UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 08-21813-Civ-Jordan/McAliley

JANICE LANGBEHN, *et al.*,

Plaintiffs,

v.

THE PUBLIC HEALTH TRUST, *et al.*,

Defendants.
_____/

MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE AND INCORPORATED MEMORANDUM OF LAW

In response to the original Complaint [D.E. 1], Defendant, Miami-Dade County Public Health Trust (the "Trust"), filed a substantial Motion to Dismiss [D.E. 19], detailing the many deficiencies in Plaintiffs' legal theories. Rather than respond to the Trust's dismissal motion, Plaintiffs filed an Amended Complaint [D.E. 25], and rather than address the original's fatal flaws, the Amended Complaint does nothing more than repackage and relabel the defective claims. Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants the Public Health Trust, Garnett Frederick, Ph.D., Alois Zauner, M.D., and Carlos Alberto Cruz, M.D., move to dismiss the Amended Complaint with prejudice.[1]

I. Introduction

Lisa Marie Pond (Ms. Pond) suffered a brain aneurysm and was transported to the Jackson Ryder Trauma Center's Trauma Resuscitation Unit (TRU).[2] She was admitted, triaged, and underwent various diagnostic and emergency medical procedures before her condition was determined to be inoperable and fatal. Plaintiffs make no complaint about the medical care provided to Ms. Pond. Instead, Plaintiffs allege that, in the approximately eight hours during and

[1] For the Court's convenience, the Trust, Dr. Cruz, Dr. Zauner, and Dr. Frederick have combined their motions to dismiss into one document. Given each individual party's right to file a separate memorandum of law, this omnibus motion and memorandum of law fits within the page limitations provided for in Local Rule 7.1C(2).

[2] The TRU is the portion of Jackson Memorial Hospital's Ryder Trauma Center that treats the most critically injured patients. The Public Health Trust is the entity responsible for the Trauma Center and the TRU.

immediately following the administration of critical care to Ms. Pond, the Defendants ignored Plaintiffs' wishes for more information about, and more visitation with, Ms. Pond.

In particular, Plaintiffs allege that, by failing to provide sufficient information about Ms. Pond's condition, and by disallowing Plaintiffs sufficient time to visit Ms. Pond in the TRU, the Defendants breached a duty of care owed to them and violated certain organizational standards of conduct, as well as some provisions of Florida's advance directives laws. Plaintiffs further allege that the lack of information and access prevented Plaintiff Janice Langbehn (Ms. Langbehn), who was Ms. Pond's healthcare surrogate, from making an informed decision about Ms. Pond's medical treatment, though these allegations are exceedingly vague. Finally, Plaintiffs allege that the Defendants caused them to suffer emotional distress resulting in physical injury, but they notably do not allege that the Defendants caused them to sustain a physical impact.

Plaintiffs have packaged these alleged violations into eight separate counts, seven against the Trust: negligence, two counts of negligent infliction of emotional distress, negligence per se, and three counts of breach of fiduciary duty. One count of intentional infliction of emotional distress is pled only against the individually-named Defendants. In packaging their claim under several different names, Plaintiffs are appealing to "the tyranny of labels." *Snyder v. Commonwealth of Mass.*, 291 U.S. 97, 114-15 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *see also United States v. Oreye*, 263 F.3d 669, 672-73 (7th Cir. 2001). Plaintiffs' allegations ultimately amount to nothing more than a negligence claim for a psychological injury that was not caused by a physical impact, and an intentional infliction of emotional distress claim that comes nowhere near the standard required for recovery under Florida law. All claims rely upon Plaintiffs' beliefs that they were not provided sufficient information and visitation.

The negligence and breach of fiduciary duty claims must be dismissed because the Defendants owe no legal duty to provide attention to patients' family members or other visitors. Not a single case arising under Florida law would even suggest the establishment of the duty sought by Plaintiffs through this lawsuit. This void is understandable given the nature of the TRU's business, which is treating the most critically injured patients within South Florida. The TRU's duty runs to the patients admitted to the unit, and it extends to providing reasonable medical care, providing physical security, and ensuring compliance with certain privacy

restrictions. Plaintiffs' proposed new common law duty owed by physicians and hospital staff to visitors would necessarily create conflict with the existing duties owed by hospitals and staff to their patients.

On the one hand, physicians and nurses have a clear duty to restrict access to the TRU to comply with duties to the patients. On the other hand, under Plaintiffs' proposed theory, physicians and nurses would be forced to balance their duties to the patients with the proposed duty to provide visitation and information to visitors. This proposed new duty would potentially create a jury question every time a visitor disagrees with a physician or nurse about visitation, or about whether the physician or nurse should have provided more frequent or more detailed information. Did the nurse respond quickly enough for a request for visitation? Was the visit long enough? Was sufficient information about the patient's condition provided? Were other emergencies in the TRU important or time consuming enough to justify the inattention to the visitors? An analysis of Florida tort law conclusively demonstrates that there is no legal cause of action for such grievances.

Negligence claims in Florida are governed by the "impact doctrine," which precludes recovery for emotional distress absent evidence of physical impact. Nowhere do Plaintiffs allege that any one of them was subject to a negligent or intentional physical impact. Plaintiffs also fail to state facts that place them within one of the two categories of exceptions to the "impact doctrine." First, Plaintiffs did not perceive an injury inflicted upon a loved one, so as to satisfy the "bystander" exception to the impact rule. Indeed, there is no allegation that the Defendants were negligent in their physical treatment of Ms. Pond.

The second category of exception to the "impact doctrine" encompasses the specific independent torts that Florida courts have excepted from the impact rule. Aside from certain traditional torts where the duty and breach of duty do not require an impact (e.g. defamation or invasion of privacy), the Florida Supreme Court has recognized only a very limited number of new common law duties, breaches of which do not require a showing of physical impact. This is what Plaintiffs are attempting to assert—a new common law tort duty to provide some amount of visitation and informational updates to a patient's visitors ***and*** a new exception to the impact doctrine for breaches of this unprecedented new cause of action.

All of the narrow exceptions recognized by the Florida Supreme Court are specific and are premised on established tort duties; no such duty exists here. Plaintiffs' Amended Complaint

has labeled several counts as "Breach of Fiduciary Relationship" in an obvious attempt to label their way out of this issue, but the mere invocation of the cause of action is insufficient to create a duty, which still must exist to hold a hypothetical fiduciary liable. Although the Trust may have had some fiduciary relationship with its ***patient***, Ms. Pond, as to the provision of medical care, there is no allegation of medical malpractice, and thus the existence of any such relationship is irrelevant to Plaintiffs' claims. In each count, Plaintiffs are asking the Court to create a new duty and a new exception to the impact doctrine. The absence of an existing legal duty to facilitate visitation and provide information to visitors is fatal to Plaintiffs' negligence, negligent infliction of emotional distress, and breach of fiduciary duty claims.

The absence of a legal duty also extends to Plaintiffs' negligence per se claim. In addition to there being no common law duty, there is no statutory duty owed by hospitals to visitors. The weakness of this particular claim is evident from the statutes (and other, non-legal authority) upon which Plaintiffs attempt to lay the foundation for negligence per se: Florida's advance directives statute and certain industry standards and internal Trust policies. The advance directives statute would have recognized Ms. Langbehn as the surrogate to make medical decisions on Ms. Pond's behalf because Ms. Pond was unable to make her own decisions during her stay in the TRU. There is no allegation, however, that the Trust failed to consult Ms. Langbehn regarding any medical decisions requiring consent; in fact, Ms. Langbehn admits that she was consulted, and that she consented to, some procedures. And there is nothing within the advance directives statute that would have required doctors or nurses to speak to Ms. Langbehn other than to seek consent regarding a medical procedure that required consent. Most importantly, the advance directives statute does not provide for a private cause of action in favor of the Plaintiffs. As to Plaintiffs' allegations of industry standards and internal policies, a claim for negligence per se cannot rest upon such non-statutory sources.

