised a "psych component" to Maya's presentation. (R.101641).

Within 48 hours, Mrs. Kowalski took Maya to the JHACH ER, again reporting persistent cough and weakness. (R.109089-109090). Physicians suspected that steroids may have caused muscle inflammation and adrenal suppression, causing Maya muscle pain and swelling. (R.109065). Again, her medical records noted her "habit cough." (R.109092, 109103).

2. Maya spends weeks in two different hospitals, both of which suspect a psychological component to her pain.

Also in the summer of 2015, Maya began complaining of chronic and severe pain. (T.3112-3118). In July and August 2015, Maya spent weeks in two separate hospitals: Lurie Children's Hospital in Chicago and Tampa General. (R.119307, R.119696).

After three days, Lurie discharged Maya with a diagnosis of steroid-induced myositis and an exaggerated psychologic stress response. (R.119307). Lurie healthcare providers noted inconsistencies between what Maya and her mother said Maya could do and her apparent ability, which raised "concern for a psychiatric component to her presentation and specifically, conversion disorder," a psychogenic pain syndrome. (T.8757; R.119311). Lurie records show that Maya could sit upright and hold her head up "without difficulty" but "slump[ed] over," when her mother let go of her. (T.8756; R.119309). Doctors noted that Maya "occasionally pushes herself off mattress with hands," despite claiming difficulty lifting her arms. (T.8753; R.119321, 119323).

Shortly after her hospitalization at Lurie, Maya was admitted to Tampa General. After four weeks at Tampa General, Maya was discharged with "psychological factor affecting physical condition—suspected conversion disorder vs factitious disorder vs other, anxiety disorder, myalgia." (R.119696).

At Tampa General, Maya's rehabilitation nurse, Bonnie Rice, connected Maya's infirmity with her mother's presence. (T.6330-6337). She summarized Maya's relationship with her mother as

"one of the weirdest mother-daughter dyads I've ever seen" and "a really abnormal situation," where she felt "both had significant mental illness." (T.6333).

Nurse Rice documented that Maya "was functionally worse across all domains with mother present and assisting." (T.6336, R.120026). Maya painted her nails and used other fine motor skills for activities she liked, but "when her mother would walk in, she would hold her hands like this and say, 'You have to feed me.'" (T.6336).

Others at Tampa General also noticed discrepancies between Maya's demonstrated physical abilities and self-reporting. The pediatric neuropsychologist, Dr. Jennifer McCain, diagnosed "[p]sychological factor affecting physical condition," (R.119742), and observed that Maya's desire to get her mother's attention "appears to be one of the issues that's contributing to her disability." (T.8533, 8540-41). And the hospital physiatrist Dr. Paul Kornberg, testified that it seemed "like Maya's mental health was a primary issue that was impeding her progress and functional recovery." (T.6739-40).

Many of the care providers at both Lurie Children's and Tampa General had experience with CRPS, but none of them documented

that Maya might have it. At Lurie, the rehabilitation physiatrist said that he did not see any signs consistent with CRPS. (T.7050-52). At Tampa General, Dr. Kornberg testified that he had treated approximately 15 to 20 CRPS patients and Maya's presentation "wasn't consistent with any presentation of CRPS" that he had seen or read about before. (T.6741-44).

3. Mrs. Kowalski diagnoses Maya with CRPS and seeks ketamine treatment.

Mrs. Kowalski first suspected that Maya had CRPS after learning of it from one of her own nursing patients. (T.3135-3137). Before any physician diagnosis, Mrs. Kowalski told Maya's doctor that Maya had been diagnosed with CRPS. (R.114982). She scheduled a consultation with Dr. Kirkpatrick, who provides non-standard CRPS treatment including large-dose ketamine infusions. (R.102509). At that initial consultation, Dr. Kirkpatrick diagnosed Maya with CRPS and recommended heated-pool exercises and medical clearance to undergo a $10,000 four-day course of ketamine infusions. (T.4780, R.102510). Dr. Kirkpatrick gave Maya nearly 908 mg of ketamine from October 6 through 9, 2015. (R.102569-102579).

Within two months, in November 2015, Mrs. Kowalski flew Maya to Mexico to be placed in a five-day "ketamine coma" (T.3476-3477, 3720-3725; R.98754, 97472, 97494, 97501, 97503-97504, 97528), a procedure unavailable in the United States, which caused Maya bacterial and fungal respiratory infections. (T.3704, 3727). Maya returned to Mexico a month later for "booster" infusions. (T.3708). During that time, Mrs. Kowalski published a blog, written as Maya in the first person, documenting Maya's condition and treatments and stating, "I have very high tolerance for drugs; if I was a horse I would be comatosed or dead already…" (R.98754, *see* R.97472, 97494, 97501, 97503-97504, 97528, 97529, 97544, 97703, 97706, 97710, 97715, 97723, 97731, 97746, 97751, 97772, 97790, 97808, 97823, 97854, 97862, 96563-96565, 96568-96571). Mrs. Kowalski also solicited her parish for donations. (R.101971).

4. A physician suspected Munchausen Syndrome by proxy in December 2015, ten months before Maya's sheltering.

Shortly after Maya returned from Mexico, a physician first documented possible Munchausen by proxy. On December 15, 2015, immunologist Dr. Elvin Mendez saw Maya to treat suspected immunodeficiency. Dr. Mendez noted that he was the third

immunologist to see Maya and documented her "ketamine coma" and resulting infections. (R.118957). He also noted her blood work as normal. (R.118959).

Dr. Mendez then noted that Maya's primary-care pediatrician should consider "possible Munchausen by proxy." (R.118959). He documented that while Maya sat "comfortably" in her wheelchair for most of the visit, when he told Mrs. Kowalski that he did not see evidence of immunodeficiency, Maya "began complaining of ears hurting from sound and an apparent headache." (R.118959). Dr. Mendez wondered if Maya's behavior was triggered by his conversation with Mrs. Kowalski. (R.118959).

5. Maya receives 55 ketamine infusions between January and October 2016.

Mrs. Kowalski brought Maya to Dr. Hanna for less-expensive ketamine infusions starting in January 2016. (R.117839, 117842). In March, Maya had a Central Venous Port installed to allow even easier infusions. (R.114682-114683). Although Mrs. Kowalski was instructed to give Maya ketamine orally only, her journal suggests she may have given Maya I.V. ketamine at home through her port in October 2016. (T.3482-3483, R.98761). At trial, Maya testified that

her mother never administered I.V. ketamine at home. (T.4330). In total, Dr. Hanna administered 55 ketamine infusions. (T.8714).

When Mrs. Kowalski brought Maya in for two days of infusion treatments on October 5, 2016, Dr. Hanna referred her to JHACH because he had "failed to help her," rating her quality of life at zero and non-functioning. (T.8710; R.116940). The next day, October 7, 2016, Mr. Kowalski took Maya to the JHACH emergency room on Dr. Hanna's recommendation. (T.8710).

The jury awarded Plaintiffs $261 million

In closing argument, Plaintiffs repeated the theme of a "great American family" destroyed by JHACH's wrongful allegations of abuse. (T.10222). After two days of deliberations, the jury returned a $261 million verdict finding for Plaintiffs on every single count. (R.95860-95880).

The jury awarded Maya:

- for the three false-imprisonment counts, just over $26 million in damages, (R.95861-95866);
- for the two battery counts, $31.5 million, (R.95867-95870);

- for the medical-negligence claim, $26.7 million, (R.95871);
- for the IIED claim, $10.5 million, (R.95879-95880); and
- as punitive damages for false imprisonment and battery, an additional $50 million, (R.95887-95893).

For the counts pertaining to Mrs. Kowalski, the jury awarded:

- Mr. Kowalski, Maya, and Kyle $108 million in wrongful-death damages, (R.95874-95878); and
- the Estate $3.65 million for IIED, (R.97876-95877), and wrongful death.

Finally, the jury awarded Mr. Kowalski:

- for the fraudulent-billing claim, for which Plaintiffs asked for "nominal damages," (T.10218), $5 million, (R.95873-95874); and
- for Maya's pre-majority medical bills caused by the intentional torts, $1,513,500, (R.95861-95870).

The trial court denied JHACH's post-trial motions but remitted damages to $208 million

JHACH filed post-trial motions alternatively seeking a directed verdict, a new trial, and remittitur of the $261 million verdict.

(R.96932-97075). The trial court denied the first two motions and partially denied remittitur. (R.115442-115458).

The court upheld the "rare" award against JHACH for intentionally causing Mrs. Kowalski's suicide, (R.115452), although it acknowledged that Plaintiffs repeatedly raised "issues that would have been tried in the Dependency Court had Beata Kowalski not died by suicide," (R.115445), despite the court's pretrial ruling that they should be excluded. (R.121675). But the court found no unfair prejudice, emphasizing that "both sides constantly attempted to" litigate these issues. (R.115445).

The court derided "JHACH's belief that it was Maya's Savior," (R.115442), but conceded the foundational point of JHACH's defense: "the health care providers at JHACH **to their core believed that Maya was not safe in Beata Kowalski's presence**." (R.115451) (emphasis added). Despite that concession, the court rejected JHACH's "quest to immunize its conduct," holding that Plaintiffs' claims do not "result from any Chapter 39 action JHACH took." (R.115442). The court reasoned that JHACH's challenged "conduct does not remotely result from its call to the DCF hotline or

its participation in the Dependency Court proceeding," (R.115443), and so it was not immune. (R.115444-115446).

The court recognized that Dr. Smith was the Medical Director of the Pinellas County CPT but deemed her an apparent JHACH employee when she consulted on Maya's case or directed Maya's care. (R.115451). Because Dr. Smith simultaneously served in "two separate capacities" for Maya, the court held that apparent agency could make JHACH "liable for her malpractice associated with Maya's care and treatment." (R.115451).

