UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.: 08-21813-CIV-JORDAN/MCALILEY

JANICE LANGBEHN, individually and as personal representative of the ESTATE OF LISA MARIE POND, and DANIELLE LANGBEHN-POND, KATELYN LANGBEHN-POND, and DAVID LANGBEHN-POND, by and through their mother and next friend, JANICE LANGBEHN,

Plaintiffs,

vs.

THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, GARNETT FREDERICK, DR. ALOIS ZAUNER, and DR. CARLOS ALBERTO CRUZ ,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs Janice Langbehn, individually ("Janice") and as personal representative of the Estate of Lisa Pond ("Lisa" and/or "Lisa's Estate") and Danielle Langbehn-Pond ("Danielle"), Katelyn Langbehn-Pond ("Katie") and David Langbehn-Pond ("David") by and through their next friend, Janice Langbehn (collectively "the Langbehn-Pond children"), through undersigned counsel, respond to Defendants' Motion to Dismiss Amended Complaint and Incorporated Memorandum at Law as follows:

I. SUMMARY OF THE ARGUMENT

Plaintiffs' Amended Complaint alleges that Defendants repeatedly and steadfastly refused to allow a dying patient access to her family and for *eight* hours ignored the pleas of their patient's three children and life partner of 18 years to be with her, during which time she passed from brain

activity and semi-consciousness toward brain death. Plaintiffs also maintain that Defendants refused to provide their patient's health care surrogate with access to the patient in order to make informed decisions. Additionally, Plaintiffs claim that Defendant completely refused to provide this family with updated medical information about their family member's condition and also denied them support services provided to others. Defendants do not dispute any of these allegations. Instead they seek to deny this family their day in court by claiming that this hospital (or any other hospital for that matter) owed no legal duty of any kind to this, or any other family, or to any of their patients, to provide access or information to their loved ones even under these tragic circumstances.

The positions taken in the motion by The Public Health Trust of Miami-Dade County d/b/a Jackson Memorial Hospital ("Jackson Memorial") are not only legally incorrect but truly unfortunate. Jackson Memorial — the largest health care provider in this community and one that is in its centennial year of service — takes the position that it owes no duty whatsoever to treat patients and their families with dignity, to respect their heath care wishes or to provide visitation consistent with their own policies and all generally accepted standards of care.[1] Jackson Memorial takes this brazen and heartless argument, although it markets itself to the outside world as committed to "family-centered care" and assuring that its "health care [is provided] with kindness and with respect for patient' diverse backgrounds and their rights to dignity," including a recognition of "the individual's . . . sexual orientation." (Am. Comp. ¶6)

Ultimately, Defendants urge this Court to accept the premise that hospital employees are free to ignore Florida's laws concerning patient's rights, the recognition of health care surrogates

[1] *See* Motion to Dismiss at 5 ("the only legal duty owed in this case … was a duty to provide the patient with appropriate medical care"); *see also* Motion to Dismiss at 2 ("Defendants owe no legal duty to provide attention to patients' family members"), 8 ("no [other] legal duty is owed to hospital patients or their visitors [including traditional family members, other loved ones of the patient and expressly recognized health care surrogates] to provide a particular amount of information or visitation."), and 15 ("there is no duty (regardless of a fiduciary relationship) to provide information or visitation to a patient's visitors.").

with advance directives from other states, as well as the hospital accreditation standards, their internal rules and regulations, their posted policies and procedures that they communicate to the outside world and all of the generally accepted standards of care by finding that the a dying woman had no right to see her family for eight hours, without any medical reason or legitimate justification.[2] Similarly, Jackson Memorial asks this Court to find that the hospital or its agents have no duty whatsoever to either the decedent's life partner of nearly 20 years, who was expressly recognized as her health care surrogate, nor the decedent's own children who sought access to and information about their loved one during the final hours of her life. Fortunately, general principles of tort law does not provide such absolute immunity for a hospital and its agents.

II. THE APPROPRIATE STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of a complaint. *Colomar v. Mercy Hosp., Inc.*, 461 F. Supp. 2d 1265, 1269 (S.D. Fla. 2006). Defendants' Motion asks this Court to go well beyond that inquiry and either reads assumptions into the asserted allegations of the Amended Complaint that are not present, or grossly mischaracterizes or ignores dispositive allegations that establish the necessary elements of the pleaded causes of action. When determining the merits of a motion to dismiss, a court may not go beyond the four corners of the complaint and must accept the facts alleged therein and exhibits attached as true. *Id.* Dismissal is inappropriate unless the movant demonstrates "beyond doubt" that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Id.* To survive a Rule 12(b)(6) motion, a complaint generally need only provide "a short and plain statement of the claim . . . [that] give[s] the defendant fair

[2] Despite Defendants attempt to create a slippery slope argument regarding the degree of access and information that a ruling in Plaintiffs favor would create, this case is about the absolute refusal to provide any family access to, or for, a dying patient for eight hours, where no other patients were being treated and where no medical procedures were taking place, (Am. Comp. ¶ 51) and the failure of this hospital and its employees to follow their own posted rules allowing access to the trauma unit, (Am. Comp. ¶ 21) and all nationally recognized standards of care. That Janice managed to sneak into Lisa's room under cloak of clergy for a few minutes, does not change the fact that she did so without Defendants' knowledge or assistance. Am. Comp. ¶¶50-53. Moreover, Lisa's children never saw their mother, or she them, in the eight hour span at issue in this case. *Id.* Nor was Janice free to comfort her partner during the brief sacrament of last rites.

notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, -- U.S. ---, ---, 127 S. Ct. 1955, 1964 (2007) (internal quotation marks omitted). As long as the allegations rise above a speculative level, a well-pleaded complaint will survive a motion to dismiss, even if it appears "that a recovery is very remote and unlikely." *Id.* at 1965. Here, the Amended Complaint more than adequately meets the minimum threshold standard provided by Rule 12(b)(6).