Moreover, as employees or agents of the Trust, each of the Defendants is immune from suit for actions undertaken in the scope of their employment. The only exception is for acts undertaken in bad faith or with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights. Thus, all of the negligence and fiduciary claims asserted against the individual Defendants are barred, not only for the reasons that they fail as against the Trust, but also because there are simply no facts in the Amended Complaint to establish a plausible

inference that Dr. Zauner, Dr. Cruz, or Dr. Frederick acted out of malice or bad faith. Dismissal of all claims against the individual Defendants is warranted for this additional reason.

Plaintiffs' Intentional Infliction of Emotional Distress count against the individually-named Defendants must also be dismissed because there are no allegations of extreme and outrageous behavior. This count contains the same allegations that are repeated throughout the Amended Complaint – that Plaintiffs were not allowed to be with Ms. Pond during her time in the TRU "without medical or other legitimate justification." [D.E. 25 at ¶ 125]. But intentional infliction of emotional distress requires that a plaintiff plead and prove intentional behavior that is wholly outside of the bounds of that which is accepted in a civilized society. Plaintiffs' beliefs that they were "unjustifiably" excluded from a restricted area of the Trauma Center cannot possibly, without substantially more facts, create a plausible inference that the exclusion was effected solely for the malicious purpose of trying to antagonize or harm the Plaintiffs. Indeed, without at least some relevant facts addressed to each individual Defendant, it would be a gross injustice to force doctors and a social worker to defend against a lawsuit based on the bald assertions that they "intentionally, willfully, wantonly, or recklessly" barred visitors from being with a patient. The mere fact that Ms. Pond and Ms. Langbehn were same-sex partners is not enough to create a legal presumption that any mistreatment that Ms Langbehn perceives resulted from "anti-gay animus." Indeed, nowhere do Plaintiffs identify any intentional conduct or statement to support this conclusion, and yet the entire Amended Complaint appears to rest upon this faulty reasoning.

Plaintiffs fail to state a claim against the Defendants because the Defendants fulfilled the only legal duty owed in this case, which was a duty to provide Ms. Pond with appropriate medical care. Absent any other legal duty, Plaintiffs cannot sustain their negligence or breach of fiduciary relationship claims. Further, the allegations do not support the conclusion that any doctor acted in a way that can be described as extreme or outrageous sufficient to support a claim for intentional infliction of emotional distress or to override their official immunity with regard to the negligence and fiduciary duty claims. Dismissal of all claims is warranted.

II. Standard of Review

To survive a motion to dismiss, a complaint must contain factual allegations which are "enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 1965 (2007). Thus, "[w]hile a complaint attacked by a Rule 12(b)(6)

motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citations omitted). Rather, the facts set forth in the complaint must be sufficient to "nudge the[ ] claims across the line from conceivable to plausible." *Id.* at 1974.

"[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at. 1966 (internal citations omitted).

III. Allegations in the Complaint

Ms. Lisa Marie Pond collapsed and was transported to the "Ryder Trauma Center . . . at approximately **3:30 P.M**." [D.E. 25 at ¶ 37]. Ms. Janice Langbehn spoke to a Trust employee or apparent "admitting clerk," identified as "**Jane Doe**." *Id.* ¶¶ 38-39. "**[J]ane Doe** appeared to be one of the relevant Jackson Memorial gatekeeper who controlled family members' access to emergency personnel attending to patients at Ryder." *Id.* at ¶ 39.

Janice offered to provide **Jane Doe** any "relevant medical history and information; established herself as the appropriate family member to discuss and receive information regarding Lisa Marie's condition; . . ." *Id.* ¶ 40. "**Jane Doe** denied Janice's offers to provide medical information . . . . refused to provide Janice information about Lisa Marie's condition and, over the next eight hours, steadfastly refused to facilitate access for Janice and the Langbehn-Pond children . . . ." *Id.*

"[D]efendant Frederick [a Trust social worker] approached Janice and informed her that she should not expect to be provided *any* information on the condition of, or have the ability to be with, Lisa Marie as they were in an 'anti-gay city and state.' Frederick further informed Janice that she would not be able to get before a court in order to secure the legal papers necessary for her to get information or access to Lisa Marie for several days since it was a holiday weekend." *Id.* ¶ 41.

"On or about **4:15 P.M.**, and shortly after Janice's conversation with Defendant Frederick, Lisa Marie's Power of Attorney was received by the appropriate Jackson Memorial facsimile machine . . . . [and] placed in Lisa Marie's medical file." *Id.* ¶ 43.

"On information and belief, Defendants Zauner and Cruz, as the attending physicians . . . and Defendant Frederick, as the assigned social worker[,] . . . knew or should have known of the receipt of the power of attorney . . . ." *Id.* ¶ 44.

"At approximately **5:20 P.M.**, one of the attending physicians spoke with Janice for approximately one minute and told her that Lisa Marie needed a 'brain monitor.' Janice consented to the procedure." *Id.* ¶ 47.

"At approximately **6:10 P.M.**, two doctors approached Janice to discuss Lisa Marie's condition and surgical options. **Janice insisted on calling Lisa Marie's parents**, who were thereafter placed on speakerphone for the duration of the conversation, and to whom the doctors directed the remainder of the conversation." *Id.* ¶ 48. (emphasis added).

"At approximately **6:20 P.M.**, Janice asked the doctors if she and the Langbehn-Pond children could see their family member . . ." *Id.* ¶ 49.

"At approximately **6:50 P.M.**, after requesting a Catholic priest to perform the ceremony of last rites for Lisa Marie from a clergy member who approached Janice in the waiting area, a priest escorted Janice into the trauma area . . . . Janice was immediately escorted back to the waiting area by the priest once the ceremony had concluded at approximately **6:55 P.M.**" *Id.* ¶ 51.

"Janice continued to request permission from **Jane Doe** to see Lisa Marie and to receive ongoing information about her condition . . ." *Id.* at ¶ 53. "[**J]ane Doe** denied such requests and provided no further information or updates on Lisa Marie's condition…." *Id.*

"Lisa Marie was transferred from Ryder to the Neurosurgery Intensive Care Unit of Jackson Memorial at **10:30 P.M.**" *Id.* ¶ 45(e).

"Defendant Zauner was an attending physician and among the doctors and professional staff directing and providing care to Lisa Maria at all times material; was partially or wholly responsible for decisions denying access and information to Janice and the Langbehn-Pond children . . . ." *Id.* ¶ 13.

"Defendant Cruz was an attending physician and among the doctors directing and providing care to Lisa Marie at all times material and was partially or wholly responsible for decisions denying access and information to Janice and the Langbehn-Pond children . . . ." *Id.* ¶ 14.

"Defendants' cruel and/or substandard treatment was motivated by anti-gay animus, was contrary to professional standards and a breach of Defendants' duty of care, ..." *Id.* ¶ 5.

IV. Argument

Count I of the Complaint attempts to assert claims by the all of the Plaintiffs (the Estate of Lisa Marie Pond and Ms. Langbehn and her children) against all of the Defendants for Negligence. Count II of the Complaint attempts to assert claims by Ms. Langbehn and her children against all of the Defendants for Negligent Infliction of Emotional Distress. Count III attempts to assert a claim by the Estate of Lisa Marie Pond against all of the Defendants for the same tort. Count IV attempts to assert claims by all of the Plaintiffs against all of the Defendants for Negligence Per Se. Count V attempts to assert claims by Ms. Langbehn and her children against Frederick, Zauner, and Cruz for Intentional Infliction of Emotional Distress. Count VI attempts to assert that claims by the Estate against all Defendants for Breach of Fiduciary Relationship. Count VII attempts to assert claims by Ms. Langbehn against the Trust, Zauner and Cruz for Breach of Fiduciary Relationship. Count VIII attempts to assert claims by Ms. Langbehn and her children against the Trust and Frederick for Breach of a Fiduciary Relationship. All of the claims against the Trust must be dismissed because Florida law recognizes no legal duty to hospital patients or their visitors to provide a particular amount of information or visitation. Counts I-IV and VI-VIII against the individual Defendants must be dismissed for the same reason and for the additional and independent reason that the Defendants are immune from suit for alleged negligent acts undertaken in the scope of their employment. Counts V must be dismissed against the individual Defendants because there are no allegations of any intentionally extreme and outrageous actions.