Finally, the court rejected JHACH's argument that an inflamed jury awarded excessive damages. The court upheld most of the quarter-billion-dollar award and commended the jury's "restraint" in awarding $50 million in punitive damages against a non-profit children's hospital. (R.115449).

The court reduced Mr. Kowalski's $68 million wrongful-death award to $26 million, reduced the Estate's award by another $3 million, and deducted $250,000 from each child's Estate award. (R.115453-115454).

As for the fraudulent-billing count, the court denied the motion for judgment without identifying the evidence proving fraud.

Sua sponte it reduced the $5 million fraudulent-billing award to $2. (R.115455). It left the remainder of the verdict intact, reasoning that remitting some awards for breaking "the outer limit of the jury's discretion" did not render every award "improper or the product of passion." (R.115443, 115453). The revised judgment exceeds $208 million. (R.115455-115456, 121137-121142).

SUMMARY OF THE ARGUMENT

Plaintiffs alleged intentional infliction of emotional distress (IIED) for both the child and mother, fraud, false imprisonment, battery, and medical negligence, creating liability for the mother's suicide. Legal errors led to an inflamed jury's $261 million verdict, and three judgments totaling $208 million. The hospital is entitled to judgment on many claims and re-trial of the remaining claims.

First, the Estate's wrongful-death claim, based on IIED-suicide, never should have gone to the jury. The Estate did not prove IIED because it never identified hospital conduct that rose to the exceptional level required to establish legal "outrageousness."

And it failed to prove wrongful death because there was no evidence of atrocious JHACH conduct intended to cause Mrs. Kowalski to commit suicide or to create distress that made her suicide foreseeable. Liability for IIED-suicide also presents a sensitive matter of first impression. This Court should require proof of outrageous conduct intending to cause severe emotional distress *and* suicide. Any less-restrictive standard should come from the Legislature. JHACH is entitled to a reversal and judgment in JHACH's favor on this claim on remand. *See* Arg. I.

Second, the intentional-fraud claim should never have gone to the jury. Mr. Kowalski argued that JHACH committed intentional fraud in its bills to Aetna by including a billing code for CRPS. Although Mr. Kowalski met *none* of fraud's required elements, the trial court refused to direct a verdict. The jury returned an irrational $5 million award because of Plaintiffs' misleading approach to both liability and damages for all claims. JHACH is entitled to reversal and dismissal of this claim. *See* Arg. II.

The jury also awarded Mr. Kowalski $1,513,498 for Maya's pre-majority medical expenses for six intentional torts. There was no evidence that any of these torts caused physical injuries or resulted in any medical treatment related to these events. The trial court declined all posttrial relief for this excessive jury award. JHACH is at least entitled to a new trial on these damages. *See id.*

The admission of prejudicial evidence for the first two judgments, and the jury's apparent passion, warrant a new trial on Maya's judgment. Plaintiffs cannot show that these major errors were harmless as to the remainder of the verdict.

Third, additional errors affect Maya's judgment. She failed to prove her IIED claim, (Arg. III), or that JHACH falsely imprisoned

her by keeping her in the ER/PICU for the first six days. *See* Arg. IV. Mrs. Kowalski, for some of this period, wanted Maya discharged against medical advice. But Plaintiffs had to prove that the doctors' decision to keep her was "unreasonable and unwarranted and without legal authority." (R.96317, T.10054). JHACH was entitled to a directed verdict on this false-imprisonment claim.

Fourth, JHACH's defense of Maya's other claims was harmed by the court's erroneous partial application of Chapter 39 immunity. *See* Arg. V. JHACH is not liable for Dr. Sally Smith's conduct or for much of its authorized child-protection activity when treating Maya, participating in dependency-court proceedings, and implementing a shelter order that separated Maya from her mother for 91 days. This requires a new trial for any remaining claims.

Fifth, the damages were excessive and improper for several reasons. *See* Arg. VI. The jury's compensatory awards were irrationally excessive because, in part, Plaintiffs' damages argument was misleading. The punitive-damages claims were not proven and should not have gone to the jury, especially with claims of "specific intent to harm." Even if properly submitted to the jury, the $50 million punitive-damages award was excessive.

ARGUMENT

I. The trial court erred in denying summary judgment and the pre- and post-verdict motions for directed verdict on the IIED and wrongful-death claims for Mrs. Kowalski.

Plaintiffs claimed that JHACH healthcare providers intentionally or recklessly caused Mrs. Kowalski severe emotional distress sufficient to drive her to commit suicide. They alleged that JHACH acted without a good-faith belief of potential abuse, executing a "harassment and intimidation campaign" to "push[] Beata to the brink" and destroy her relationship with Maya and her husband. (R.71801).

But trial produced no evidence that JHACH employees, individually or collectively, engaged in atrocious conduct utterly intolerable in a civilized community, the threshold requirement for any IIED claim. Nor did evidence at trial show any *intent* to cause Mrs. Kowalski extreme emotional distress, *i.e.* stress so substantial or enduring that no reasonable person in a civilized society should be expected to endure it.

The "overwhelming weight of authority" holds that suicide is nearly always a new and intervening act that breaks the causal connection between the wrongful act and death. *Nelson v. Seaboard*

C. L. R. Co., 398 So. 2d 980, 982 (Fla. 1st DCA 1981). Successful wrongful-death claims premised upon IIED causing suicide are so rare, in fact, that this Court will be the first in the country to consider the necessary proof for such claims after a jury verdict.

On this question of first impression, JHACH submits that the foreseeability necessary to support this controversial liability theory requires proof of an actual intent to cause *suicide* or some level of stress more severe than what non-suicide IIED claims require.

Courts that have considered the issue pretrial recognize only two exceptions to the rule that, absent a special duty, suicide is an intervening act: where truly outrageous conduct (1) caused the decedent to experience an "irresistible impulse" for self-harm; or (2) was a "substantial cause" of the suicide. Plaintiffs' evidence could not meet either exception.

Without evidence to support the claims relating to Mrs. Kowalski, the Court should reverse the judgments on these counts and remand with instructions to enter judgment for JHACH.

Standard of Review: Denials of motions for summary judgment, directed verdict, and JNOV are all reviewed de novo. *See, e.g., Allison v. Grand at Olde Carrollwood Condo. Ass'n, Inc.*, 369 So.

3d 1200, 1204 (Fla. 2d DCA 2023); *Sims v. Cristinzio*, 898 So. 2d 1004, 1005 (Fla. 2d DCA 2005). A directed verdict should be granted where no proper view of the evidence could sustain a verdict for the nonmoving party. *R.J. Reynolds Tobacco Co. v. Giambalvo*, 386 So. 3d 251, 254 (Fla. 2d DCA 2024).

A. No evidence shows that JHACH engaged in conduct sufficiently outrageous to support an IIED claim.

Plaintiffs never presented evidence, either at the summary-judgment stage or at trial, that JHACH employees, individually or collectively, engaged in conduct outrageous enough to support an IIED judgment as to Mrs. Kowalski.

Florida law sets a very high bar for IIED claims. Plaintiffs must prove that the defendant's conduct: (1) was intended to cause distress or recklessly disregarded the likelihood of emotional distress; (2) exceeded "all possible bounds of decency," and "is regarded as shocking, atrocious, and utterly intolerable in a civilized community"; and (3) caused severe emotional distress. Fla. Std. Jury Instr. (Civ.) 410.4; *see Winter Haven Hosp., Inc. v. Liles*, 148 So. 3d 507, 515 (Fla. 2d DCA 2014). "[S]evere emotional distress means emotional distress of such a substantial quality or

enduring quality that no reasonable person in a civilized society should be expected to endure it." *Kim v. Jung Hyun Chang*, 249 So. 3d 1300, 1305 (Fla. 2d DCA 2018) (cleaned up); *see* Fla. Std. Jury Instr. (Civ.) 410.5.

"The standard for outrageous conduct is particularly high in Florida." *Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998) (cleaned up). It is not enough that a defendant has intentionally caused distress, acted with malice or criminal intent, or that the conduct would entitle a plaintiff to punitive damages. Restatement (Second) of Torts § 46; *Lopez v. Target Corp.*, 676 F.3d 1230, 1236 (11th Cir. 2012) (applying Florida law). Even "extremely reprehensible" conduct can fall short of the degree of "outrageousness and atrociousness" required to sustain an IIED claim. *Lay v. Roux Lab'ys, Inc.*, 379 So. 2d 451, 452 (Fla. 1st DCA 1980). Only where the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" can IIED liability attach. Restatement § 46.

Whether conduct is sufficiently outrageous to support an IIED claim is "a question of law, not a question of fact." *Liberty Mut. Ins.*

Co. v. Steadman, 968 So. 2d 592, 595 (Fla. 2d DCA 2007); *Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. 2d DCA 1985). And the outrageousness of the conduct must be viewed objectively, not by the affected person's subjective feelings. *Mellette v. Trinity Mem'l Cemetery, Inc.*, 95 So. 3d 1043, 1048-49 (Fla. 2d DCA 2012). Only if the court finds as a matter of law that the conduct is objectively outrageous enough to support an IIED verdict can the case go to the jury. *Steadman*, 968 So. 2d at 595 n.1.

Plaintiffs never clearly articulated which conduct supports the Estate's IIED claim. Responding to JHACH's motion for a directed verdict, Plaintiffs pointed to Ms. Bedy's (1) "interrupting" Maya's phone calls with her mother, while monitoring calls under the sheltering order, (T.5990); (2) not delivering a Christmas dress to Maya, (T.5992); (3) asking Mr. Kowalski if he had ever considered divorcing Mrs. Kowalski, (T.5992); (4) telling Maya that her mother was in a "mental institution" and Ms. Bedy could be Maya's mother, (T.5989); and (5) photographing Maya to document her skin condition, (T.3397-3398, 3541, 5994).