III. COUNT I SHOULD NOT BE DISMISSED BECAUSE PLAINTIFFS HAVE ADEQUATELY STATED A CLAIM FOR NEGLIGENCE.

A. Plaintiffs Have Alleged Sufficient Facts to Establish a Legal Duty and Viable Causes of Action Against the Hospital and the Health Care Professionals Involved.

Count I plainly states a sufficient cause of action for negligence arising out of Defendants' breach of the duty of care they owed to Plaintiffs. To state a claim for negligence in Florida, a complaint must allege "a 'duty, or obligation . . . requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks,'" breach of that duty, causation, and "some actual harm" to the plaintiff. *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007) (citations omitted); *see also Harris v. Lewis State Bank*, 482 So. 2d 1378, 1384 (Fla. 1st DCA 1986) ("To withstand a motion to dismiss, a complaint for negligence must contain three elements . . . . It is sufficient if ultimate facts are alleged showing the relation between the parties, the act or omission causing the injury, and that the act was negligently done or omitted.") (citation omitted). The Florida Supreme Court has explained that "duty ordinarily arises from four general sources: '(1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case." *Williams*, 974 So. 2d at 1056 (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992)).

Defendants effectively concede the breach, causation, and damages elements of Plaintiffs' negligence claim, and argue only that they "owed no duty like the one advocated by Plaintiffs throughout the Amended Complaint."[3] (Mot. to Dismiss at 9) Defendants ignore Plaintiffs' allegations that numerous instances of "other judicial precedent" recognize sources that amplify and inform the duty that the Plaintiffs allege Defendants owed them. Under Florida law, a plaintiff may "establish that the health care provider breached his or her own rule of practice or violated an industry standard as evidence of the standard of care." *Moyer v. Reynolds*, 780 So. 2d 205, 208 (Fla. 5th DCA 2001) (citations omitted). "Courts have held repeatedly that these internal manuals should be admitted when they contain either: 1) evidence of a general industry custom or standard, or 2) evidence that the defendant violated its own policy or an industry standard." *Brown v. Sims*, 538 So. 2d 901, (Fla. 3d DCA 1989) (citing *Marks v. Mandel*, 477 So. 2d 1036, 1039 (Fla. 3d DCA 1985)) (citations omitted). Indeed, Florida courts expressly have recognized that "Florida hospitals are governed by the Joint Commission on Hospital Accreditation Standards, as are hospitals all over the country." *Columbia/JFK Med. Ctr. Ltd. v. Sangounchitte*, 977 So. 2d 639, 641 (Fla. 4th DCA 2008) (citations omitted). *See also Cornfeldt v. Tongen,* 262 N.W.2d 684 (Minn.1977), *rev'd on other grounds,* 295 N.W.2d 638 (Minn.1980) (the standards announced in the JCAH manual, which had been adopted by the hospital in question, were improperly excluded on the issue of standards for anesthesia care); *Darling v. Charleston Community Memorial Hosp.,* 33 Ill. 2d 326, 211 N.E.2d 253 (1965) (evidence of standard regulations for hospitals is relevant on question of due care but not conclusive).

Where an entire industry has adopted essentially the same regulations, evidence of those industry-wide standards can support a negligence claim. *See Marolla v. Am. Family Mut. Ins. Co.*,

[3] To the extent that Defendants rely on their flawed construction of the "impact rule" to avoid liability for all claims, based on their incorrect assertion that there is no allegation of physical impact, Plaintiffs have consolidated their argument in response in Section VI below.

157 N.W.2d 674, 678 (Wis. 1968) (recognizing a duty of care may not be premised solely on internal rules/policies, but recognizing an exception "if it could be shown that an entire industry or substantially an entire industry had essentially the same safety regulations."); *see also Cooper v. Eagle River Mem'l Hosp., Inc.*, 270 F.3d 456, 462 (7th Cir. 2001) (recognizing exception to general rule in considering whether internal hospital policies reflected industry-wide standards in holding that the plaintiff had failed to prove that the hospital policies had been in effect at the time.).

In the instant case for example, Plaintiffs allege that the "Joint Commission's standards set the standard of care [Defendants] owed individually" to Plaintiffs (Am. Compl. ¶65), and similarly allege that "Jackson's Public Policies and Jackson's Rules and Regulations set the standard of care [Defendants] owed individually" to Plaintiffs (Am. Compl. ¶67). Plaintiffs specifically identified the Joint Commission standards applicable to Defendants' conduct in this case in paragraph 20 of their Amended Complaint, including those standards pertaining to the definition of "family" and the involvement of "family" in a patient's care at an accredited hospital. (Am. Compl. ¶24(a), (b).) Plaintiffs also identified the internal standards promulgated by Jackson Memorial that are particularly applicable to the instant facts, including those standards guaranteeing "care that is holistic, compassionate, and culturally sensitive" (Am. Compl. ¶20(e)), and promising to "keep the family apprised of the patient's progress." (Am. Compl. ¶20(j).) Consequently, Plaintiffs allege both a duty and the concomitant standard of care, which clearly establish the obligations Defendants owed to Plaintiffs.

Plaintiffs allege "a duty arising from the general facts of the case" which is sufficient where material facts demonstrate that Defendants could have foreseen that their conduct would cause injury to Plaintiffs. *See McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992), (recognizing that legislative enactments and case law "are not required to catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care"). Where duty is alleged to flow from

the general facts of the case, "the focus is on 'whether the defendant's conduct foreseeably created a broader zone of risk that poses a general threat of harm to others.' . . . [T]he query is whether a general zone of risk was created by the defendant's conduct, thus giving rise to a legal duty of care." *Hitchcock v. F.S. Disposition, Inc.*, 704 So. 2d 1118, 1120 (Fla. 2d DCA 1998) (citing *McCain supra*, 593 So. 2d at 502); *see also Stepien v. Bay Memorial Medical Center*, 397 So. 2d 333, 334 (Fla. 1st DCA 1981) (reversed directed verdict for hospital holding whether a medical center failed to exercise such reasonable care as may have been warranted by the center's knowledge of a patient's physical condition involved a factual issue for the jury). "Fundamentally, the duty of a person to exercise care, and his consequent liability for negligence, depends on the tendency of his acts under the circumstances as they are known or should be known to him. The foundation of liability for negligence is knowledge, actual or constructive, of the peril that subsequently results in injury." *Harris*, 482 So. 2d at 1384-85.