A. There Is No Common Law Duty Or Statutory Duty Of Care To Provide Patients Or Their Visitors With A Particular Amount Of Information Or Visitation

The threshold question in any negligence claim is whether there is a legal duty. *Williams v. Davis*, 974 So. 2d 1052, 1056 n.2 (Fla. 2007) ("[E]stablishing the existence of a duty under our negligence law is a minimum threshold legal requirement . . . , and is ultimately a question of law for the court . . . ."). Defendants owed the same duties to Plaintiffs that they have to any person in society: the duty not to negligently harm them physically; the duty not to defame them; the duty to keep the physical premises reasonably safe, etc. As to Ms. Pond, Zauner, Cruz, and the Trust had the additional duty to provide medical services in accordance with the prevailing

professional standard of care. However, Defendants owed no duty like the one advocated by Plaintiffs throughout the Amended Complaint. Indeed, the duty that Plaintiffs would seek to have this Court create is unprecedented under Florida law. That is, Plaintiffs ask this Court to create, for the very first time, a legal duty owed by physicians and hospitals to the visitors of the hospital's patient. The duty would extend to providing the visitors with some undefined amount of visitation and information. No law exists for the creation of this duty, and accordingly, this Court must dismiss the negligence and fiduciary duty claims upon which these flawed claims rely.

B. Plaintiffs' negligence, negligent infliction of emotional distress, and fiduciary duty claims are barred as a matter of law

Traditionally, duties in the negligence context extend only to the exercise of reasonable care to safeguard against physical injury to a person's body or property. *Rivers v. Grimsley Oil Co.*, 842 So. 2d 975, 976 (Fla. Dist. Ct. App. 2003), *review denied*, 853 So. 2d 1070 (Fla. 2003). One of the doctrines that defines this limitation in Florida negligence law is called the "impact doctrine." *Id.*

The impact doctrine holds that, absent a physical impact, a plaintiff may not recover damages for emotional distress caused by negligence. *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360, 362 (Fla. 1995) ("'[E]motional distress suffered must flow from physical injuries . . . sustained in an impact.'") (citation omitted). The doctrine "'gives practical recognition to the thought that not every injury which one person may by his negligence inflict upon another should be compensated in money damages.'" *Zell v. Meek*, 665 So. 2d 1048, 1051 (Fla. 1995) (citation omitted). Thus, claims for negligence or negligent infliction of emotional distress that do not allege damages following an impact fail as a matter of law unless they fit into one of the limited and specific exceptions to the impact doctrine. *See Rowell v. Holt*, 850 So. 2d 474, 478 (Fla. 2003) ("Exceptions to the rule have been narrowly created and defined in a certain very narrow class of cases . . . .").

Although Plaintiffs allege that their emotional distress led to physical injuries [D.E. 25 ¶¶ 54, 91-92], Plaintiffs do not allege that their emotional distress was caused by a physical impact. There are two categories of negligence cases that do not require a physical impact. Plaintiffs' claims do not satisfy either exception.

1. Impact Doctrine

a. Plaintiffs do not fit within the "bystander" exception to the impact doctrine

The first exception to the impact doctrine is probably best characterized as a "bystander" claim for witnessing a physical injury negligently inflicted upon a loved one. This exception was first recognized by the Florida Supreme Court in 1985, when the court held that persons who suffer a physical injury as a result of emotional distress arising from their witnessing the death or injury of a loved one may maintain a cause of action for negligent infliction of emotional distress. *Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985). The rule established in *Champion* has since been reiterated to require that a plaintiff establish the following four elements:

> (1) the plaintiff must suffer a physical injury; (2) the plaintiff's physical injury must be caused by the psychological trauma; (3) the plaintiff must be involved in some way in the event causing the negligent injury to another; and (4) the plaintiff must have a close personal relationship to the directly injured person.

Zell v. Meek, 665 So. 2d 1048, 1054 (Fla. 1995).

Plaintiffs do not allege any negligent actions by the Trust that resulted in physical impact, either to Ms. Pond or to any of the other Plaintiffs, much less that Plaintiffs were in any way involved in an event causing negligent injury to a loved one. [*See* D.E. 25.] Therefore, Plaintiffs do not qualify for the "bystander" exception to the impact doctrine.[3]

b. Plaintiffs do not fit within the remaining category of exceptions to the impact doctrine

The second category of negligence cases that do not require the plaintiff to sustain a physical impact, although often discussed as "exceptions" to the impact doctrine, are actually

[3] Count III, brought by the Estate of Ms. Pond, does allege that "[Ms. Pond] was touched, contacted by and otherwise impacted in the course of treatment while a patient in Jackson Memorial including but not limited to physically placing her in isolation from her family." [D.E. 25 at ¶ 107.] Certainly Ms. Pond was touched in the course of the physician's and nurses' attempts to save her life, and certainly much of this was done away from her family, but the allegation does not further any of Plaintiffs' claims. There is no allegation in the Amended Complaint of a prohibited or negligent touching, or of any injuries resulting from or relating to any touching of Ms. Pond. Indeed, none of the complained-of actions are related in any way to the touching that accompanied the emergency medical treatment provided to Ms. Pond.

independent torts to which the doctrine was held to be inapplicable. *See Gracey v. Eaker*, 837 So. 2d 348, 356 (Fla. 2002) ("[T]he impact rule generally 'is inapplicable to recognized torts in which damages often are predominantly emotional.'") (citation omitted). A survey of this second category of cases demonstrates that, in every such case, Florida courts have recognized independent, stand-alone tort duties that the court then determined to be excepted from the impact doctrine.

(a) Duties and causes of action that the Florida Supreme Court has excepted from the impact doctrine.

Outside of the "bystander" cases discussed above, negligent infliction of emotional distress is not properly a "cause of action," but instead is a category of negligence cases recognized by the Florida Supreme Court as not requiring a physical impact. For example, the well-established causes of action for negligent defamation and negligent invasion of privacy do not require a showing of physical impact. *Id.* Although these torts are not usually referred to as negligent infliction of emotional distress cases or "exceptions to the impact doctrine," but rather by their specific names, e.g. defamation, Florida law does categorize them as such. *Id.*

The newer, and less well known, non-impact negligence torts recognized by the Florida Supreme Court, in contrast to defamation or invasion of privacy, are more regularly referred to as "exceptions to the impact doctrine." However, these new torts are also specific causes of action based upon stand-alone duties. For example, the Court recognized that parents who had received assurances from medical professionals that their unborn child was not at risk for deformation could maintain a cause of action for "wrongful birth" when the child was born deformed; at the same time, the Court held that the impact doctrine was inapplicable to the tort. *Kush v. Lloyd,* 616 So. 2d 415, 422 (Fla. 1992). Likewise, the Court specifically recognized a cause of action for "negligent stillbirth" and held that the impact doctrine was inapplicable. *Tanner v. Hartog,* 696 So. 2d 705, 708 (Fla. 1997) ("A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action."). Significantly, both such cases were species of medical malpractice. *See Kush*, 616 So. 2d at 417 n.2 (recognizing "wrongful birth" as a "species of medical malpractice"); *Tanner*, 696 So. 2d at 706 (noting that claim was based on allegations that negligence of doctors and hospital caused the stillbirth).

In addition to the two new medical malpractice causes of action, the Court has recognized two other specific torts as "exceptions to the impact rule." *Gracey*, 837 So. 2d 348; *Rowell v.*

Holt, 850 So. 2d 474 (Fla. 2003). *Gracey* concerned a psychotherapist's breach of a duty of confidentiality to a patient. 837 So. 2d at 348. The heart of the cause of action in *Gracey* was the breach of a statutory duty not to disclose information that the psychotherapist learned in the course of treatment. *Id.* at 354 ("[A] psychotherapist who has created a fiduciary relationship with his client owes that client a duty of confidentiality, and [] a breach of such duty is actionable in tort. . . . Here, the statute unambiguously indicates the intent of the Legislature to protect from unauthorized disclosure the confidences reposed by a patient in his or her psychotherapist. A breach of this duty not to disclose is therefore actionable under the common law cause of action for breach of fiduciary duty.") Thus, the Court held that a psychotherapist could be sued based on a statutory duty not to disclose confidential information about a patient, **and** that the damages for breach of that duty would not be limited by the absence of a physical impact. *Id.* at 355.