In closing, Plaintiffs argued that the evidence of JHACH's "outrageous" conduct toward Mrs. Kowalski was: (1) changing

Maya's diagnosis, (T.10201); (2) bringing Dr. Sally Smith into the case, (T.10205); and (3) telling the Kowalskis that Maya could not leave the hospital, (T.10206), all of which were done in the child-abuse investigation and dependency-court proceedings. But none of these eight allegations rise to the level of extreme and outrageous conduct that is "beyond all bounds of decency" and "utterly intolerable in a civilized community." *Kim*, 249 So. 3d at 1305. Plaintiffs' inability to prove such conduct dooms their claim.

Plaintiffs cannot alter objective reality by arguing that JHACH "kidnapped" and "tortured" Maya or by subjectively considering JHACH's conduct "outrageous." *See Glegg v. Hurk*, 379 So. 3d 1171, 1174 (Fla. 4th DCA 2024). The *Glegg* court rejected a father's IIED claim against his daughter's step-father based on allegations of "kidnapping" and interfering with the parent-child relationship. The father "wildly exaggerate[d]" the stepfather's conduct, the court said, and even if the father subjectively considered it "kidnapping," "courts do not focus on the alleged victim's subjective response to, or description of, the actor's conduct." *Id.* When viewed objectively, the court held, the step-father's conduct was "nowhere near the level of 'outrageous' conduct" necessary to state a claim for IIED. *Id.*

JHACH's conduct in this case bears no resemblance to conduct found outrageous enough to send an IIED claim to a jury. Conduct such as an insurance company intentionally delaying approval of a patient's double lung transplant to "hasten her demise," *Steadman*, 968 So. 2d at 596, a creditor lying about a debtor's children being in a serious car accident as a collection tactic, *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956, 958 (Fla. 1st DCA 1979), or a cemetery disinterring the plaintiff's late husband against her wishes and shipping the body to another state, *Mellette*, 95 So. 3d at 1048.

Even if the conduct were "outrageous" and intentional, it cannot support an IIED claim because Chapter 39 authorized much of it and JHACH was acting within its legal rights. *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985) (rejecting an IIED claim based on conduct within the defendant's legal rights to perform). Conduct that otherwise might be considered extreme and outrageous—even when substantially certain to cause severe emotional distress—cannot support IIED liability when it is within a defendant's "legal rights" or duties. Restatement § 46, cmt g. In *Metro. Life*, the defendant insurance company stopped paying for

round-the-clock nursing care after plaintiffs failed to comply with the policy requirement to provide proof of Medicare ineligibility. 467 So. 2d at 278. This prompted the wife's transfer to a nursing facility, where she soon died. *Id.* Because the insurance company had the right to discontinue payment absent proof of Medicare ineligibility, the conduct could not support an IIED claim. *Id.* at 279. The "tragic results" and defendant's conduct "in reckless disregard of the potential for such tragedy" did not matter for IIED liability, even after jurors found it atrocious. *Id. See Southland Corp. v. Bartsch*, 522 So. 2d 1053, 1056 (Fla. 5th DCA 1988) (reversing IIED verdict against store owner who had six-year-old arrested for stealing gum).

Here, JHACH was acting within its legal rights and fulfilling legal obligations under Chapter 39 and the dependency court's sheltering order. Maya's time at JHACH and the court-imposed restrictions on Mrs. Kowalski's contact with her were undoubtedly stressful to both mother and daughter. But JHACH could not return Maya to her mother and was obligated to enforce the court order restricting Mrs. Kowalski's contact with Maya. Although

Plaintiffs argued that, as in *Metro. Life*, Defendant's conduct had "tragic results," it cannot support an IIED claim.

Because none of the alleged conduct clears the IIED outrageousness threshold, jurors never should have considered an IIED claim. For this reason alone, the judgment should be reversed.

B. No evidence shows that JHACH acted with the intent to cause Mrs. Kowalski emotional distress.

Because the Estate failed to prove truly outrageous conduct, this Court need go no further to order judgment for JHACH. But Plaintiffs also failed to establish JHACH's intent to cause Mrs. Kowalski emotional distress or that it acted with reckless disregard for her emotional distress. Plaintiffs alleged that JHACH's "outrageous" conduct was retaliation for Mrs. Kowalski's asking "pointed questions" and taking down names when Maya was in the ICU. (T.10201-10202). According to Plaintiffs, Maya's providers "panicked" when Mrs. Kowalski questioned them "and they decided they weren't going to let this brusque lady with an Eastern European accent com[e] in and tell[] then how to do their job[.]" (T.10203-10204). So they plotted to falsely accuse her of child abuse and intentionally mistreat her daughter to keep the "pressure

on" Mrs. Kowalski and ultimately push her "to the edge." (T.10210). Plaintiffs imagine that, because Mrs. Kowalski asked too many questions, JHACH launched a months-long hospital-wide conspiracy to abuse Maya and drive her mother to suicide.

No evidence supports Plaintiffs' theory. Mrs. Kowalski was miles away when most of the alleged conduct occurred. So Plaintiffs' claim was that JHACH intended to cause Mrs. Kowalski severe emotional distress by (1) engaging in outrageous conduct outside of her presence (2) relying on Maya or Mr. Kowalski to relay the information to her so that (3) hearing the information would cause Mrs. Kowalski's severe emotional distress.

But that does not support IIED liability. *See M.M. v. M.P.S.*, 556 So. 2d 1140 (Fla. 3d DCA 1989). The *M.M.* court held that IIED failed as a matter of law where the defendant told plaintiffs that he had repeatedly sexually molested their young daughter for 15 years. *Id.* at 1140. Despite the truly outrageous conduct, the court explained that it cannot "allow relatives of tort victims compensation for the distress they suffer when they receive bad news about family members when there is no attendant intentional or reckless conduct directed toward them" because "an avalanche of

litigation would ensue." *Id.* at 1141. Where an IIED plaintiff is not the direct "recipient of the insult or abuse," the message relaying the outrageous conduct must be "clearly directed at the plaintiff through a third person" for the claim to survive. *Habelow v. Travelers Ins. Co.*, 389 So. 2d 218, 220 (Fla. 5th DCA 1980). There is no evidence of that here, only argument.

Just as the absence of sufficiently outrageous conduct is itself dispositive, the absence of intent, by itself, also defeats the Estate's IIED claim. The trial court found as much when ruling on JHACH's post-trial motions. It recognized that JHACH providers "to their core believed that Maya was not safe in Beata Kowalski's presence." (R.115451). Yet it nevertheless denied JHACH's motion for judgment on the Estate's IIED claim. (R.115451). The Estate did not prove IIED's elements. This Court should vacate the Estate's IIED judgment and remand to the trial court with instructions to enter judgment for JHACH.

C. JHACH cannot be liable for Mrs. Kowalski's suicide.

There is no evidence that JHACH engaged in outrageous conduct or intended to cause Mrs. Kowalski emotional distress. But even if Plaintiffs had stated an IIED claim, the wrongful-death claim

still fails because JHACH cannot be liable for Mrs. Kowalski's suicide. The "overwhelming weight of authority" holds that, unless a special duty exists between the parties, suicide is "an independent intervening act," which breaks the causal link between the defendant's conduct and the resulting harm. *Seaboard*, 398 So. 2d at 982. Florida courts have not directly spoken on this issue.[4]

1. Any rule of law creating a wrongful-death action for suicide arising from IIED needs to be extremely narrow.

JHACH is not asking this Court to categorically bar IIED-suicide claims. Instead, it suggests that, if Florida courts recognize such claims, they should require a more stringent standard than that applied to non-suicide IIED claims. So, if a person intentionally causes emotional distress while encouraging another to commit suicide, an IIED-suicide claim should exist.

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[4] In *Seaboard*, the First District held that an employer might be liable for an employee's suicide under the Federal Employers' Liability Act (FELA). 398 So. 2d at 982; *see* 45 U.S.C. § 51. That holding is inapplicable here because FELA liability is far broader than common-law tort liability. *Id.* Under FELA's "relaxed standard of causation," plaintiffs need not even show that the employer's negligence proximately caused the injury or death. *Conrail v. Gottshall*, 512 U.S. 532, 543 (1994).

In the trial court, JHACH argued that, for a defendant's extreme and outrageous conduct to be a legal cause of suicide, it must have (1) been intended to cause severe emotional distress *and* suicide, and (2) caused plaintiff to experience an irresistible impulse so severe that it destroys the plaintiff's ability to appreciate suicide's consequences.

JHACH maintains that Florida should establish this high standard. Grieving families often blame someone besides the decedent. And without tight guardrails, a rule allowing wrongful-death suicide liability, like the claim permitted here, could trigger an avalanche of lawsuits.

If a claim with a less-rigorous standard were to exist, JHACH suggests that only the Legislature should create it.

2. Under out-of-state case law, JHACH cannot be liable for Mrs. Kowalski's suicide.

Out-of-state courts have recognized two exceptions to the general rule that suicide is an intervening act that breaks the causal chain: where (1) the defendant's wrongful act created a state of insanity that caused an irresistible impulse for self-harm; or (2) the intentionally tortious conduct of the defendant was a

"substantial cause" of the suicide. *Mikell v. Sch. Admin. Unit No. 33*, 972 A.2d 1050, 1054 (N.H. 2009). No evidence of either exception exists here.