Finally, Defendants' claim that any duty owed to Plaintiffs is limited to not "negligently harm them physically" is simply wrong as a matter of law. Florida courts have "accepted the concept that '[t]he purpose of a duty in tort is to protect society's interest in being free from harm.'" *Gracey v. Eaker*, 837 So. 2d 348, 352 (Fla. 2002) (allowing claims against psychiatrist for purely emotional harm) (quoting *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993). Indeed, the Florida Supreme Court noted that the state "Legislature has recognized and found that one's emotional stability and survival must be protected to the same extent as physical safety and personal security. Our representatives have declared for the people of Florida that 'emotional survival is equal in importance to physical survival.'" *Id.* (citing § 491.002, Fla. Stat. (2001)).

Here, Plaintiffs have alleged that Defendants' conduct "foreseeably created a zone of risk that posed a threat of harm individually to" Plaintiffs. (Am. Compl. ¶68.) In other words, it was

reasonably foreseeable to Defendants that their absolute refusal to provide a dying patient access to her children and life partner would cause injury. Likewise, it was reasonably foreseeable that denying a patient's children and partner the opportunity to be with their family member during the final hours of her life, in order to say goodbye and start the grieving process, without any justification or explanation, would cause injury to Plaintiffs. It was also foreseeable that harm would flow by denying a health care surrogate the ability to see, hear and perceive the condition of the person whom they were asked to make ongoing health care decisions about, and thereby inhibit their ability to make, and be at peace with, those medical decisions.[4] Thus, the "tendency" of Defendants' conduct under the egregious circumstances outlined in the Amended Complaint created a duty of care running from Defendants to Plaintiffs.

A defendant also can be held responsible for foreseeable harm flowing from defendant's actions where a particular duty is based upon the unique relationship of the parties.[5] *See, e.g., Draper Mortuary v. Superior Court*, 185 Cal. Rptr. 396 (Ct. App. 1982) (holding that special relationship of funeral home and deceased's family gave rise to a duty of care). The reasoning in *Draper* should prove helpful to determine that the hospital employees owed a duty here to provide

[4] In support of each such duty, Plaintiffs have alleged that Defendants repeatedly denied Plaintiffs access to Lisa (Am. Compl. ¶¶38, 40, 49, 50, 52, 53, 54) while she lay "semi-conscious and responsive upon arrival and for several hours afterward" (Am. Compl. ¶60) as well as Janice's numerous requests for relevant information about Lisa (Am. Compl. ¶¶52, 53), notwithstanding that Janice made Defendants aware of Lisa's relationship to Janice as her life partner and to the Langbehn-Pond children as their mother (Am. Compl. ¶38). Further, Plaintiffs have alleged that Janice was Lisa's designated health care surrogate and that Defendants had received Lisa's Power of Attorney very early in the eight period of Defendants' tortious conduct (Am. Compl. ¶43) while Lisa lay "semi-conscious and responsive upon arrival and for several hours afterward." (Am. Compl. ¶60.)

[5] Florida recognizes that a physician's duties extend to third parties. *See e.g., Ziegler v. Tenet Health Systems, Inc.*, 956 So. 2d 551 (Fla. 4th DCA 2007 (examining duty to husband of patient); *Hofmann v. Blackmon*, 241 So. 2d 752 (Fla. 4th DCA 1970) (physician has duty to use reasonable care to advise and warn members of patient's family of existence of disease once physician knows of patient's contagious disease); *Hunt v. Palm Springs General Hospital*, 352 So. 2d 582 (Fla. 3d DCA 1977) ("We hold that the questions of whether [hospital] owed Hunt a duty of care despite his non-admitted status ... are for the jury to determine."). Florida law on this point is in accord with the law of other states. *See e.g., Melfi v. Mount Sinai Hosp.* 19 Misc. 3d 1129(A), Slip Copy, 2008 WL 1970897 (Table) (N.Y.Sup. 2008) (finding liability to family members for failure to notify next of kin of hospital patient's death contrary to policies);. *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278 (Ca. 1989) (holding that a duty was owed to mother of boys who were molested by psychotherapist).

this dying patient access to her family after medical intervention had ceased and where they knew family members were steps away pleading to see her.

> The basis for analysis of whether or not there is a duty is the relationship of the parties. For if the conduct of the one who is to be charged with the duty brings him into a human relationship with another where social policy requires that either affirmative action or precaution be taken on his part to avoid harm, then a duty to act or to take the precaution should be imposed by law.

Id. at 398-399.

Here, this Court should find that the hospital owed a legal duty to their dying patient and her family to allow reasonable visitation, an opportunity to say goodbye and to otherwise be comforted by their presence, as well as a duty to a health care surrogate to be able to perceive the condition of the principal on whose behalf they are making decisions, based on the special relationship and circumstances of this case. For all of the foregoing reasons, Count I cannot be dismissed.

B. Plaintiffs Have Alleged Sufficient Facts To Establish a Legal Duty To Respect the Wishes of an Incapacitated Patient as Expressed Through Her Health Care Surrogate As Well As a Right of Access to the Patient as an Imputed Right Owed to the Health Care Surrogate.

Plaintiff's negligence claim should not be dismissed for the additional reason that Florida health care workers have a clearly-established legal duty to respect the health care decisions of their patients, which right "extends to all relevant decisions concerning ones health." *Matter of Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993). "Patients do not lose their **right to make decisions affecting their lives** simply by entering a health care facility. Despite concededly good intentions, **a health care provider's function is to provide medical treatment in accordance with the patient's wishes and best interests.**" *Id.* at 823 (emphasis added); *Harrell v. St. Mary's Hosp., Inc.*, 678 So. 2d 455, 456-457 (Fla. Dist. Ct. App. 1996) ("a competent person has the constitutional right to choose or refuse medical treatment, and **that right extends to all relevant decisions concerning one's health.**") (citing *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990)) (emphasis added). The Florida Supreme Court has acknowledged that everyone has a fundamental right to the

sole control of his or her person, which right includes "the right to make **choices pertaining to one's health.**" *Id.* at 10.