The Florida Supreme Court has also held that the impact doctrine does not apply to a narrowly defined claim for legal malpractice. *Rowell*, 850 So. 2d 474. The suit was brought pursuant to the well-established claim for professional legal malpractice found in the "special, professional, and independent duty to 'exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise.'" *Id.* at 479 (citation omitted). The attorneys in *Rowell* failed for more than ten days simply to file an exonerating document that would have resulted in the immediate release of the client from jail. *Id.* at 476-77. Based on the "clear forseeability of emotional harm resulting from a protracted period of wrongful pretrial incarceration," the court held that the damages would not be limited to economic damages and that emotional damages could be included in the legal malpractice claim. *Id.* at 479. The Court also very clearly limited the holding of the case to its specific facts. *Id.* at 481 ("This determination should not, and we are confident will not, be interpreted to cast doubt on the continued viability of the impact rule, nor should this decision be extended any further than as narrowly tailored.")

(b) Plaintiffs have not identified a common law duty

Plaintiffs have not identified any cognizable tort duty or cause of action recognized by the courts in Florida. In Counts II and IV, Plaintiffs allege that a "fiduciary, special relationship and/or special professional duty exists between the trauma unit treating physicians and the patient's healthcare surrogate . . . . [and] between the trauma unit treating physicians and/or the

social worker assigned to the trauma unit and the families of its incompetent and/or dying patients . . . ." [D.E. 25 ¶¶ 82-83; 114-115.] Similarly, in Count VII, Ms. Langbehn alleges that "[a] fiduciary relationship existed between [her] and each of Lisa Marie's treating physicians . . . based upon their fiduciary relationship with their incapacitated patient . . . or alternatively, . . . based on the trust and confidence she bestowed upon them and which trust and confidence they accepted." [*Id.* ¶¶ 134-35.] Finally, in Count VIII, Plaintiffs allege that "[a] fiduciary relationship existed between [them], as the family of Jackson Memorial's critically ill admitted patient, and Frederick, as the social worker who held himself as the mental health professional whose duty it was to provide appropriate mental health and support services, counseling, information, communication and to other appropriate services." [*Id.* ¶ 140.]

But merely labeling a relationship as "fiduciary" does not establish a legal duty in tort, much less one that is exempt from the impact doctrine. For example, before analyzing the impact doctrine in *Gracey*, the Florida Supreme Court first recognized the long-established fiduciary relationship between a psychotherapist or physician and their patient. *Gracey*, 837 So. 2d at 354. The Court next examined the specific Florida statute governing psychotherapists that forbade them from disclosing confidential information obtained in the course of and in furtherance of treatment – thus recognizing and defining the duty. *Id.* at 355. In that very specific and narrow context the Court held that it would allow the breach of fiduciary duty claim based on the duty of confidentiality defined in the statute **and** that the damages would not be limited by the impact doctrine. *Id.* Notably, the Court did not find a blanket "professional duty" that allowed a patient to sue his psychotherapist for any actions whatsoever that he disagreed with or which he alleged caused him to suffer emotional distress.

Similarly, before turning to the impact doctrine in *Rowell*, the Court found a cognizable legal malpractice claim based on the defendant's failure to exercise the degree of reasonable knowledge and skill required of a lawyer -- recognizing that an ordinary lawyer had a duty to file exonerating paperwork in less than ten days. *Rowell*, 850 So. 2d at 479. The Court then allowed damages beyond economic damages, but limited the holding to the very particular nature of the breach of professional duty in the case. *Id.* at 481. By contrast, Florida has not found a specific duty owed by physicians, nurses, hospitals, or social workers to the family or other visitors of trauma center patients; nor has Florida found a specific duty owed to a healthcare surrogate that is independent of the duty owed to the patient for whom the surrogate speaks. The Florida

Supreme Court also has not found a duty to allow a patient a certain amount of visitation with their family. Thus the second question about whether the breach of such a duty would be exempt from the impact doctrine is not reached. [4]

This Court should not extend the scope of Florida law to create ***both*** a new duty and a new exception to the impact doctrine. The Florida Supreme Court rarely recognizes new duties and rarely crafts exceptions to the impact doctrine, a fact that is exemplified in *Woodward v. Jupiter Christian School, Inc.*, 913 So. 2d 1188 (Fla. Dist. Ct. App. 2005), *review dismissed*, 972 So. 2d 170 (Fla. 2007). The plaintiff in *Woodward* brought a breach of fiduciary duty claim and attempted to assert a professional duty by relying upon *Gracey*, which featured very similar facts. In *Woodward*, a high school senior was approached by the school chaplain, who asked the student about his sexual orientation. *Woodward*, 913 So. 2d at 1189-90. The chaplain assured the student that the conversation was confidential, and only after this assurance did the student disclose that he was homosexual. *Id.* at 1190. The student alleged that he made the disclosure to seek spiritual counsel and salvation. *Id.* The chaplain disclosed the information to administrators, who then disclosed it to others, and ultimately the student was expelled. *Id.* The court notes in the opinion that, like the statutory duty regarding communications with psychotherapists in *Gracey*, there is a Florida evidence statute that makes communications with clergy confidential. *Id*. at 1191. Nevertheless, the court held that "the Supreme Court of Florida has not yet recognized an exception to the impact rule for disclosure of information by a member of the clergy," and affirmed the dismissal of the breach of fiduciary duty claim. *Id.* The appellate court certified the question to the Florida Supreme Court, *id.* at 1191-92, but the Supreme Court dismissed review, *Woodward*, 972 So. 2d at 170.

A Florida appellate court likewise rejected a negligent infliction of emotional distress claim as a result of alleged medical malpractice that resulted in the death of a fetus. *Thomas v. OB/GYN Specialists of Palm Beaches, Inc*. 889 So. 2d 971, 972-73 (Fla. Dist. Ct. App. 2004), *review dismissed*, 912 So. 2d 320 (Fla. 2005) ("According to the Supreme Court of Florida, the impact rule is alive and well. It is for that court to determine when 'public policy dictates' that

[4] In *Southern Baptist Hosp. of Fla., Inc. v. Welker*, 908 So. 2d 317 (Fla. 2005), the court refused to address whether a negligent infliction of emotional distress claim for negligent interference with parental rights should be excepted from the impact doctrine, because the more fundamental question of whether there was an underlying duty or cause of action at all had not been addressed below or briefed to the court.

an exception be created. In *Tanner,* [allowing a claim for negligent stillbirth] the court recognized that some facts make it 'difficult to justify the outright denial of a claim for mental pain and anguish.' *Id.* at 708. Perhaps the facts of this case are such as to entitle Robert Thomas to a claim for negligent infliction of emotional distress. ***However, that is a decision for the Supreme Court of Florida***.") (emphasis added).

As explained above, there is no duty (regardless of a fiduciary relationship) to provide information or visitation to a patient's visitors. Thus, Plaintiffs cannot survive dismissal by labeling their relationship as "fiduciary" or by referring vaguely to "professional duties." Moreover, as no such claim exists, the Florida Supreme Court has not found an exception to the impact rule for it, and this Court should decline to find one as did the courts in *Woodward*, *Thomas,* and *Welker*. . .