The "irresistible impulse" exception reasons that a decedent acting in a "delirium or frenzy" or in the throes of "an uncontrollable impulse" brought on by the defendant's conduct engages in no "new and independent" act that destroys causation. *Clift v. Narragansett TV L.P.*, 688 A.2d 805, 808-09 (R.I. 1996). The "delirium/insanity" exception is "extremely limited in application" and typically involves severe physical injury. *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 736-37 (6th Cir. 2007); *Mikell*, 972 A.2d at 1054.

The "substantial cause" exception has been applied when a defendant's intentional conduct allegedly led to suicide. In those cases, "the plaintiff must demonstrate that the tortfeasor, by extreme and outrageous conduct, intentionally wronged a victim and that this intentional conduct caused severe emotional distress in his victim which was a substantial factor in bringing about the suicide of the victim." *Mikell*, 972 A.2d at 1054.

As argued to the trial court, a "substantial factor" is more likely to confuse a jury in this context than to sufficiently describe

the level of causation needed for this extreme claim. Even applying this test, however, Plaintiffs fail. The only evidence supporting JHACH's liability for Mrs. Kowalski's suicide was Dr. Scott Richards's counterfactual opinion testimony. Dr. Richards is Plaintiffs' counsel's fraternity brother and life-long friend. (T.5827). He has no specialized education or training in suicide and has done no research into its causes. (T.5827-5830). His experience with suicide is limited to routine psychiatric-intake questions addressing suicidality. (T.5830).

Dr. Richards never met Mrs. Kowalski, but he testified that he reviewed her "personal history, her past history, her familial history," and "events she may have gone through in her life" to determine her state of mind at the time of her death and the substantial causes of her suicide. (T.5789).

Dr. Richards told the jury that Mrs. Kowalski experienced an "irresistible impulse" to commit suicide out of "altruistic surrender," which he described as an overwhelming impulse to "do something for others without any thought of yourself," and even "discount[ing] any harm to yourself." (T.5838). He even told jurors that Mrs.

Kowalski was presented with a "Sophie's choice" and made a "deal with God" to get Maya home in exchange for her suicide. (T.5838).

He did not say that "altruistic" suicide is a recognized theory in psychiatry. Nor did he refer to scientific literature, studies, personal experiences with other patients, or generally accepted psychiatric techniques. Indeed, Dr. Richards failed to provide any support for his ad hoc theory.

Dr. Richards's "altruistic" irresistible-impulse theory not only lacked support, it contradicted the evidence. Mrs. Kowalski wrote several drafts of two suicide notes—one the day before her suicide and only minutes after the dependency court denied her request to hug Maya. In both, she stated that Maya was suffering at JHACH and that committing suicide would prompt her discharge. Suicide notes are "perhaps the most important piece of physical evidence available as to the state of [Mrs. Kowalski's] mind immediately" before she took her own life. *See Seaboard*, 398 So. 2d at 981. Mrs. Kowalski wrote that she can no longer "take the pain" of "being away from Maya and being treated like a criminal." (R.103944). She expressed frustration at watching Maya "suffer in pain" while the "state of Fl and the judge" tied her hands. (R.103944).

In another note, she blamed the dependency-court judge for allowing JHACH and DCF to destroy Maya and feared that Maya's CRPS would worsen if she stayed at JHACH, resulting in "her slow, painful death." (R.103947). She directly criticized the judge's refusal to allow her to see Maya in court a day earlier. (R.103946).

Dr. Richards admitted that the stressors that drove Mrs. Kowalski to suicide were (1) being "unable to touch her child, see her child," (2) the "limitations on her ability to control her world," and (3) the "overwhelming" loss of control during the child-abuse investigation. (T.5837-5838). Despite acknowledging that it was the dependency-court judge that prohibited the hug and any other physical contact between Maya and her mother, Dr. Richards insisted that *JHACH's* treatment of Maya was somehow "a direct factor" in Mrs. Kowalski's suicide and her "perception of the hospital" was a "substantial factor" in the irresistible impulse that led to her suicide. (T.5489, 5842).

Even Plaintiffs acknowledged that Mrs. Kowalski's suicide was not caused by JHACH's conduct but by her desire to end DCF sheltering. They argued that Mrs. Kowalski "knew that she was the key. If she was in the picture, [Maya] was never going to get out of

there, and it was likely that [Maya] was going to end up in some kind of foster care and in some situation where she would be even worse." (T.10209). In other words, she committed suicide because she thought it was the fastest way for Maya to return home.

JHACH was not responsible for the orders sheltering Maya from Ms. Kowalski, restricting in-person visits, or denying Mrs. Kowalski's request to hug Maya. Mrs. Kowalski explained her reasons for committing suicide, and they were not substantially based on JHACH's conduct.

D. The erroneous inclusion of the Estate's IIED claim deprived JHACH of a fair trial.

The arguments that JHACH was responsible for Mrs. Kowalski's suicide infected the entire trial and caused JHACH irreparable prejudice. Jurors saw unblurred photos of Mrs. Kowalski's hanging corpse. (T.2913-2915). They listened to the 911 call of Mr. Kowalski and Kyle finding her body, over objection. (T.2615). They read her suicide notes. (T.2925, 2927).

They heard Maya's tearful testimony that she now wears the Christmas necklace that she gave her mother shortly before her suicide. (T.4335). Maya testified that her mother wore it when she

died. (T.4335-4336). Maya also explained that certain colors and smells remind her of her mother, and that even looking in the mirror is hard because she resembles her mother. (T.5487).

Maya also told the jury that she replays her last phone call with her mother and wonders if there was something she could have said to save her mother's life. (T.5509). She testified that she blames herself for her mother's suicide because her mother "end[ed] her life to get me out of there." (T.5510).

Kyle testified that he still hears his mother's voice and that he stopped playing piano and speaking Polish after her death. (T.5384-5385). He told the jury how difficult it is to live in the house where his mother committed suicide and that he "breaks down" whenever he goes into the garage. (T.5391).

The undeniably emotional impact of such testimony requires a completely new trial if the suicide claim should not have been tried. The beneficiary of a civil-trial error has the burden of proving harmlessness, which "is no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Plaintiffs cannot show that this evidence did not possibly affect the verdict. Indeed, the excessive verdict

shows the evidence's unfairly prejudicial effect on the jury. It awarded Mr. Kowalski, Kyle, and Maya a combined $108.6 million for Mrs. Kowalski's death plus $3 million to the Estate. JHACH is entitled to a new trial on all remaining claims, without inflammatory evidence of Mrs. Kowalski's suicide.

II. The trial court erred in denying the motions for summary judgment and directed verdict on Mr. Kowalski's claim for insurance fraud.

Mr. Kowalski alleged that he was harmed by JHACH's "fraudulent billing" of his insurer. Mr. Kowalski thinks that JHACH provided no CRPS treatments, apparently because it refused to provide high-dose ketamine, so he believes that the CRPS diagnostic code that appeared on some JHACH bills is fraudulent and alleges that he was somehow harmed by Aetna's paying these bills. (R.71793-71796). Plaintiffs never produced evidence sufficient to prove any elements of this claim. The trial court erred by not dismissing it.

Standard of Review: The failure to present a prima facie case of the elements of a fraud claim is reviewed de novo. *Allison*, 369 So. 3d at 1204.

Needing to prove five essential elements of fraudulent misrepresentation, Plaintiffs proved *none*. The court delivered the standard jury instruction, which states the five required elements:

> (1) JHACH made a false statement concerning a material fact,
>
> (2) JHACH (through at least one agent or employee) knew the statement was false or made it without regard to its truth,
>
> (3) JHACH intended that another would rely on the false statement,
>
> (4) either Aetna or Mr. Kowalski relied on the statement,
>
> (5) resulting in harm.

(R.96347)(A.249-251); *see Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (stating the same as four elements).

When JHACH moved for summary judgment, and after Plaintiffs presented their case in chief at trial, Plaintiffs had never:

(1) Offered expert testimony opining the CRPS codes on the bills were misstatements of fact;

(2) Proved that the person who prepared the bill knew it contained a false or reckless statement;

(3) Proved that the person made a false statement intending that Aetna or Mr. Kowalski would rely on it; or

(4) proved that such statements harmed Mr. Kowalski or Aetna.

Indeed, witnesses testified that JHACH provided in-patient physical, occupational, and psychological therapy to Maya. (T.2208-2209, 3985, 4360, 4441, 5212). And both JHACH's doctors and Maya's CRPS experts testified that these therapies were appropriate regardless of whether she had CRPS or a purely psychological condition. (T.7416, 9396, 2759, 2208-2209, 3985, 5212, 4360, 4441).

Mr. Kowalski introduced no evidence that he received or paid a JHACH bill sent to him for a co-payment or deductible. He provided no proof that Aetna applied even $1 of his deductible to JHACH's bills. Indeed, Aetna's lengthy report proved that it did *not* apply a deductible or co-pay. (R.104991-105888). And JHACH's evidence showed Aetna reviewed the bills and paid all but $11 of the billed charges. (T.8629).

As for damages, Mr. Kowalski claimed that JHACH's "fraud" increased his medical-insurance costs, but he proved only that he obtained COBRA coverage for $1,300/month after Mrs. Kowalski died. (T.3404). COBRA coverage was required because Mrs.

Kowalski was no longer employed. (T.3404, 5418). Although it carried a higher premium than the Aetna group coverage, that had nothing to do with CRPS billing codes.

Mr. Kowalski claimed that fraud might have created insurance liens against his lawsuit recovery. (T.5117-5121, 5434, 9587-9593). But he never provided any proof of this confusing "lien" theory. After trial, Mr. Kowalski filed documents showing that any liens against him were resolved by the prior settlement in this case. (R.115468-115474). Thus, Mr. Kowalski did not reserve jurisdiction in any of these judgments to resolve any liens.