In Florida, the right to designate "another person **to direct the course of his or her medical treatment** upon his or her incapacity" has been codified by statute. Fla. Stat. §765.102(2) (emphasis added). In the context of an advance directive, the agent stands in the shoes of the patient, holding the full extent of the patient's right to direct the patient's health care wishes. *See, e.g.*, Carol J. Wessels, Treated With Respect: Enforcing Patient Autonomy By Defending Advance Directives, 6 MARQ. ELDERS ADV. 217 (Spring 2005). The physician must respect the health care power of attorney, to act in the place of the individual when the individual is no longer capable of making their own health care decisions. *Id.* at 218-19. The Florida Supreme Court has recognized that **the surrogate decisionmaker is to make "the decision which the patient would personally choose.**" *Browning, supra,* 568 So. 2d at 13.

Thus, as this authority clearly shows, the powers that can be delegated to, and the duties to respect the decisions of, the surrogate are much broader than simply the ability "to [provide] consent regarding a medical procedure that required consent." (Mot. to Dismiss at 4) Liability attaches where health care workers fail to follow, or otherwise ignore, the patient's health care decisions, which decisions involve much more than merely consenting or refusing a medical procedure, but, as specifically set forth in the foregoing cases and laws, include the decisions to "direct their health care," "make decisions in the health area," "direct the course of his or her medical treatment," and "make choices pertaining to one's health." Additionally, Defendants breached their duty of care to Lisa's health care surrogate by failing to provide written notification or express acknowledgment that her authority had commenced, contrary to law,[6] and refused to allow her to sign consent forms and other medical forms on behalf of Lisa during her hours in the

[6] *See* Fla. Stat. §765.204 (2).

trauma unit and while under the identified doctors' care,[7] and refused to provide access to medical information, both with respect to access to Lisa in order for Janice to perceive Lisa's physical condition as well as to Lisa's medical records after her death.[8]

Here, Defendants breached their duty to respect the wishes of their patient, as expressed through her health care surrogate, to allow visits from Lisa's children and partner to comfort Lisa and to ease her suffering in her final hours of consciousness and, indeed, life. Defendants also breached the duty owed to Lisa, and to Janice as Lisa's health care surrogate, to allow access in order for her health care surrogate to perceive the principal's condition in order to make informed health care decisions. For all of the foregoing reasons, Count I cannot be dismissed.

IV. PLAINTIFFS HAVE ALSO STATED A CLAIM FOR NEGLIGENCE AND/OR NEGLIGENCE PER SE BASED UPON VIOLATIONS OF FLORIDA STATUTORY LAW BY THE HOSPITAL.

Florida courts have also long recognized that the violation of a statute may be utilized as evidence of negligence. *See Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201, 205 (Fla. 2007). Moreover, the rationale for admitting a statute, ordinance, or administrative rule or regulation as prima facie evidence of negligence is that "the standards of conduct or care embraced within such legislative or quasi-legislative measures represent a standard of at least reasonable care which should be adhered to in the performance of any given activity." *See id.* (citing *Alford v. Meyer*, 201 So. 2d 489 (Fla. 1st DCA 1967)).

To state a claim for negligence *per se* under Florida law, a plaintiff must allege that the defendant violated either: (1) a strict liability statute designed to protect a class of persons that cannot protect themselves; or (2) a statute that establishes "a duty to take precautions to protect a particular class of persons from a particular injury or type of injury." *deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198, 200-01 (Fla. 1973). Plaintiffs cite to two statutes that satisfy one or

[7] *See* Am. Compl. ¶¶56-57.
[8] *See* Am. Compl. ¶¶58-59.

both prongs. First, Plaintiffs allege that Defendants violated "The Patient's Bill of Rights," a law clearly designed to protect a class of persons who cannot protect themselves (namely, hospital patients) from a particular injury. This law expressly recognizes the right of a patient in a hospital to "dignity," Fla.Stat. §381.026(4)(a)(1), the right to a prompt and reasonable response to a request, Fla Stat. §381.026(4)(a)(3), and requires health care facilities to "ensure that inpatients are provided the opportunity during the course of admission to receive information regarding their rights and how to file complaints with the facility and appropriate state agencies." Fla Stat. §381.0261(3). The right to "dignity" necessarily must include the dignity to determine with whom one can draw comfort in one's final hours. Similarly, the right to a response to a request would include the request of Janice, as Lisa's surrogate, for the children to be able to visit their dying mother. Secondly, Plaintiffs allege violation of the Florida Health Care Surrogate Act (the "Act"), another statute designed to protect vulnerable persons (namely incapacitated hospital patients) from particular injury. Fla. Stat. §§765.202-205, 765.1103 .[9] The legislative intent of the Act clearly implies that the Act provides patients and their health care surrogate with certain fundamental rights and that health care providers have a duty to honor and give effect to them.[10]

It is too basic a notion to merit citation that correlative with the existence of a person's right is another's duty. Here, Plaintiffs allege that Janice attempted – to no avail – to give effect to Lisa's

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[9] *See Bush v. Schiavo*, 885 So. 2d 321, 335 (Fla. 2004) ("Parts I, II, III, and IV of chapter 765, enacted by the Legislature in 1992 and amended several times, provide detailed protections for those who are adjudicated incompetent, including that the proxy's decision be based on what the patient would have chosen under the circumstance.")

[10] Among the specific statutory provisions Plaintiffs allege Defendants violated are the duties to "comply with a request for pain management or palliative care ... [from a surrogate] for an incapacitated patient under their care, Fla. Stat. §765.1103 (2); failure to "notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced", Fla. Stat. §765.204 (2); failure to be provided access to the appropriate medical records of the principal, Fla Stat. §765.205(d) and access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care, Fla. Stat. §765.101(c); and failure to ... "provide to each patient written information concerning the individual's rights concerning advance directives and the health care facility's policies respecting the implementation of such rights, and [to] document in the patient's medical records whether or not the individual has executed an advance directive. Fla. Stat. §765.110(1) Indeed, Plaintiffs contend that Janice was ***never*** informed that her authority had commenced, nor knew that the document had been received, since no one acknowledged receipt and she never saw Defendant Frederick after her first upsetting encounter with him in which he hurled a dismissive anti-gay warning. Plaintiffs believe the medical records will reflect that her authority was disregarded.