2. The Estate also fails to state a claim for negligent infliction of emotional distress because Ms. Pond's emotional distress damages cannot be determined

In Count III, the Estate of Lisa Marie Pond separately sues the Trust for negligent infliction of emotional distress. But, although the Estate asserts that "Lisa Marie was touched, contacted by and otherwise impacted in the course of treatment while a patient in Jackson Memorial including but not limited to physically placing her in isolation from her family" [D.E. 25 ¶ 107], the Amended Complaint fails to allege that physical contact between Trust employees and Ms. Pond was in any way negligent[5] or that any physical impact to Ms. Pond was related to any negligence. Instead, the Estate's claim is based on the same purported acts and omissions as the other Plaintiffs' claims—namely, the failure to provide Ms. Pond's family with timely information and visitation while she was being treated in the Trauma Resuscitation Unit. [*Id.* ¶¶ 98, 107-08.] This claim also fails under Florida's impact doctrine.

The impact doctrine forbids the "'recover[y of] damages for emotional distress caused by the negligence of another, [unless] the emotional distress suffered [] flow[s] from the physical injuries sustained in an impact.'" *Sch. Bd. of Miami-Dade County, Fla. v. Trujillo*, 906 So. 2d 1109, 1111 (Fla. Dist. Ct. App. 2005) (quoting *R.J. v. Humana*, 652 So. 2d at 360; *Champion*, 478 So. 2d at 17). Because the Estate has failed to allege any connection between the physical

[5] Moreover, as explained in the following Section, any claims premised on a lack of informed consent must be dismissed based on Plaintiffs' failure to properly plead a medical malpractice claim.

impact on Ms. Pond and any physical injury giving rise to the alleged emotional distress—and, moreover, has failed to allege that the physical impact was in any way negligent—this is a claim for "purely emotional and/or psychological damages . . . . [for which] the impact rule precludes recovery." *Id.*

This case is similar to the *Trujillo* case as regards the application of the impact doctrine. In *Trujillo*, a school bus driver picked up a four-year-old boy with special needs and got lost on the way to school. By the time the bus arrived, the boy "had urinated on himself at least once and appeared to be thirsty and dehydrated." *Id.* at 1110. The doctor found "no signs of abuse or physical injury," but shortly after the incident, the boy "began having nightmares, started wetting his bed and appeared to develop a fear of school buses." *Id.* The court found those facts insufficient to establish a physical injury as would be necessary to overcome the impact rule. *Id.* The court explained the reasons the impact rule applies to cases involving purely emotional or psychological damages:

> First, emotional harm is difficult to prove as the source of the injury is often elusive. *Rowell v. Holt*, 850 So.2d at 478. Second, courts need to assure a tangible validity to claims involving emotional or psychological harm. *R.J. v. Humana*, 652 So.2d at 362. If a physical impact or injury is not required, courts will be inundated with fictitious or speculative claims and defendants' abilities to defend themselves will be paralyzed. *R.J. v. Humana*, 652 So.2d at 363.

Id. at 1111.

The impact rule applied for an additional reason in *Trujillo* that is analogous to the case at bar: "As [the boy] is non-verbal, he was unable to confirm the extent of his mental pain and suffering and was not available for cross-examination. Without a physical injury, measuring [the boy's] emotional damages would be difficult if not impossible." *Id.* Similarly, because Ms. Pond is unable to express the existence of any mental pain and suffering resulting from the visitation policies of the TRU, [*see* D.E. 25 ¶ 30, 45, 48], assessing the extent to which, if at all, the lack of visitors or the failure to provide her family with information caused Ms. Pond to "suffer[] psychological trauma and severe emotional distress," [*id.* ¶ 108], would be impossible. *See Trujillo*, 906 So. 2d at 1111. Accordingly, Count III must be dismissed for this additional and independent reason.

3. The Estate also fails to state a claim for breach of fiduciary relationship because it did not comply with the pre-suit conditions to bringing a medical malpractice claim

In Count VI, the Estate attempts to assert a claim for breach of fiduciary relationship based on the allegation that "[a] fiduciary relationship existed between Lisa Marie and each of her treating physicians." [D.E. 25 ¶ 129]. The only arguable basis for any fiduciary duty under the facts of this case is the doctor-patient relationship, and in this context, it appears that the Estate sues Defendants for failing to respect Ms. Pond's health care surrogate's right to informed consent. Florida has "codified the doctrine of medical informed consent generally in section 766.103 of the Florida Statutes." *State v. Presidential Women's Center*, 937 So. 2d 114, 117 (Fla. 2006). "A claim based on lack of informed consent constitutes a species of medical negligence." *Stackhouse v. Emerson*, 611 So. 2d 1365, 1367 (Fla. Dist. Ct. App 1993). Accordingly, because lack of informed consent amounts to medical negligence, the Estate was required to comply with Chapter 766 of the Florida Statutes, which governs medical negligence or medical malpractice claims.

State law claims relating to alleged medical negligence or medical malpractice are subject to the binding requirements of Chapter 766 of the Florida Statutes. That chapter governs all claims "arising out of the rendering of, or the failure to render, medical care or services." Fla. Stat. § 766.106(1)(a); *J.B. v Sacred Heart Hosp.*, 635 So. 2d 945, 948-49 (Fla. 1994). A plaintiff bringing a claim relating to the provision medical services must follow the presuit screening requirements of chapter 766, and must meet the pleading requirements as well. The screening requirements include a notification requirement as well as a corroborating affidavit requirement. In addition, to plead a claim arising out of medical negligence, "the attorney filing the action [must have] made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." Fla. Stat. § 766.104(1). Furthermore, the complaint must "contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. *Id*. Because the Estate has not complied or allege that they complied with such pre-suit conditions, the Court must dismiss its claim.

4. Plaintiffs Cannot Premise A Duty On The Advanced Directives Statute Or Patient's Bill Of Rights

Plaintiffs recite throughout the Complaint various standards of care based on the Trust's "Public Policies" and "Rules and Regulations," "Joint Commission standards," and Florida's Health Care Advance Directive Statute. [D.E. 25 ¶¶ 19-27, 64-67, 69, 80, 84-86, 98, 101-103, 109-118.] To the extent Plaintiffs are suggesting that these standards should be considered as instructive in determining whether the Trust acted negligently, then, as discussed above, these recitations are moot because there is no established duty. To the extent Plaintiffs are asserting these standards as independent bases for creating a duty of care under a negligence per se theory, *see id.* Count IV, ¶¶ 109-118], it is clear that Plaintiffs do not state a claim for negligence per se for a number of reasons.

First, Plaintiffs' claim is barred to the extent that it relies on industry "standards" as providing the foundation for negligence per se. Second, although Plaintiffs do not actually cite the precise legal authority that they claim would supply a private cause of action, the only statutes arguably at issue do not expressly or impliedly authorize a private cause of action in favor of Plaintiffs. Third, Plaintiffs fail to allege how any purported statutory violations caused the injuries they now allegedly endure. For all of these reasons, the Court should dismiss Count IV against the Trust.

Florida law defines negligence per se as a violation of any "'**statute** which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury.'" *White v. NCL America, Inc.*, No. 05-22030-CIV, 2006 WL 1042548, at *5 (S.D. Fla. Mar. 8, 2006) (quoting *DeJesus v. Seaboard Coast R.R. Co.*, 281 So.2d 198, 200-01 (Fla.1973)) (emphasis added). Plaintiffs can only state a claim for negligence per se if they can plead and prove that Defendants violated a statute or, in some cases, an administrative regulation. *Compare Greehauf v. Sch. Bd. of Seminole County*, 623 So. 2d 761, 763 (Fla. Dist. Ct. App. 1993) (identifying legislative enactments and administrative regulations as the kinds of authorities that are the proper subject of negligence per se) *with Murray v. Briggs*, 569 So. 2d 476, 480 (Fla. Dist. Ct. App. 1990) (observing that "the notion that violation of an administrative regulation constitutes negligence per se is not without its critics."). Indeed, when given the opportunity, courts have specifically declined to extend the scope of potential liability under a theory of negligence per se beyond statutes and regulations. *See, e.g., Pressley v. Farley*, 579 So. 2d 160, 161 (Fla. Dist. Ct. App. 1991) (finding that "[a] violation of the Rules of

Professional Conduct does not create a legal duty on the part of the lawyer nor constitute negligence per se") (internal citation omitted). Courts have specifically declined to extend the theory of negligence per se to apply to violations of industry standards. *St. Louis-San Francisco Ry. Co. v. Burlison*, 262 So. 2d 280, 281 (Fla. Dist. Ct. App. 1972) (declining to hold that "failure to conform one's own practices with those generally recognized by an industry safety council or committee is negligence per se.").