The erroneous denial of JHACH's motion for summary judgment freed Plaintiffs to argue "fraudulent conduct" by JHACH throughout trial without any proof of the required elements. (T.1564, 10217). After Plaintiffs rested, JHACH moved for directed verdict on the fraud count because Plaintiffs failed to make a prima facie case. (T.6012-6020). The trial court took the motion under advisement. (T.6020).

This forced JHACH to use valuable trial time presenting an employee with billing expertise to further explain that its bills were appropriate, while Plaintiffs continued to imply that JHACH

fraudulently bills its patients. (T.8583-8660). At the close of evidence, JHACH renewed its motion for directed verdict on the fraud count, which the trial court denied. (T.9722).

Perhaps recognizing that they failed to prove damages, in closing, Plaintiffs suggested that jurors could award nominal damages of $1 for the fraud claim unless they found nonexistent "evidence involving an increase in insurance or any co-pays." (T.10218). The jury returned a verdict for Mr. Kowalski, specifically finding JHACH liable for fraud and awarding *$5 million* in damages. (T.10352-10353; R.95873-95874).

Plaintiffs ignored the jury's indefensible verdict in post-trial motions, proposing a one-dollar judgment on the $5 million fraud award. (R.96542-96543). JHACH filed a renewed motion for directed verdict and a new trial because the verdict was excessive and against the manifest weight of the evidence. (R.115442-115458) (A.32-175). JHACH did not seek remittitur because there was no rational basis to award any amount above zero. The trial court remitted the verdict to $2, denying JHACH's requested relief without discussing any evidence. (R.115455). Plaintiffs accepted this remittitur. (R.121135-121136).

The trial court should have dismissed the fraud count every time that JHACH requested it because Mr. Kowalski failed to prove a single element of fraud.

Plaintiffs cannot prove that this error had "no reasonable possibility" of contributing to the verdict. *Special*, 160 So. 3d at 1256. Allowing Plaintiffs to rail against JHACH's "fraud" against its patients and their families for weeks at trial, without any evidence, further deepened the jury's hostility to JHACH. Already inflamed by the trial court's erroneous decision to allow Plaintiffs to argue that JHACH intentionally caused Maya's mother's suicide, the jury reacted with passion and prejudice to unproven allegations that JHACH also fraudulently billed the family. This animosity poisoned JHACH's entire case, including its defense of Maya's claims. And even a nominal damages judgment on this claim results in a judgment against JHACH that it defrauded an insurance company and a patient's parents on an unproven claim. This cannot stand.

This Court must reverse the judgment on the fraud claim and remand with instructions to order judgment in JHACH's favor and order a new trial on any claims that remain after this appeal.

III. The trial court erred in denying the motion for directed verdict on Maya's IIED claim.

Just as there was no evidence of outrageous conduct or intent to cause distress sufficient to support Mrs. Kowalski's IIED claim, no evidence supports Maya's IIED claims. Again, Maya must show that JHACH's conduct toward her not only was intended to cause distress or recklessly disregarded the likelihood of emotional distress but also exceeded "all possible bounds of decency" and "is regarded as shocking, atrocious, and utterly intolerable in a civilized community." Fla. Std. Jury Instr. (Civ.) 410.4; *see* Arg. I, *supra,* at 51-70.

Although Plaintiffs aggressively condemn JHACH's conduct, they resist clarifying what specific JHACH conduct was utterly intolerable to any objective civilized person and done to Maya with intent to cause emotional distress. Mere medical negligence would not be extreme and outrageous intentional misconduct. Nor is it utterly intolerable for healthcare providers who "to their core believed that Maya was unsafe in Beata Kowalski's presence," to detain Maya—as Plaintiffs allege—while DCF investigates the complex case. (R.115451). And having a social worker and nurse

photograph a protesting child's skin condition before releasing her from the hospital is not utterly intolerable when the hospital is sheltering the child from parental abuse and a physician with good-faith suspicions of self-harm has recently requested the photos.

Lacking any evidence of extreme and outrageous conduct against Maya, Plaintiffs try to create it with counter-factual narrative. Although Maya testified that she was left alone in a darkened EEG room for 48 hours and forced to defecate in her bed by nurses who placed a portable commode just out of reach and refused to help her, video evidence proves otherwise. (T.4361-4363; R.97112-97117).

Maya's EEG room was largely indistinguishable from Maya's other patient room on the same floor, apart from its video-recording capacity. (R.138988, T.9465, 9482-9483). It was neither dark nor windowless. The video shows that, while in the EEG room, Maya watched television and the children's movie Happy Feet 2, (R.97114), played with her stuffed animals, (R.97114), wrote in her journal, (R.97113), painted with visitors, (R.97115), filed her nails (R.97113), and ate chocolate cake and ice cream, (R.97112, 97115).

It also shows her being wheeled out of the room at least twice for physical therapy. (R.97113, 97116). This was no dungeon.

More important, the video shows that Maya was not forced to defecate in her bed. She was transferred to the commode at least four times and declined at least two additional offers to be helped to the commode. (R.97114-97116). The only competent testimony of proper commode placement was that, to allow the nurse to safely position herself to transfer the patient from bed to commode, it must *not* be placed against the bed. (T.9483-9484). JHACH is entitled to judgment as a matter of law on Maya's IIED claim, and any new trial cannot include it.

IV. The trial court erred in denying the motion for directed verdict as to the first false-imprisonment claim.

The evidence supporting Maya's first false-imprisonment claim is likewise insufficient. Plaintiffs claim that JHACH falsely imprisoned Maya during the first week of her hospital stay when they allegedly refused to discharge her despite her parents' request. (T.10206-10207). There was evidence that JHACH obtained Maya's parents' consent for her to stay at JHACH through October 13th

but, regardless, JHACH's conduct was both reasonable and statutorily protected and cannot be part of a new trial.

First, proof of false imprisonment requires, among other things, an unlawful detention that "is unreasonable and unwarranted under the circumstances." *Mathis v. Coats*, 24 So. 3d 1284, 1289 (Fla. 2d DCA 2010). Given the trial court's pre-trial ruling that—as a matter of law—JHACH was reasonable to suspect Munchausen by proxy and its posttrial recognition that JHACH healthcare providers at "JHACH to their core believed that Maya was not safe in Beata Kowalski's presence," their actions to protect Maya in her first week at JHACH cannot be "unreasonable and unwarranted."

Second, Plaintiffs also cannot meet false imprisonment's required element of action "without legal authority." *Mathis*, 24 So. 3d at 1289. Chapter 39 authorizes healthcare providers to "detain [a] child without the consent of the parents" if "returning the child to" parental custody "presents an imminent danger to the child's life or physical or mental health." § 39.395, Fla. Stat.

The provider must "immediately" notify DCF and, if DCF determines the child should be detained, DCF must petition the

court for custody within 24 hours. § 39.395, Fla. Stat. While the statute clearly requires *DCF* to act within 24 hours, it is silent on whether Florida healthcare providers must return a child to a life-threatening situation if DCF fails to act within 24 hours.

Maya's hospitalization from October 7 until she was ordered sheltered on October 13 is authorized under Section 39.395. The first 24 hours are expressly authorized, and 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. Within a week of Maya's initial detention, a court ordered Maya sheltered. Because JHACH's conduct was authorized by Chapter 39, a new trial cannot include this claim of false imprisonment.

V. The trial court's erroneous interpretation of Chapter 39 requires a new trial on all remaining claims.

Despite initially recognizing Chapter 39's immunity, the trial court misinterpreted plain statutory language when recognizing only reporting immunity. The error allowed Plaintiffs to do exactly what Chapter 39 forbids: seek civil liability and damages for good-

faith participation in a child-abuse investigation and court-ordered sheltering.

A. Chapter 39 immunity is necessarily broad and protects even overzealous good-faith actions to protect children.

Section 39.203 expressly immunizes two kinds of good-faith conduct: (1) "participating" in "any act authorized or required" by Chapter 39 and (2) reporting "any instance of child abuse." *Id.* It provides:

> 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 [D]epartment [of Children and Families] or any law enforcement agency, shall be immune from any civil or criminal liability which might otherwise result by reason of such action.

§ 39.203(1)(a), Fla. Stat.

Chapter 39 has immunized all authorized actions since its enactment. And Chapter 39 authorizes a wide array of conduct besides reporting and including many forms of treatment. It:

- allows CPT doctors—such as Dr. Sally Smith—to diagnose and evaluate patients, including performing X-rays, lab tests and related services, family-psychosocial, specialized-

clinical, or forensic interviews. And it allows CPT members to document the related findings. § 39.303(3)(a).

- authorizes healthcare providers to "detain [a] child without the consent of the parents" if "returning the child to" parental custody "presents an imminent danger to the child's life or physical or mental health." § 39.395.
- allows DCF's "authorized agent"—including a CPT doctor—to take a child into custody based on probable cause to believe certain risks are present and, for children delivered to a DCF agent, to "place the child in out-of-home care" while "awaiting the shelter hearing." § 39.401.
- authorizes DCF to medically screen a child who has been removed from home and requires that a licensed healthcare provider conduct the screening. § 39.407. DCF regulations prescribe how to conduct these initial healthcare assessments, including requiring them to be performed by the child's regular healthcare provider when possible, or if not, either a doctor chosen by the child's parents or a CPT doctor. Fla. Admin. Code R. 65C-29.008(2).