Power of Attorney and health care wishes, and that Defendants prevented Janice from doing so effectively. (*See* Am. Compl. ¶¶48-49, 53-54, 56-58, 112-113.) Further, the Amended Complaint alleges that as a result of Defendants' conduct, Plaintiffs suffered injuries. (*See* Am. Compl. ¶¶117-118).[11] Although Defendants rely on *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994), in their effort to avoid liability by claiming it stands for the proposition that the Legislature did not intend, through the Act, to create a cause of action for its violation, this assertion is incorrect. The *Murthy* case applies to the instant case solely for the general principle that whether a statutory cause of action should be judicially implied is a question of legislative intent. *See id.* at 985-87. Contrary to Defendants' naked assertions, the legislative intent of the Act supports a finding that the Legislature intended to create a statutory cause of action for its violation. Specifically, the legislative intent of the Act states in pertinent part that:

> (1) The Legislature finds that **every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health,**. . . .
>
> (2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, **the 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**. . . .
>
> (3) **In order to ensure that the rights and intentions of a person may be respected even after he or she is no longer able to participate actively in decisions concerning himself or herself,** and **to encourage communication among such patient, his or her family, and his or her physician, the Legislature**

[11] Defendants' expansive reading of the "Purpose" Section of the Florida Patient's Bill of Rights and Responsibilities is mistaken. *See* § 381.026(3), Fla. Stat. (2008) ("Patient's Bill of Rights"). Specifically, Defendants rely on the last sentence of section 381.026(3), to conclude that the entire Patient's Bill of Rights cannot be used in any civil or administrative action. *Id.* Section 381.026(3) states the purpose of the Bill of Rights as a whole (i.e., to promote the interests and well being of patients, and to minimize misunderstandings with health care providers), and explains that a health care provider may not require that a patient waive such rights. *Id.* The last sentence of section 381.026(3) should be interpreted to curb or limit only the use of the "Purpose" section of the Bill of Rights as the basis for bringing a new statutory right of action in a civil or administrative proceeding. A contrary reading of that section would mean that the Patient's Bill of Rights actually provides patients with no "rights" at all. Moreover, it makes no sense to provide that these rights cannot be required to be waived by a patient in order to obtain treatment (as the section does) if there actually are no enforceable rights that one is to be protected against waiving. In addition, as set forth above, Plaintiffs allege a violation of section 381.0261 in that, as Lisa's health care surrogate, she was never informed of the patients rights and grievance procedures, which she would have immediately implemented.

> **declares that the laws of this state recognize the right of a competent adult to make an advance directive** ...
>
> (4) The Legislature recognizes the need for all health care professionals to rapidly increase their understanding of end-of-life and palliative care. . . .
>
> (5)(b) Palliative care must include: . . . .
> 2. **Assurance that physical and mental suffering will be carefully attended to**. . .
> 5. **Assurance that the dignity of the dying person will be a priority. . . .**
> 7. **Assurance that the burden to family and others will be addressed.**
> 8. **Assurance that advance directives for care will be respected regardless of the location of care.**

See Fla. Stat. §§765.102(1)-(5) (2001) (emphases added). Clearly inherent in that statute's mandate that palliative care must include "assurance that physical and mental suffering must be attended to," "that the burden to family and others will be addressed" and "that the dignity of the dying person will be a priority" is the implied right and obligation to assure for both the patient and the grieving family the right to be by the bedside of their beloved. Plaintiffs allege that Janice, as Lisa's health care surrogate, repeatedly requested that Lisa be able to have her family by her side for visits as she lay dying and as Lisa lay alone in a trauma bay (Am. Compl. ¶51) and that no triage or extraordinary treatment was undertaken on Lisa during most of this period (Am. Compl. ¶¶48-50, 54-55). Given Plaintiffs' additional allegations that other more traditional families were "met with compassion; were provided immediate information... and were escorted into and out of Ryder's restricted area to see their family members" (Am. Compl. ¶52), denying Plaintiffs the same treatment while Lisa lay "semi-conscious and responsive upon arrival and for several hours afterward" (Am. Compl. ¶60) certainly shows that the duties inherent in the statute were not met.

Defendants' argument that the violations of industry standards are insufficient for maintaining the instant cause of action also is erroneous. In *Pollock v. Florida Dep't. of Highway Patrol*, 882 So. 2d 928 (Fla. 2004), the Florida Supreme Court explained that:

> While a written policy or manual may be instructive in determining whether the alleged tortfeasor acted negligently in fulfilling an independently established duty of

> care, it does not itself establish such a legal duty *vis-a-vis* individual members of the public. This principle applies, **unless, of course, the sovereign adopts such protocols and procedures as standards of conduct, in which case there would exist an independent duty of care.**

Id. at 937 (citations omitted) (emphasis added); *see also City of Jacksonville v. DeRay*, 418 So. 2d 1035, 1036-37 (Fla. 1st DCA 1982) (affirming final judgment against the City for its failure to follow the protocols provided for in the traffic control devices manual which the City had adopted as the standard for signalization and street markings); *accord State Dep't of Transp. v. Cooper*, 408 So. 2d 781 (Fla. 2d DCA 1982). Here, the Amended Complaint clearly alleges that Defendants have adopted the JCAH Standards, Jackson's Public Policies, and Jackson's Rules and Regulations as their standard of conduct and procedures. Having so alleged, the Amended Complaint sufficiently states a cause of action for negligence *per se* against the Defendants.

For the above reasons, Count I and IV of the Amended Complaint should stand.