Regardless of how Plaintiffs label the Trust's internal policies, the Trust's "Public Policies" and "Rules and Regulations" are not positive law that subjects them to statutory civil liability. Plaintiffs also cannot establish a duty of care, much less a *presumption* of negligence, through alleged breaches of internal policies, rules or industry standards. *Pollock v. Fla. Dept. of Highway Patrol*, 882 So. 2d 928, 936-37 (Fla. 2004) (holding that internal policies do not create a legal duty and corresponding civil cause of action.)

Plaintiffs have referred to two statutes in their Amended Complaint. But those statutes do not create a private cause of action, and even if they did, the subject of the statutes would not support a cause of action based on the facts alleged.

For a plaintiff to successfully use a statute to support a claim for negligence per se, she must demonstrate that the legislature intended to create a private cause of action for those aggrieved by conduct violating the statute. *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985 (Fla. 1994). Implicit in this understanding is the idea that the subject statute must generally require, or proscribe, conduct. The Amended Complaint fails to state a cause of action because the allegations do not support a violation of the statute, and because the alleged violation is not alleged to be the cause of the injuries complained of by Plaintiffs.

To begin with, Plaintiffs do not identify in Count IV (Negligence Per Se) what specific laws allegedly support their claim. Instead, Plaintiffs allege generally that the Trust violated durable power of attorney laws, which appear to be rooted in the Health Care Advance Directives chapter of the Florida Statutes. [D.E. 25 ¶¶ 25-27, 109-118.] Plaintiffs allude to three subsections that may be at issue. Florida Statutes Section 765.204 provides that:

> (2) [i]f the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

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> (4) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity.

Finally, Florida Statues Section 765.112 states that, "[a]n advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter."

The gist of Ms. Langbehn's allegations is that no one conferred with her regarding Ms. Pond's medical condition despite the fact that she held a power of attorney that the Trust was required to acknowledge under Florida law.[6] But nowhere does Ms. Langbehn allege that the Trust failed to seek her consent at a point in time that it would be required to do so for the provision of medical care to Ms. Pond. Nowhere does she allege that a physician conducted a procedure that required the surrogate's consent. And nowhere does she identify any procedure that she would have objected to had she been so informed. In fact, the Amended Complaint alleges that the physicians did consult with Ms. Langbehn regarding medical procedures and courses of action for Ms. Pond.[7] [D.E. 25 ¶¶ 47-48.]

The purpose of the health care advance directives statute is to authorize surrogates to act on another's behalf regarding medical treatment *only*. Fla. Stat. § 765.102 ("[T]he Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her ***medical treatment*** upon his or her incapacity.") (emphasis added). Thus, Plaintiffs cannot rely upon that statute to impose any other conditions, i.e., visitation or keeping Ms. Langbehn or the children

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[6] Although Ms. Langbehn's children are included in Count IV, they obviously cannot state a claim for negligence per se on account of a violation of the health care advance directive statutes, as Ms. Langbehn was the only designated surrogate. Likewise, neither Ms. Langbehn nor the Estate has a cause of action for negligence per se, as there is no allegation that Ms. Pond suffered damages as a result of any alleged failure by Defendants to consult with Ms. Langbehn regarding her medical care. And as discussed in the previous Section, allegations of lack of informed consent must be brought pursuant to the medical malpractice statute.

[7] As such, to the extent that Defendants did not comply with every technical aspect of the statute, such as providing Ms. Langbehn with written notification that her authority under the power of attorney had been triggered, [D.E. 25 ¶ 43], Plaintiffs do not allege any harm resulting from that.

generally "informed." The facts alleged in the Amended Complaint simply do not relate to the subject matter of the advance directive statutes.

Regardless, even if Plaintiffs could establish that Defendants were acting contrary to some portions of the advance directives statute, Plaintiffs' claim for negligence per se would still fail because the relevant portions of the statute do not create a private cause of action. First, there is no explicit grant of such right. Second, this Court should not imply a private cause of action because the Florida Legislature never intended for one to exist. *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship*, 959 So. 2d 176, 182 (Fla. 2007) (noting that "legislative intent had become the primary factor that most courts, including the United States Supreme Court, used to determine whether a cause of action exists when a statute does not expressly provide for one"); *Buell v. Direct Gen. Ins. Agency*, 267 Fed. Appx. 907, 909 (11th Cir. 2008) (recognizing that Florida law requires courts to look at "whether the statute was intended to create a private remedy" before determining that a statutory violation gives rise to a common law claim).

The *Horowitz* Court recently explained how to discern whether the legislature intended to create a private cause of action against a hospital for a physician's failure to comply with an applicable financial responsibility statute. It began with an analysis of the language of the statute itself. *Id.* at 182. It noted that the statute was primarily designed to regulate doctors, not hospitals, and that the stated legislative purpose behind the statute was to "safeguard the public from unsafe and unqualified physicians." *Id.* at 183. The Court also observed that there was no legal obligation on hospitals to guarantee or insure malpractice judgments in the event that a doctor fails to comply with the financial responsibility requirements, nor did Florida law require anything of hospitals apart from reporting when it has disciplined a physician. *Id.* at 184. Finally, the Court found it significant that the Legislature imposed physician liability in certain clear cases. *Id.* at 185. Thus, the Court found no private cause of action against hospitals based on its analysis of "the text, context, and purpose of the relevant provisions." *Id.*

Likewise, the Florida Legislature never intended to create a private cause of action against doctors and hospitals who fail to adhere to the mandates of the health care advance directives statute. To begin, the Legislature's findings relating to the purpose of the health care advance directives statute belie any intent to create a private cause of action for the surrogate; the primary focus of the Legislature's findings is on protecting the interests of the principal. That is, the Legislature declared that "every competent adult has the fundamental right of self-

determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment." Fla. Stat. § 765.102 (1). The Legislature goes on to say that it intends by its approval of advance directives to "ensure that such right is not lost or diminished by virtue of later physical or mental incapacity." *Id.* at § 765.102 (2).

Moreover, taking the health care advance directives statute as a whole, it is clear that the legislative intent is to protect the interests of the principal. Florida Statutes provide that a health care surrogate's responsibilities are only triggered upon the incapacity of the principal because a principal "is presumed to be capable of making health care decisions for herself or himself unless he or she is determined to be incapacitated." Fla. Stat. § 765.204. A surrogate's primary responsibility, in turn, is to "provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions." *Id.* at § 765.205 (1) (b). The surrogate has no independent role, and incurs no independent rights, pursuant to the advance directives statute. In short, the text, context, and purpose of the health care advance directives statute is to ensure that the principal's medical care wishes are carried out as fully as possible. No intent to protect the interests of the surrogate through a private cause of action can be implied from the relevant statutes. Accordingly, the Court should dismiss the negligence per se claim as a matter of law.

Finally, even if the Trust violated the health care advance directives statute, such violation could not have caused the damages stated by Plaintiffs. *See deJesus,* 281 So. 2d at 201 (noting that a plaintiff cannot establish negligence per se unless he can prove that "the violation of the statute was the proximate cause of his injury."). That is, Plaintiffs allege that they suffered injuries "from the breach of duties described in paragraph 112 above, including but not limited to refusing to provide information to loved ones on the condition, and to allow access to, a patient in his or her last hours where no medical or other legitimate justification exists for doing so." [D.E. 25 ¶ 117.] Nowhere do Plaintiffs allege that their injuries were the result of the Trust taking some action that violated the advance directive or the relevant statutes.

Plaintiffs' reliance on the "Patient's Bill of Rights" [D.E. 25 ¶ 27] is easily dispensed with. The Patient's Bill of Rights is contained in Fla. Stat. § 381.026. The statute specifically provides that it neither creates a private right of action nor imposes any additional legal duties: "This section shall not be used for any purpose in any civil or administrative action and neither expands nor limits any rights or remedies provided under any other law." *Id.* § 381.026(3).