Florida courts have explained that Chapter 39 immunity is broadly construed to encourage good-faith *action*. *Floyd v. Dep't of Child. & Fams.*, 855 So. 2d 204, 205-06 (Fla. 1st DCA 2003). In allowing litigation against a DCF investigator who returned a toddler to a dangerous home where he was soon murdered, *Floyd* explained that Chapter 39 immunity "was not intended to protect those who fail to fulfill their duty to protect children." *Id.* at 206. Instead, the broad immunity in the child-protection law "was intended to protect those who might be *overzealous* in protecting children from potential abuse." *Id.* (emphasis added). A broad interpretation is necessary to fulfill the legislature's intent that Chapter 39 immunize even overzealous child-protection efforts.

Child-protection mandates that immunize overzealous good-faith action may cause parents great distress whenever parents view the sheltering as unwarranted and invasive. But that does not give parents a cause of action against good-faith actors. Chapter 39 and its broad immunities were "created for the benefit of children and not for the parents." *See Dep't of Health & Rehab. Servs. v. Dougherty*, 700 So. 2d 77, 79 (Fla. 2d DCA 1997).

B. The trial court recognized only half of Chapter 39's statutory immunity and inconsistently applied its erroneous immunity finding.

The trial court plainly misconstrued the scope of Section 39.203 immunity. The court held that Section 39.203 provides immunity only for "those claims that 'otherwise result' from the report [of suspected abuse] to the hotline." (R.53119). Once JHACH's "statutory obligation to report" was fulfilled, the court ruled, "its subsequent, affirmative conduct towards M.K." was not immune under Section 39.203. (R.53123). This is wrong.

Standard of Review: Issues of statutory interpretation are reviewed de novo. *Ripple v. CBS Corp.*, 385 So. 3d 1021, 1027 (Fla. 2024).

Section 39.203 immunizes the reporting of child abuse, to be sure, but the statute does not stop there. It also immunizes the good-faith participation in *any act* authorized or required by Chapter 39. As a result of its error, the court failed to consider whether issues unrelated to *reporting* were nonetheless authorized by Chapter 39 and allowed inflammatory evidence of unquestionably immune acts to reach the jury.

The court's failure to fully enforce Section 39.203 requires reversal. It violated reading-the-whole-text canon, under which "proper interpretation requires consideration of 'the entire text, in view of its structure and of the physical and logical relations of its many parts.'" *Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). It also violated the "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of a statute if possible," and words in a statute should not be construed as mere "surplusage." *Allstate Ins. Co. v. Revival Chiropractic, LLC*, 385 So. 3d 107, 115 (Fla. 2024). Courts cannot construe statutes in a manner that "would ignore, or altogether negate, other language within the same subsection." *City of Miami Beach v. Miami New Times, LLC*, 314 So. 3d 562, 568 (Fla. 3d DCA 2020); *Strober v. Harris*, 332 So. 3d 1079, 1087 (Fla. 2d DCA 2022) (citing *Miami New Times* approvingly).

Worse still, the trial court's ruling that acts that "flowed from" reporting suspected child abuse were immune was enforced inconsistently, and the court limited the immunity to "pure"

Chapter 39 reporting issues that had no "overlay" with what the court considered non-immune issues. (T.4949) Where there was "overlay," the court admitted evidence of immune conduct and relied on its instruction to the jury to ignore it. (*See* T.4948 (ruling that only "purely dependency court" evidence is excluded; if evidence addressing the dependency proceeding "goes to" one of the counts, it is admissible); *see* Arg. V.E, *infra*, at 96-97).

C. The trial court's misinterpretation of Chapter 39 led it to erroneously allow Plaintiffs to argue that Dr. Sally Smith was JHACH's apparent agent.

There can be no dispute that Dr. Smith was not JHACH's actual agent or employee and her conduct as CPT medical director in the DCF investigation is (1) not JHACH's legal responsibility, and (2) activity that Chapter 39 broadly protects. But because the trial court erroneously believed that (1) the Kowalskis' belief that Dr. Smith worked for JHACH was material and (2) Chapter 39 protected only good-faith *reporting*, it allowed Plaintiffs to argue that JHACH could be liable for Dr. Smith's conduct if she was "engaged" in Maya's care. These legal errors harmed JHACH's defense.

Standard of Review: While evidentiary rulings are generally reviewed for an abuse of discretion, where the ruling is based on an

erroneous interpretation of the law, the review is de novo. *See Sottilaro v. Figueroa*, 86 So. 3d 505, 507-08 (Fla. 2d DCA 2012) (reviewing de novo a trial court's ruling on the admissibility of a crash report where the ruling was contrary to statute); *accord Bellevue v. Frenchy's South Beach Café, Inc.*, 136 So. 3d 640, 642-63 (Fla. 2d DCA 2013) (reviewing evidentiary decision "based upon an erroneous interpretation of the applicable case law" de novo).

1. Dr. Smith was not JHACH's apparent agent.

Even without Chapter 39 analysis, the evidence at trial made JHACH's apparent-agency liability for Dr. Smith impossible here. The Kowalskis (1) signed a consent form acknowledging that independent contractors worked at JHACH, (R.118713), and (2) expressly knew that Dr. Smith was a CPS investigator as early as October 11, 2016, (R.97704-97705). There was no evidence that they authorized JHACH to do anything because they thought Dr. Smith was JHACH's agent. Apparent-agency liability cannot exist when Plaintiffs did not—and could not—materially change their position in reliance upon any belief that Dr. Smith was JHACH's agent. *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995).

Although Plaintiffs argued that Dr. Smith "ran the show," JHACH doctors made the medical decisions that Plaintiffs now criticize. JHACH doctors decided to wean Maya off ketamine before Dr. Smith was even notified about the case. There is no evidence that Dr. Smith, as an apparent agent in the ER, contributed to that decision. Her subsequent *agreement* with the decision is immaterial. So, too, for the 48-hour video monitoring in the EEG room to see if Maya's behavior was consistent with CRPS. Dr. Smith agreed with the plan, to help DCF's investigation, but Dr. Dees had already decided to do it for diagnostic purposes.

The jury instructions' plain language entitled JHACH to a directed verdict on Dr. Smith's actions. (A.240-244).

2. Chapter 39 immunizes Dr. Smith's conduct.

The answer to Plaintiffs' exasperated question to jurors, "What the heck was Sally Smith doing there?" is simple: *her job* as the CPT Medical Director. (T.10203). *All* of her good-faith conduct is immune—for both her and any apparent principal. *See* §§ 39.203, 39.303, Fla. Stat. Agency is not only unproven, (Arg. V.C.1, *supra*), but also irrelevant because, Section 39.303(3) authorizes Dr. Smith, as a DCF investigator, to consult about and diagnose Maya's

condition. Even if she had persuaded JHACH providers to reduce ketamine and unilaterally demanded that Maya be moved to a different room to allow 48 hours of video monitoring, that would be immune.

Dr. Smith was the CPT Medical Director. JHACH physicians testified that they were legally obligated to contact her to initiate a child-abuse investigation and to cooperate and communicate with her during the investigations. (T.7799, 8474-8475). That is what happened here; physicians consulted Dr. Smith because of her role as CPT Medical Director and the only onsite child-abuse expert.

Section 39.303 broadly authorizes CPTs to "support the activities of the family safety and preservation program of DCF," through various means, including providing:

- Medical diagnosis and evaluation services as needed and documentation of related findings, § 39.303(3)(a);
- telephone-consultation services in emergencies and other situations, § 39.303(3)(b);
- medical evaluation related to abuse, abandonment, or neglect, § 39.303(3)(c);

- psychological and psychiatric diagnosis and evaluation for the child and/or parents and legal guardians, § 39.303(3)(d);
- expert medical, psychological, and related professional testimony, § 39.303(3)(e);
- treatment-plan development if requested by the family safety and preservation program or any professional involved with the child, § 39.303(3)(f); and
- CPT assessments, including medical evaluations, medical consultations, family psychosocial interviews, specialized clinical interviews, or forensic interviews, as appropriate. § 39.303(3)(j).

These categories cover all of Dr. Smith's involvement in Maya's care.

Because Chapter 39 authorized Dr. Smith's actions, section 39.203 immunizes them. But instead of considering whether Dr. Smith's conduct was authorized by Chapter 39 when determining immunity, the trial court tried to distinguish Dr. Smith's investigating suspected child abuse from her "impacting or directing" Maya's care. (T.5448-5449). When Dr. Smith took off "the hat of child abuse investigator and went into the role of treating

physician," the court ruled, that conduct was not immune. (T.6813; *see* T.7339 ("to the extent that Sally Smith is providing or appears to be providing medical care and treatment . . . it's going to be admissible").

This legal error confused and misled the jury. One juror, after hearing that Dr. Smith suggested weaning Maya off ketamine, asked, "So is she or is she not part of the team—the treatment team of M.K.?" (T.7834-7835). Plaintiffs exploited this confusion, arguing in closing that "they" brought Dr. Smith in to "set up a case" and be the "hammer that they might need" if the Kowalskis complained about JHACH. (T.10203).

This error requires a new trial on the medical-malpractice claim. The verdict sheet asked whether Dr. Smith was JHACH's apparent agent and, if so, whether she was negligent in her medical treatment of Maya. The jury answered both questions affirmatively.

Forcing JHACH to stand trial for Dr. Smith's conduct warrants re-trial on all remaining counts. Dr. Smith did not present well as a witness, and Plaintiffs made her the face of JHACH. Tying her to JHACH contributed to the severe, cumulative prejudice caused by the trial court's Chapter 39 error. This requires a new trial

D. The trial court's error denied JHACH a fair trial.

The trial court's error in interpreting Section 39.203 pervades its evidentiary rulings and the trial itself. Instead of a trial limited to conduct unauthorized by Chapter 39 or the dependency-court orders, the lower court sanctioned a trial where Plaintiffs could claim JHACH was solely liable for statutorily immune and court-ordered conduct. Because of the court's error, JHACH was denied a fair trial. This Court should reverse the judgments on all counts and remand the case for a new trial.