V. PLAINTIFFS HAVE SUFFICIENTLY STATED THEIR CAUSES OF ACTION FOR BREACH OF FIDUCIARY RELATIONSHIP AGAINST DEFENDANTS.

Plaintiffs have adequately stated their claims against Defendants for breach of fiduciary duty. "The elements of a claim for breach of fiduciary duty [under Florida law] are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." *See Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). To establish a fiduciary relationship, "a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Bankers Life Ins. Co. v. Credit Suisse First Boston Corp.*, 2008 WL 4683235, at *11, U.S. Dist. LEXIS 33039, at *30-31 (M.D. Fla. Apr. 22, 2008) (*quoting from Am Honda Motor Co., Inc. v. Motorcycle Info. Network, Inc.*, 390 F. Supp. 2d 1170 (M.D. Fla. 2005)). Further, Florida law has long recognized that the term "fiduciary relationship" is a very broad one, and that:

> The relation and duties involved need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties

> (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial. A fiduciary relationship may be implied by law, and such relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties."

Doe v. Evans, 814 So. 2d 370, 374 (Fla. 2002) (citations omitted)

Defendants had a special professional duty to Lisa based on her incapacity, the doctor-patient relationship, the hospital-patient relationship that existed upon Lisa's admittance into Jackson Memorial and her complete reliance on them as her caregivers. *See* RESTATEMENT (SECOND) OF TORTS, § 874 cmt. a (1979) ("A fiduciary relation exists between two persons when one of them is under a duty to act for ... the benefit of another upon matters within the scope of that relation."); *Gracey*, 837 So.2d at 353-54 (noting that psychiatrists and all physicians have fiduciary relationship with patients in ruling that impact rule did not apply to bar purely emotional injuries) (citations omitted); *Abril,* 969 So.2d at 211 (recognizing that that the "nature of the fiduciary relationship in the psychotherapist-patient and physician-patient contexts" allow an exception to the impact rule) (citations omitted). Under Florida law, whenever a patient is treated by a series of surgeons and doctors, "the fiduciary relationship exists regardless of whether the patient is aware who is treating him." *Nardone v. Reynolds*, 538 F.2d 1131, 1136 (5th Cir. 1976) ("This Hippocratic duty is born out of the doctor's purpose to render professional service. Treatment of infants, the senile and the unconscious proves that the duty does not spring from a consensual basis.").

Plaintiffs sufficiently allege that Defendants were in the unique position to provide Lisa with palliative and end of life medical treatment including providing her with access to the comfort and security of her family's presence in her final hours. Certainly, one could not contend that Jackson Memorial and its health care providers had no fiduciary relationship that was owed to Lisa. Moreover, the health care professionals at Jackson Memorial were in a similarly unique position to provide Plaintiffs access to Lisa, and to provide Lisa's health care surrogate access to her in order to

make fully informed decisions about her health care. The Amended Complaint sufficiently alleges that Defendants owed various duties rising to the level of fiduciary ones to the respective Plaintiffs, including, without limitation: (a) to provide Janice, Lisa's health care surrogate, access to Lisa; (b) to respect Lisa's visitation rights, health care directives and health care wishes; (c) to recognize, acknowledge and respect Lisa's validly executed power of attorney; and (d) to provide Janice and the Langbehn-Pond children with information regarding their long-term partner and mother and her condition, access to her during her final hours and/or crisis and bereavement counseling and emotional support. (*see e.g.,* Am. Compl. ¶¶130, 136, and 141). Further, each of the breaches of fiduciary claims allege that Defendants breached the duties owed to Plaintiffs, and that such breaches caused Plaintiffs' injuries. (*see* Am. Compl. ¶¶130-132, 136-138, and 141-142). For the above reasons, Counts VI-VIII of the Amended Complaint adequately allege breach of fiduciary claims and should not be dismissed.

Defendants' claim that no breach can exist where Florida has not recognized the specific duties alleged is unfounded. The fact that a plaintiff has not yet sought redress for the exact breaches of the fiduciary duties alleged is not tantamount to such duties not existing, or to Plaintiffs being unable to maintain actions for such breaches. Such a holding would provide carte blanche for tortious behavior simply because it is so egregious as not to have been previously addressed by the Florida judiciary. To the contrary, Florida law clearly provides for the recognition of fiduciary relationships in different contexts, where – as previously stated – a legal, moral, social, domestic or personal, relation of trust and confidence exists between the parties. *See Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002) (holding that, when a church, through its clergy, holds itself out as qualified to engage in marital counseling and a counseling relationship arises, the relationship between church and counselee is a fiduciary relationship). Indeed, "[a] fiduciary relationship may be implied by law, and such relationships are **'premised upon the specific factual situation** surrounding the

transaction and the relationship between the parties.'" *Id.* (*citing Capital Bank, v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. 3d DCA 1994)) (emphasis added).

Finally, Defendants fail in their attempt to avoid liability by claiming that Plaintiffs were required to comply with malpractice claim prerequisites, ignoring their own concession that "Plaintiffs make no complaint about the medical care provided to Ms. Pond." (Mot. to Dismiss at 1). The breach of fiduciary claims while derived from the hospital and health care professionals' status and relationships are not premised upon improper medical treatment but instead legal, moral, ethical and social obligations owed by those professionals to their patients and their families, and are wholly independent from the quality or appropriateness of the medical services furnished to Lisa.[12] Plaintiffs have sufficiently stated their breach of fiduciary duty claims, and Defendants' Motion to Dismiss Counts VI-VIII should be denied.