Plaintiffs cannot cite to a provision of either statute that required the Trust to provide information about, and access to, Ms. Pond. Accordingly, even if the Trust took actions contrary to the advance directives statute or the Patient's Bill of Rights, these actions are not the proximate cause of Plaintiffs' injuries, nor are they alleged to be. Count IV (Negligence Per Se) must be dismissed with prejudice.

5. Individual Defendants Are Immune From Negligence Claims

The negligence claims brought against the individuals are also barred on account of the individuals' official immunity. Counts I-IV and VI-VII against Dr. Cruz, Dr. Zauner, and Dr. Frederick are controlled by § 768.28(9)(a), Fla. Stat., which states that:

> "[n]o officer, employee, or agent of the state or any of its subdivisions shall beheld personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act . . . in the scope of her or his employment, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The Amended Complaint alleges that Defendants Zauner, Cruz, and Frederick are employees of the Public Health Trust. [D.E. 25 ¶¶ 12-14]. An employee of the Trust acting in the scope of his employment cannot be sued individually for acts of negligence. *Jaar v. University of Miami*, 474 So. 2d 239, 243-44 (Fla. Dist. Ct. App. 1985) (where a physician was acting as an agent of the Trust at the time of the alleged negligence, he was held to be immune from suit). The legislature has "substituted the state and its agencies, which previously could not be sued because of sovereign immunity, for the individuals who could have been sued." *White v. Hillsborough County Hosp. Auth.*, 448 So. 2d 2, 3 (Fla. Dist. Ct. App. 1983). Thus, "either the agency can be held liable … or the employee, but not both." *McGhee v. Volusia County*, 679 So. 2d 729, 733 (Fla. 1996). The facts pled in the Amended Complaint indicate that the individual Defendants were acting within the scope of their employment. Therefore, each of the negligence, negligence per se, and negligent breach of fiduciary duty claims pled against the individual Defendants must be dismissed.

C. Plaintiffs Claims For Intentional Infliction Of Emotional Distress Against Frederick, Zauner, And Cruz Must Be Dismissed Because They Fail To Allege Facts Supporting An Inference of Extreme And Outrageous Conduct

Florida law provides that, in order to survive a motion to dismiss an intentional infliction of emotional distress claim, a plaintiff must plead: (1) extreme and outrageous conduct; (2) an intent to cause or reckless disregard to the probability of causing, emotional distress; (3) severe emotional distress suffered by the plaintiff; and (4) proof that the conduct caused the severe emotional distress. *Quezada v. Circle K Stores, Inc.*, No. 204CV190FTM33DNF, 2005 WL 1633717, at *2 (M.D. Fla. July 7, 2005) (dismissing a complaint after finding that the defendant's "alleged conduct was not sufficiently outrageous and extreme as is required to support a claim for intentional infliction of emotional distress."); *Hart v. U.S.*, 894 F.2d 1539, 1548 (11th Cir. 1990). Indeed, courts only uphold such claims in "extremely rare circumstances." *Id.* (citing *Gonzalez-Jiminez de Ruiz v. U.S.*, 231 F. Supp. 2d 1187, 1199 (M.D. Fla. 2002)). Whether conduct satisfies the legal standard of "extreme and outrageous" is a question of law that can lead to dismissal of a complaint. *Quezada v. Circle K Stores, Inc.*, No. 204CV190FTM33DNF, 2005 WL 1633717, at *2 (M.D. Fla. July 7, 2005) (dismissing a complaint after finding that the defendant's "alleged conduct was not sufficiently outrageous and extreme as is required to support a claim for intentional infliction of emotional distress.").

In the Middle District of Florida a plaintiff brought a claim for intentional infliction of emotional distress against the United State Bureau of Prisons ("BOP"), to which the court applied Florida law. *Gonzalez-Jimenez De Ruiz v. United States*, 231 F. Supp.2d 1187 (M.D. Fla. 2002). Plaintiff's father was being held in a Florida prison, and because of concerns for his father's health, plaintiff traveled from Puerto Rico to Florida to visit his father. *Id.* at 1192. From April until June the prison officials refused to allow plaintiff to visit his father, told plaintiff that his father didn't wish to see him, and told plaintiff that his father was "fine." *Id*. Since at least May, the father was actually in a nearby hospital being treated for terminal cancer. *Id*. Plaintiff learned of this from a non-prison official and visited the hospital, where he also learned that his father's spine and neck had been broken by prison personnel who "had crudely attempted to manipulate [his] spine." *Id.* The very next day, plaintiff's father was transferred to a prison in Texas where he died nine days later, all without notification to his family. *Id.* Thus, for over a month the plaintiff was denied contact with his dying father, was lied to and denied the

most basic information about his father's terminal condition and the condition caused by the BOP personnel, and was not given information about his father's transfer to Texas and ultimate death. *Id.* at 1200. The court held that because the father was in a federal correctional facility the allegations were not "beyond the bounds of decency" or "utterly intolerable in a civilized community," and dismissed the Complaint. *Id.*

Plaintiffs insinuate that Dr. Cruz, Dr. Zauner, and Dr. Frederick deliberately excluded them from seeing their loved one due to anti-gay animus. [D.E. ¶ 5]. However, there are absolutely no facts to support this conclusion aside from a bald assertion of "animus" (in the "summary of the claim") and an allegation that Defendants, generally, excluded visitors from the resuscitation unit of a trauma center. Certainly, these lone allegations cannot amount to intentional infliction of emotional distress. A holding to the contrary would amount to the creation of a *legal presumption* of extreme and outrageous conduct by a physician or health care worker providing care to a dying patient whenever the patient's visitors merely assert that they were not provided sufficient time to visit.

In evaluating whether Plaintiffs have stated a cause of action, the Court must look to the Complaint for facts that plausibly allege that Dr. Cruz, Dr. Zauner or Dr. Frederick *deliberately intended to harm* Plaintiffs through extreme and outrageous conduct based on gay animus, which caused Plaintiffs' alleged injuries. *Twombly*, 127 S.Ct. at 1974. There are no such allegations in the Amended Complaint, and therefore it should be dismissed.

1. Dr. Cruz and Dr. Zauner are not accused of extreme and outrageous conduct

Plaintiffs fail to allege any facts about any conduct by Dr. Cruz or Dr. Zauner that could be interpreted as either extreme and outrageous or as intended to cause emotional distress. There is no allegation that the Doctors said a word to any of the Plaintiffs. There is no allegation that the Plaintiffs ever saw the Doctors or that, aside from Ms. Pond, the Doctors ever saw the Plaintiffs. There is not one paragraph in the Amended Complaint that makes a factual allegation about any conduct undertaken by either Doctor. Plaintiffs allege **only** that they were Ms. Pond's attending physicians; were partially or wholly responsible for decisions denying the Plaintiffs access to Ms. Pond, [D.E. 25 ¶¶ 13, 14]; and, in a generic recitation applied to all three individual Defendants, that they barred Plaintiffs from seeing Lisa Marie in the TRU. *Id.* ¶ 125.

The fact that Plaintiff cannot describe what either Doctor did undermines that claim that both acted in a manner that can be described as "extreme and outrageous."

Regardless, assuming that Plaintiffs had pled that one of the Doctors excluded Ms. Langbehn and her children from the Trauma Resuscitation Unit, there is nothing extreme and outrageous about that conduct. The TRU provides the most time sensitive and critical care available to serious trauma victims throughout South Florida. Ms. Pond spent seven hours in the TRU before she was *stepped-down* to the Neurosurgery Intensive Care Unit. [D.E. 25 at ¶ 45]. Limiting visitor access, given the critical nature of operations inside the TRU, cannot possibly carry any plausible inference of intentional extreme and outrageous conduct toward those visitors. The inference is even weaker in this case given that Plaintiffs have not alleged that Ms. Pond had the entire TRU and staff to herself. It cannot be the law that disallowing visitors into a Trauma Center is *prima facie* extreme and outrageous unless or until the Trauma Center rebuts that presumption in a court of law. Yet, Plaintiffs ask this Court to make precisely this inference. *Gonzalez-Jimenez De Ruiz*, 231 F.Supp.2d at 1191 ("whether a plaintiff has alleged conduct which meets the essential elements for a claim for intentional infliction of emotional distress is a matter of law to be decided by the court.")