Standard of Review: When an evidentiary ruling is based on an erroneous interpretation of the law, the review is de novo. *Bellevue*, 136 So. 3d at 642-63; *Sottilaro*, 86 So. 3d at 507-08.

The trial court's misreading of Section 39.203(1)(a) led it to deny JHACH's motion for summary judgment on several claims. The court allowed the false-imprisonment claims to proceed because they did "not 'otherwise result by *reason' of the hotline reports*." (R.53123) (emphasis added). The claim of negligent hiring and supervision survived to trial because "JHACH's own substantial participation or conduct within the confines of the dependency court action" did not "flow[] from the hotline report." (R.53127).

Summary judgment on the count of negligent infliction of emotional distress, which was later amended to allege intentional infliction of emotional distress, was denied because "Defendants' alleged conduct during [Maya's] prolonged stay at the hospital" "has nothing to do with the action of making the abuse report." (R.53124).

In fact, the court ruled that all of JHACH's "substantial participation or conduct within the confines of the dependency court action" was admissible and its "attempt to broadly shield its own post-report conduct fails to fit within" Chapter 39 immunity. (R.53127). But JHACH's participation "within" the dependency-court action is *exactly* the conduct that Chapter 39 is intended to protect. As is *all* of Dr. Sally Smith's challenged conduct as the CPT medical director. *See* Arg. V.C.2, *supra*, at 88-91.

The court's error re-shaped the trial. Because it failed to recognize that Section 39.203(1)(a) immunity covered JHACH's immunity for any act authorized by Chapter 39, the trial court admitted JHACH conduct that was required by, or inextricably intertwined with, the dependency-court proceedings as support for Plaintiffs' claims. This allowed Plaintiffs to conflate DCF and

dependency-court conduct with JHACH conduct and argue to the jury that JHACH was liable for that conduct.

JHACH's repeated objections to this attempt to conflate JHACH with DCF and the dependency court were largely overruled. On the first day of witness testimony JHACH objected to Plaintiffs implying that the hospital was restricting visitation and denying Maya access to her laptop and personal items when it was DCF making those decisions. (T.1887). The court said it would instruct the jury on the court order but anything "beyond the court order" is "fair game." (T.1889).

The next day, a fellow parishioner testified that Mrs. Kowalski told her, "the hospital took [Maya]." (T.2108). The court overruled JHACH's objection, pointing to its intent to instruct the jury on the issue. (T.2110). Later that day, JHACH "renew[ed] its grave concerns" about the "muddling of DCF shelter orders" with JHACH action. (T.2130). The court again said it would instruct the jury but warned JHACH that "some of this evidence" is going to come in because it is "applicable to some of the causes of action." (T.2131).

The pattern continued. When Mr. Kowalski testified that he was "denied visitation" on October 14th, JHACH objected because

the dependency court governed visitation at that point. (T.3285). That objection was overruled. (T.3286). As was the objection to Mr. Kowalski's testimony that JHACH was supposed to be treating his daughter not trying "to prosecute [his] family[.]" (T.3544-3545). Later, Mr. Kowalski testified over objection about his fear of authorities and of seeking medical treatment. (T.5424-5425).

When Maya was on the stand, she testified that she was never told why "they were going after" her mother. An objection was overruled and counsel asked: "Did the Johns Hopkins doctors you spoke to ever explain why they were going after your mom if they had a problem with your treatment as opposed to the doctors prescribing it?" (T.4465). The court ruled that this question "did not bleed over into the Chapter 39 issue" and overruled the objection. (T.4466). Maya was also permitted to testify about Ms. Bedy interrupting her last phone calls with her mother and the pain that caused. (T.5503-5504).

Dr. Brewerton testified over objection that Maya's reaction to the "accusations against her mother" was: "Confusion, disbelief, devastation, feeling misunderstood, blamed, victimized, shamed, increase in stress rather than decreasing pain and stress,

increasing stress and pain of a psychological and physical nature." (T.4583-4584). Dr. Henschke testified that Maya's depression was "tied to the stay" at JHACH. (T.3855).

E. The jury instruction did not ameliorate the prejudice and the error is not harmless.

During jury selection, the court told the parties it intended to deliver a preliminary jury instruction on the parameters of Chapter 39 immunity. (T.837). Although the court reiterated its intent to deliver a Chapter 39 instruction in the first days of trial, (T.1889, 2131), it was not actually given until September 29th, after six days of testimony conflating JHACH's conduct with DCF's.

The court instructed the jury that JHACH could not be found liable for reporting the suspected abuse or for sheltering Maya. (T.2651)(A.199-201). The court told the jury that DCF obtained a custody order and DCF's custody of Maya was supervised by a dependency court. (T.2652). It said that JHACH did not take Maya from her parents and Plaintiffs are not claiming that it did. (T.2652). But the court concluded by saying that Plaintiffs' claims of false imprisonment, medical malpractice, or battery "are not affected by the dependency court's order." (T.2653).

Although the instruction properly stated that JHACH did not take Maya, it remains legally incorrect by allowing Plaintiffs to re-label protected conduct as intentional torts (also for the reasons explained in Arg. V.B, *supra*, at 84-86). Each of Plaintiffs' claims is affected by the admission of the dependency-court proceedings and conduct immune under Chapter 39. No instruction could prompt jurors to disregard weeks of testimony about JHACH ripping a 10-year-old girl from her mother and the agony the separation caused the family. The unsupported and excessive verdict shows that the jury instruction did nothing to ameliorate the pervasive prejudice caused by the trial court's statutory-construction error.

For the same reason, Plaintiffs cannot prove the error was harmless. When evaluating harmless error, a reviewing court must "focus on the effect of the error on the trier-of-fact" and ask whether "the admission of evidence that should have been excluded" contributed to the verdict. *Special*, 160 So. 3d at 1256. Unless Plaintiffs can prove "there is no reasonable possibility that the error contributed to the verdict, the error is harmful." *Id.* at 1256-57.

VI. Plaintiffs were awarded excessive compensatory and punitive damages.

The damages awarded are excessive. The awards for past and future medical (including psychological) expenses have little supporting evidence, and improper closing arguments bolstered the excessive awards for non-economic damages. Claims with no basis for compensatory damages cannot support *punitive* damages.

A. The compensatory damages were excessive.

Standard of Review: The denial of a motion for a new trial or a remittitur is reviewed for abuse of discretion. *Lively v. Grandhige*, 313 So. 3d 917, 919 (Fla. 2d DCA 2021).

1. October 7-13 false imprisonment. There is no evidence that Maya sustained any physical injury, or needed any treatment, based on her first week of hospitalization. Plaintiffs offered no evidence that Maya would need treatment because of this event either before or after she turned 18. Invited to speculate, the jury awarded Mr. Kowalski $67,200 for past medical expenses and Maya $2,496,000 for future medical expenses, and $3 million in non-economic injuries.

2. October 18-20 false imprisonment. There is no evidence that Maya was injured or needed any medical treatment, past or future, because of the two days she spent in the EEG room. But the jury awarded Mr. Kowalski $561,298 for past medical expenses and Maya $1.4 million for future medical expenses plus $3 million for non-economic injuries.

3&4. January 6 false imprisonment/battery. On these counts as well, Plaintiffs offered no evidence of physical injury or past or future medical treatments by this event. Yet the jury awarded Mr. Kowalski $884,000 for past medical expenses and Maya $4,188,000 for future medical expenses plus $23 million for non-economic injuries.

5. Unwanted-affection battery. Without any evidence that Ms. Bedy's unwanted affection caused Maya physical injury or required past or future medical treatment, the jury awarded Mr. Kowalski $1,000 for past medical bills and Maya $8 million for future medical bills plus $11 million for non-economic injuries.

6. Maya's IIED. There was no evidence of outrageous conduct or conduct intended to cause Maya extreme emotional distress, yet

the jury awarded Maya $3 million for economic damages and $7.5 million for non-economic injuries for IIED.

7. Medical Malpractice. Maya's medical-malpractice award included $4.7 million for lost earnings and future medical treatment plus $22 million in non-economic damages. JHACH's alleged "malpractice" was weaning Maya off ketamine and continuing the conservative therapies begun at Tampa General. Although Plaintiffs' experts claimed that JHACH's withdrawal of high-dose ketamine would aggravate Maya's CRPS symptoms, (T.2455-2459, 2505-2508), they also acknowledged that CRPS patients experience lifelong pain. And the evidence was that, with ketamine withdrawn, Maya resumed walking, exercising, bike riding, and ice skating, all while excelling at school.

8. Wrongful Death. Finally, even after remittitur, the total wrongful-death award for IIED-suicide is $66,153,676. The trial court remitted Mr. Kowalski's $50 million pain-and-suffering award to $24 million. After a $250,000 remittitur, Maya and her brother were each awarded $18 million for pain and suffering and $1,750,000 in support and services until age 25.

This is all excessive and speculative. Despite being instructed not to duplicate damages, jurors awarded Mr. Kowalski $1,513,478 for past medical expenses—an amount far higher than *all* of Maya's JHACH medical bills combined and which "obviously" exceeds "the maximum limit of a reasonable range within which the jury may properly operate." *Bould v. Touchette*, 349 So. 2d 1181, 1185 (Fla. 1977); (R.95862, 95864, 95866, 95868, 95870, 97535, 105719; T.10212-10215); *see Albertson's, Inc. v. Brady*, 475 So. 2d 986, 988 (Fla. 2d DCA 1985) (requiring proof of reasonableness and necessity of medical expenses).