VI. THE IMPACT RULE DOES NOT BAR PLAINTIFFS' CLAIMS.

Defendants misstate the "impact doctrine" in their attempt to deny this family their day in court by erroneously stating that it "precludes recovery for emotional distress absent evidence of physical impact." (Mot. to Dismiss at 3.) The Florida Supreme Court, however, has clarified that the "application of the 'impact rule' in Florida reflects a dichotomy under the law for cases in which the plaintiff is claiming damages for mental pain and anguish." *Willis v. Gami Golden Glades, LLC*,

[12] A complaint does not state a medical malpractice claim for chapter 766 purposes, where the complaint does not allege that the defendant was negligent in the rendering, or the failure to render, medical care or services. "Not every wrongful act by a medical provider is medical malpractice." *Quintanilla v. Coral Gables Hosp., Inc.*, 941 So. 2d 468, 469 (Fla. 3d DCA 2006) (holding that burn injuries caused by scalding hot tea spilled by nurse onto patient constituted negligence claim, not a claim based on medical malpractice). Similarly, just because "conduct occurs in a medical setting does not necessarily mean it involves medical malpractice." *Robinson v. W. Fla. Reg'l Med. Ctr., Inc.*, 675 So. 2d 226, 228 (Fla. 1st DCA 1996); *see also Solomon v. Well Care HMO, Inc.*, 822 So. 2d 543, 545 (Fla. 4th DCA 2002) (holding that insured's complaint against health maintenance organization (HMO) did not allege HMO was negligent in rendering medical care or services, and thus did not state a "medical malpractice claim" that was subject to statutory presuit notice requirements); *see also J.B. v. Sacred Heart Hosp. of Pensacola*, 635 So. 2d 945, 948-49 (Fla.1994), *and Silva v. Southwest Fla. Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla.1992) ("In ordinary, common parlance, the average person would understand 'diagnosis, treatment, or care' [subject to the medical malpractice statutes] to mean ascertaining a patient's medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient's daily needs during the illness.").

967 So.2d 846, 850 (Fla. 2007). The Florida Supreme Court noted that this "dichotomy and controlling law was aptly described" in *Eagle-Picher Indust., Inc. v. Cox,* 481 So. 2d 517 (Fla. 3d DCA 1985), and "was noted with approval by . . . [the Florida Supreme Court] in *Zell v. Meek,* 665 So. 2d 1048, 1050 n. 1 (Fla. 1995). *Id.* The Florida Supreme Court thus adopted the following recent recitation of controlling law in this area:

> In Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force. If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be "manifested by physical injury," the plaintiff must be "involved" in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment "within a short time" of the incident.

Willis, 967 So. 2d at 850 (citations omitted).

As Plaintiffs Janice and the Langbehn–Pond children have alleged physical manifestations resulting from the their involvement in the incident giving rise to the action, which injuries occurred at the time of the incident or within a short time afterward, including but not limited to exacerbation of Janice's multiple sclerosis symptoms, severe psychological distress, trauma, nausea, insomnia, severe depression, nightmares, and symptoms of post-traumatic stress disorder (Am. Compl. ¶62), they have adequately pleaded their negligence, negligence per se, negligent infliction of emotional distress, and breach of fiduciary duty claims, all of which involve emotional injuries. *See Willis*, 967 So. 2d at 872 ("In *Champion,* however, we 'retreated from our strict adherence to the impact rule and recognized for the first time a negligence action *for physical injuries* occurring without an actual impact.'... We permitted recovery in *Zell* because expert medical testimony linked the plaintiff's emotional distress to physical impairment of her stomach area, pain below her rib cage, an ulcer, blockage of her esophagus, joint pain, and insomnia.") (citations omitted) (emphasis in original); *see also Willis*, 967 So. 2d at 850 (where "the plaintiff has not suffered an impact, the

complained-of mental distress must be 'manifested by physical injury,' **or** the plaintiff must be 'involved' in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment 'within a short time' of the incident.) (citing *Eagle-Picher Indust.*, *supra*; *Zell*, 665 So. 2d at 1050, 1052 (recognizing that a cause of action for psychological trauma exists in Florida in cases involving "some physical impact to a claimant" **or** in cases "where psychological trauma could be demonstrated to cause a demonstrable physical injury") (emphasis added)..

Additionally, as set forth in more detail below, the "impact rule" does not apply in cases involving discrete torts, such as breach of fiduciary duty, nor to claims where the gravity and foreseeability of the harm exceeds the rationale for the rule, such as occurred here as to each of the Plaintiffs in unnecessarily being denied the ability to be comforted by close family members, or to say goodbye to them, and otherwise to be treated with human decency during a mother's last hours of life -- for *eight* hours -- as they were restrained from being together while Lisa moved irrevocably from consciousness to semi-consciousness to brain death. With respect to all the Plaintiffs, the "impact rule" does not bar their claims for the reason cited above, in that this case is both a discrete tort and an exception to the application of the "impact rule," and because she suffered a physical impact, as set forth more fully below.

A. Florida Supreme Court Precedent Recognizes an Exception To the Impact Rule Under the Instant Facts.

In support of their motion to dismiss, Defendants essentially argue that the facts of this case simply would not support an exception to the impact rule for any of Plaintiffs' claims where emotional injuries flow without a physical impact. Defendants are incorrect for a number of reasons. Fist, Defendants argument that Plaintiffs' have failed to allege a "physical impact" sufficient to satisfy the so-called "bystander exception," (Mot. to Dismiss at 10) completely misconstrues the "bystander exception" by seeking to impose a requirement of showing a "physical

impact on Ms. Pond or the other Plaintiffs" *Id.* To the contrary, the bystander exception allows "damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured." *Champion v. Gray*, 478 So. 2d, 17, 20 (Fla. 1985). Plaintiffs meet every part of this exception, and Defendants' argument conflates "physical impact" with "negligent injury." The "negligent injury" alleged here is to Lisa, who Plaintiffs claim suffered severe emotional distress in being kept from her family for eight hours as she lay dying. This presents a fact question for resolution, as forth in Section VII below.