The references to the health care power of attorney are extraneous and irrelevant. The power of attorney grants the designee authority to consent to or deny medical treatment on behalf of the patient when the patient is incapacitated and where such consent is medically required. In paragraph 44 of the Amended Complaint, Plaintiffs allege that Doctors Zauner and Cruz "knew or should have known of the receipt of the Power of Attorney, the advanced directives of Lisa Marie and Janice's role as guardian of Lisa Marie's person and the person to make decisions given Lisa Marie's incapacity." Plaintiffs do not allege that the Doctors failed to obtain consent for a medical procedure that would have required it. Rather, the alleged facts state that attending physicians ***did*** consult with Ms. Langbehn (the first time less than two hours after Ms. Pond's arrival) to obtain consent for medical procedures, consent that Ms. Langbehn admittedly gave to those doctors. *Id.* ¶ 47. There are no allegations in the Complaint that any medical procedures requiring consent were undertaken without consent. Because the facts do not support a violation of Ms. Pond's right to informed consent, and a claim for medical malpractice has not been brought as required by Florida Statute, it is unclear what is meant or what purpose is intended to be served by the vague allegations of "refusing to timely acknowledge the Power of Attorney, . .

. ." *Id.* ¶ 125. Such assertions do not allege extreme and outrageous conduct intended to cause emotional distress.

2. Dr. Frederick is not accused of extreme and outrageous conduct

With respect to Dr. Frederick, paragraph 125 also alleges that he intentionally denied Plaintiffs access to the TRU. The allegations fail to allege extreme and outrageous conduct for the reasons explained above. Moreover, unlike Dr. Cruz and Dr. Zauner, there is no allegation that Dr. Frederick had any responsibility or control over decisions regarding Plaintiffs' access to the TRU. The allegations are that the attending physicians were responsible for denying access. *Id.* ¶ ¶ 13, 14, 43. Therefore, to the extent that paragraph 125 alleges that Frederick barred Plaintiffs from seeing Ms. Pond, the only reasonable inference is that Frederick was following orders of a physician charged with controlling access to the TRU. This cannot be extreme and outrageous.

The only words or specific actions attributed to Dr. Frederick were in the first thirty minutes of Plaintiffs' arrival at the TRU, prior to the power of attorney being faxed, and thus prior to any documentation authorizing Ms. Langbehn to be informed of private medical information about Ms. Pond, pursuant to HIPAA. [D.E. 25 at ¶¶ 41, 43]. Ms. Langbehn alleges that Dr. Frederick said, only to her, that "she should not expect to be provided *any* information on the condition of, or have the ability to be with, Lisa Marie as they were in an 'anti-gay city and state.'" [D.E. 25 at ¶ 41] (emphasis in original).

In determining who could make medical decisions for Ms. Pond due to her incapacity, and prior to receiving the health care power of attorney appointing Ms. Langbehn as a surrogate, Dr. Frederick was bound by Section 765.401, Florida Statutes. The statute lists, in order of priority, classes of persons authorized to make decisions on behalf of an incapacitated patient. § 765.401(1), Fla. Stat. (2007). For purposes of informed consent, the statute does not recognize a same sex life partner, regardless of their legal status within another state, as anything other than a "close friend," the seventh class in order of priority. *Id.*; s*ee also* § 741.212 (disallowing recognition of same sex marriage in Florida "for any purpose".). Thus, the Trust could not interpret the second category of "spouse" in Section 765.401 as including same sex partners even if it wanted to because Florida law forbids it. § 741.212(3) ("spouse" applies only to a "union between one man and one woman").

Therefore, even accepting Dr. Frederick's alleged statement as true, which he must for purposes of this Motion to Dismiss, the alleged statement that Florida and the City of Miami are "anti-gay," is an accurate characterization of Florida law in the context of health care advance directives. Indeed, Florida is one of only four states that categorically refuse to recognize same-sex marriages from other states. Andrew Koppelman, *The Limits of Strategic Litigation*, 17 Law and Sexuality, 1, 4 (2008). Importantly, Plaintiffs do not allege that Dr. Frederick said that he is anti-gay or that anyone else within the TRU or the Trust is anti-gay, but only that Florida and the City of Miami are anti-gay. [D.E. 25 at ¶ 41]. This Court should not hold that providing accurate information about the laws of the state, however unfair those laws may be, amounts to extreme and outrageous conduct.

Approximately one hour later, after the power of attorney appointing Ms. Langbehn as Ms. Pond's surrogate was faxed (thereby putting Ms. Langbehn at the top of the section 756.401 proxy list), physicians consulted Ms. Langbehn regarding a procedure for the placement of a "brain monitor" on Ms. Pond. *Id.* ¶ 46. Another forty minutes later Ms. Langbehn was consulted by two more doctors. *Id.* ¶ 48. Approximately forty minutes after that, Ms. Langbehn gained access to the TRU. *Id.* ¶ 51. Thus, Dr. Frederick's alleged statement to Ms. Langbehn about what she should "expect," *made prior to receipt of the power of attorney*, was a legally accurate statement. The Court should find that the alleged statement was not extreme and outrageous and that it was not intended to cause emotional distress.

Ultimately, there are no factual allegations against Dr. Cruz, Dr. Zauner, or Dr. Frederick that are even remotely "outrageous" in character. It is apparent that the intent of the Complaint is to **insinuate** that all three deliberately undertook to cause Plaintiffs emotional distress by barring them from seeing their family member based solely on the sexual orientations of Ms. Langbehn and Ms. Pond. But the allegations in the Amended Complaint do not support the insinuation. First, the Amended Complaint does not allege that any specific Defendant excluded Plaintiffs or failed to acknowledge Ms. Pond's power of attorney. Second, the Amended Complaint lacks facts to suggest a reason, good or bad, why one of the individual Defendants excluded Plaintiffs from the TRU or disregarded Ms. Pond's power of attorney. Third, the alleged "anti-gay animus" is a conclusion that is asserted against no one in particular, and that is not linked to either the purported deprivation of visitation or disregard of the power of attorney. Indeed, the Amended Complaint is cautious not to actually allege that Dr. Zauner refused to

allow Plaintiffs into the TRU because he harbored anti-gay animus. The alleged "animus" is not given as a reason (the sole or one of many) for excluding Plaintiffs. The same is true for Dr. Cruz and for Dr. Frederick. Plaintiffs' conclusory assertion of "anti-gay animus," which is not attributed to any individual Defendant, and which is unaccompanied by any other fact demonstrating wrongdoing, simply cannot be enough to haul well-meaning, well-respected, and dedicated health professionals into court and accuse them of intentionally trying to harm patients and their loved ones on account of sexual orientation.

In the end, the only thing plausibly alleged in the entire Complaint is that Ms. Langbehn believes that her access to the TRU and to Ms. Pond was limited because of her sexual orientation. But there is no cause of action for emotional distress based on subjective beliefs. *Ravitch v. Whelan*, 851 So. 2d 271, 273 (Fla. Dist. Ct. App. 2003). There are simply no facts alleged to indicate that Dr. Cruz or Dr. Frederick denied Ms. Langbehn access to the TRU because of her sexual orientation, and thus there is no fact-based allegation that Dr. Cruz, Dr. Zauner or Dr. Frederick intentionally harmed Ms. Langbehn and her children by ignoring Ms. Pond's power of attorney or deliberately keeping them away from their dying partner and mother out of anti-gay animus. It is an irresponsible and scandalous insinuation and there will never be facts to support it.

V. Conclusion

For the reasons set forth above, Defendants respectfully request that the Court enter an order dismissing with prejudice all claims asserted against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SERVICE LIST

Case No. 08-21813-CIV-JORDAN-McAliley
United States District Court, Southern District of Florida

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