Maya's awards are even more excessive. The jury awarded her $23.7 million for future medical expenses and lost wages and $69.5 million in non-economic compensatory damages—that is $6,227 every day for over 40 years. No reasonable jurist could conclude that the relevant evidence supports these amounts.

JHACH argues that the IIED-suicide claim cannot stand. *See* Arg. I. If the Court disagrees, the damages far exceed what a jury could reasonably award. Even after remittitur, the award is $63.5 million—$24 million for Mr. Kowalski and $19.75 million each for Maya and Kyle. This is outside the "reasonable range" that a jury

can operate within. *Bould*, 349 So. 2d at 1185. The trial court abused its discretion in denying JHACH's posttrial motions for new trials and remittiturs for these claims. (A.176-192).

In closing, Plaintiffs—over JHACH's objection—showed the jury a PowerPoint that requested massive non-economic damages based on a per-hour-per-component formula. (A.299-304, 305-320) (T.9139-43, 10169-71; R.93681-86). This formula allowed Plaintiffs to ask for excessive and unjustified damages. (T.10213). JHACH knew Plaintiffs were using this formula, and it moved in limine to exclude this argument. (R. 93681-86). The trial court denied the motion shortly before closing arguments. (T.10169-10171).

By using this formula, Plaintiffs misled the jury into awarding excessive damages. For example, Mr. Kowalski requested $25,839,810 for his pain and suffering by dividing it into two separate components—seeking 27 hourly payments of $100/hour for a 24-hour-day ($2700/day). (A.315-318). Even the remitted judgment is more than $920,000 per year for life. Maya similarly requested 20 hourly payments of $100 ($2000/day) for nearly 40 years. (A.320-322). Her remitted judgment still exceeds $450,000 per year. But courts have long warned that the "trial court must

use care to the end that the [per diem] argument will not inflame the jury resulting in an excessive verdict." *See Baron Tube Co. v. Transp. Ins.*, 365 F.2d 858, 864 (5th Cir. 1966). The trial court did not use such care here, and the impassioned and inflamed jury awarded an excessive verdict.

The trial court's denial of summary judgment and directed verdict on the suicide claim and its admission of immune Chapter 39 conduct combined with Plaintiffs' improper argument resulted in awards based on passion, not the law or the evidence. The verdict's size provides no benchmark for this Court to award lesser amounts. JHACH is entitled to, at least, a new, fair trial on all damages.

B. The $50 million punitive-damages judgment for four intentional torts is erroneous for multiple reasons.

The jury awarded $50 million in punitive damages (T.10620-10622) for the first four intentional-tort claims discussed above:

- $15 million for the October 7-13 false-imprisonment claim;
- $10 million for the October 18-20 false-imprisonment claim; and
- $25 million for the January 6 false-imprisonment and battery claims.

(T.10620-10622).

1. The punitive-damages claims were not proven by clear and convincing evidence.

Standard of Review: The standard for granting a directed verdict for a punitive-damages claim is no different than for other claims. *See R.J. Reynolds Tobacco Co. v. Ledo,* 274 So. 3d 416, 417 (Fla. 3d DCA 2019). But the clear-and-convincing burden of proof requires higher-quality *evidence* for such claims to reach a jury. §§ 768.72(2), 768.725, Fla. Stat (2023). *E. Bay NC, LLC v. Reddish*, 306 So. 3d 1225, 1227 (Fla. 2d DCA 2020).

Although Maya never pleaded her claim based on section 768.72, relying instead on common-law pleadings, (R.71750-71755), for punitive damages, evidence must first establish that an employee's conduct meets the statute's standards for "intentional conduct" or "gross negligence." "Intentional misconduct" requires action in the face of "actual knowledge of the wrongfulness of the conduct and the high probability that injury" would result. § 768.72(2)(a). "Gross negligence" means conduct "so reckless or wanting in care that it constituted a conscious disregard or indifference" to the life or safety of others. § 768.72(2)(b).

The evidence must also establish that the employer, in this case JHACH, through its officers, directors, or managers:

a. "actively and knowingly participated in such conduct," or

b. "knowingly condoned, ratified, or consented to such conduct," or

c. "engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury" to the claimant, Maya.

§ 768.72(3)(a)-(c).

As the jury instructions explained, a manager must be "more than a midlevel employee." (A.229). It is someone whose level of authority could result in their acts being deemed the corporation's acts. *See Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019).

Plaintiffs failed to produce clear and convincing evidence of a JHACH employee's intentional or grossly negligent conduct or of JHACH's gross negligence, knowledge, or participation in such conduct. The trial court erred in submitting all four of the punitive damages claims to the jury:

a. <u>The October 7-13 false-imprisonment claim.</u> JHACH properly reported suspected abuse to DCF on October 7 and 9. It

declined to release a child against medical advice to her mother. The mother was a nurse infusionist who wanted JHACH to administer massive doses of ketamine through an existing port after Dr. Hanna sent her to JHACH because of her condition after such infusions. JHACH doctors cooperated with the DCF investigation, as required by law.

Plaintiffs failed to prove that anyone had "actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result." And they argued that the doctors providing the treatment were themselves the "managers" of JHACH if they chaired hospital committees, (T.6060-6061), when this Court has clearly ruled otherwise. (T.9765).

The trial court erred in submitting this claim to the jury.

b. The October 18-20 false-imprisonment claim. Moving a patient to another room on the same floor is not wrongful conduct. Only Maya's sensational testimony about defecation due to abandonment and isolation would support the claim, but the video evidence disproves these allegations.

There is certainly no "clear and convincing" evidence that Maya was abandoned or isolated during these two days or that

anyone had actual knowledge of the wrongfulness of any conduct or that any conduct had a high probability of injuring or damaging Maya. While there is evidence that moving her to the room was not one employee's unilateral decision, there is no evidence that JHACH management committed one of the three acts that would make JHACH liable for punitive damages.

The trial court erred in submitting this claim to the jury.

c.&d. The January 6 false-imprisonment and battery claims.

Maya was photographed because she had red marks on her body that she claimed were CRPS lesions but which staff suspected were self-inflicted scratches. (T.4001-4004, 8865-8866; R.105933-105937). Because she was leaving the hospital, staff reasonably wanted to document her skin condition in case she returned with more "lesions."

There is no evidence of any physical injury requiring treatment from this claim. Although these events were brief and the photos were taken in private by two female employees, JHACH appreciates that Maya found them very unpleasant.

But there is no "clear and convincing" evidence that anyone had actual knowledge of the wrongfulness of the conduct and high

probability of injury or damage could result to Maya. While there was evidence that employees in the risk-management department were involved in this decision, there is no evidence that they were "managers" under *Dominguez*, 295 So. 3d at 1205.

The trial court erred in submitting this claim to the jury.

2. The erroneous jury instruction on "specific intent" impacted the punitive-damages awards.

Section 768.73(1)(c) provides that there is no cap on punitive damages when a fact finder determines that, at the time of injury, defendant had specific intent to harm plaintiff and did so. Plaintiffs here never pleaded a specific-intent claim. Thus, JHACH had no notice of this issue until Plaintiffs proposed a jury instruction near the end of trial. (T.10432-33, 10463, 10596-10597).

JHACH objected to the instruction and maintained that any proof of "specific intent" needed to be presented in the main case and proven by clear and convincing evidence. (T.10481-10483) (A.329-331). Because Plaintiffs failed to meet this burden, JHACH argued it was entitled to a directed verdict even if the claim had been properly pleaded. (A.329-331). Instead, the trial court gave the jury a verdict form with the specific-intent issue presented under

both burdens of proof for each claim. (R.95887-95893)(A.332-335). And the trial court allowed Plaintiffs to argue that JHACH had the specific intent to harm Maya despite recognizing that JHACH providers "to their core believed that Maya was not safe in Beata Kowalski's presence." (A.185). These positions cannot be squared. "Specific intent" requires proof of a special, subjective mental intent coupled with a knowing act to achieve that intent. *See Frey v. State*, 708 So. 2d 918, 919 (Fla. 1998); *Linehan v. State*, 442 So. 2d 244, 247 (Fla. 2d DCA 1983) *rev'd on other grounds by Coicou v. State*, 39 So. 3d 237, 243 (Fla. 2010).

The trial court violated JHACH's due-process rights in allowing Plaintiffs to raise the specific-intent argument during jury deliberations on liability and erred in submitting the specific-intent questions to the jury.

This issue is not about capping damages, but rather the award's excessiveness. This jury was measuring the appropriate award after finding, twice for each claim, that JHACH had committed punitive conduct with specific intent to harm Maya. For the erroneous specific-intent instruction to be harmless error, Plaintiffs must show "that there is no reasonable possibility that the

error contributed to the [verdict]." *Special*, 160 So. 3d at 1256. At minimum, the trial court erred in not awarding a new trial on punitive damages.

3. The punitive-damages awards were excessive.

Even without the errors described in subsections 1 and 2, these awards remain legally excessive. Section 768.74(5)(d) requires that the award bear "a reasonable relation to the amount of damages proved and the injury suffered." Although the ratio between compensatory and punitive damages awarded was not excessive, the compensatory awards themselves were grossly excessive. The punitive-damages awards cannot stand because the compensatory awards supporting them cannot stand. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). (R.96959-96960). JHACH is entitled to a directed verdict on the punitive-damages claims. And at minimum, it is entitled to a new trial on the amount of these damages.

(*Conclusion on next page*)

CONCLUSION

For all these reasons, Appellant, Johns Hopkins All Children's Hospital, respectfully requests that this Court reverse the final judgment and remand to the trial court with instructions to (1) enter judgment in Appellant's favor on the wrongful-death and IIED claims and the first false-imprisonment claim (October 7-13), and (2) re-try any remaining claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 2nd day of August 2024 to:

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