Defendants also seek to convince this Court that in denying this motion the Court would somehow be inventing a radical cause of action out of whole cloth. Quite to the contrary, the Florida Supreme Court has recognized "that the impact rule does not apply where emotional damages are a 'consequence of conduct that itself is a freestanding tort apart from any emotional injury.'" *Willis* 967 So. 2d at 857 (citing *Tanner v. Hartog,* 696 So. 2d 705 (Fla. 1997) (impact rule does not apply to emotional injuries from negligent stillbirth); *see also Gracey v. Eaker,* 837 So. 2d 348 (Fla. 2002) (impact rule does not apply to emotional injuries from breach of fiduciary duties). Finally, the Florida Supreme Court recognizes exceptions to the impact rule where "the foreseeability and gravity of the emotional injury involved, and lack of countervailing policy concerns, have surmounted the policy rationale undergirding application of the impact rule." *Woodard v. Jupiter Christian Sch. Inc.*, 913 So. 2d 1188, 1191 (Fla. 4th DCA 2005) (citing *Rowell v. Holt*, 850 So. 2d 474, 478 (Fla. 2003). Indeed, "[t]he impact rule is not . . . an inflexible unyielding rule of law, so sacred that it must be blindly followed without regard to context. If [courts] were to ascribe such weight to the doctrine, the impact rule itself would exceed the

parameters of its underlying justifications." *Rowell*, 850 So. 2d at 478. As succinctly set out in *Kennedy v. Byas*, 867 So. 2d 1195, 1197 (Fla. 1st DCA 2004):

> There exist common threads in all of the . . . cases in which the court established exceptions to the impact rule. In all, the likelihood of emotional injury was clearly foreseeable; the emotional injury was likely to be significant; the issue of causation was relatively straightforward; and it was unlikely that creating an exception to the rule would result in a flood of fictitious or speculative claims.

In *Gracey*, the court reflected that the impact rule does not apply when the emotional distress caused by a particular breach is greater than the kind of emotional distress caused in one of the specific instances in which the court has found it applicable. 837 So. 2d at 356 ("The emotional distress that the Graceys allege they have suffered is at least equal to that typically suffered by the victim of a defamation or an invasion or privacy. Indeed, we can envision few occurrences more likely to result in emotional distress than having one's psychotherapist reveal without authorization or justification the most confidential details of one's life.").

In *Way v. Tampa Coca Cola Bottling Co.*, 260 So. 2d 288 (Fla. 2d DCA 1972), where the plaintiff drank from a bottle of soda and then, upon discovering a rat in the bottle, became nauseous and vomited, the court held that the lack of a physical impact from external causes would not bar a cause of action for damages where there is a proximate causal relationship between the negligent act and reasonably foreseeable emotional suffering by a reasonably foreseeable plaintiff. 260 So. 2d at 290 (cited approvingly in *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234, 1240-41 (Fla. 2001)). Moreover, the Florida Supreme Court cases addressing the impact rule aptly demonstrate that the rule does not apply under the instant facts because the gravity and foreseeability of Plaintiffs' emotional injuries far exceeds conduct and resulting injuries that have previously been found actionable. In *Rowell v. Holt*, 850 So. 2d 474 (Fla. 2003), the Florida Supreme Court recognized an exception to the impact rule for a client who was subjected to extended prison confinement due to his attorney's malpractice. *Id.* at 481. In finding such an exception to exist, the court reflected that

"the special professional duty created by the relationship between Rowell and his attorney, coupled with the clear foreseeability of emotional harm from a protracted period of wrongful pretrial incarceration, render application of the impact rule unjust and without an underlying justification in the factual circumstances here." *Id.* at 479. According to the court, Rowell's injuries were a "direct result of his attorney's negligence," and his attorney could have "doubtlessly foresee[n] that his negligent failure to end his client's wrongful incarceration would result in significant emotional distress." *Id.* at 480.

Further, the *Rowell* court remarked that "[w]hile [it was] cognizant of precedent suggesting that the impact doctrine properly reflects the principle that there must be some level of harm which one should absorb without recompense . . . Rowell paid too high a price with his pretrial liberty to be forced to forego compensation based upon rigid application of a limiting doctrine." *Id.* (internal quotations omitted). The *Rowell* court also considered the issue of causation, remarking that "[a] direct causal link can be clearly and rationally drawn . . . from the attorney's negligen[ce] . . . to the extended period of continuing wrongful pretrial confinement and resultant emotional injury" flowing from Rowell's deprivation of "one's most basic freedoms – the freedom of movement, the right to privacy, and the freedom to associate with persons of one's choosing." *Id.*

This is a case where "the facts make it 'difficult to justify the outright denial of a claim for mental pain and anguish.'" *Thomas v. Ob/Gyn Specialists of the Palm Beaches, Inc.*, 889 So. 2d 971, 972 (Fla. 4th DCA 2004) (citing *Tanner v. Hartog*, 696 So. 2d 705, 708 (Fla. 1997)). Like Rowell's attorney, who "had a special, professional, and independent duty to 'exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise,'" *Rowell*, 850 So. 2d at 479, Plaintiffs have alleged that Defendants undertook a special duty to Plaintiffs to exercise reasonable care, and to not breach their fiduciary duties, and that Defendants have reasonably foreseen that their conduct would cause "profound mental pain and anguish" to

Plaintiffs "with irreversible consequences." (Am. Compl. ¶¶87, 90, 104-106.) Unlike *Rowell*, where the plaintiff had to spend extra, yet unwarranted time in prison, the Langbehn-Pond family lost forever the opportunity to say good-bye to their mother and life partner, which may cause them distress for a lifetime. *See Kush v. Lloyd*, 616 So. 2d 415, 422-23 (Fla. 1992) (finding a wrongful birth exception to the impact rule in part because "the fact of a child's serious congenital deformity may have a profound effect, cannot be ignored, and at least in this case is irreversible."); *see also Turner v. Williams*, 762 N.E.2d 70, 77 (Ill. App. Ct. 2001) (allowing plaintiffs to testify about the fact that they never got to say good-bye to their father who died in a car accident in support of their negligent infliction of emotional claim). Therefore, because the impact rule does not apply to bar Plaintiffs' claims, Defendants' motion to dismiss Counts I-IV, and VI-VIII must be denied.

B. Plaintiffs Allege That They Each Suffered a Physical Impact.

Plaintiffs allege that they suffered physical injuries flowing from the emotional distress they endured during the tortuous eight hours at issue in this case and, therefore, there is no "impact rule" bar to their claims. But even if they had not alleged, or could not prove, physical injuries, the "impact rule" only applies where there is no impact. *See, e.g., Willis* 967 So. 2d at 850 ("If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident...."). Here, Plaintiffs' factual allegations sufficiently meet the test of a "physical impact" under Florida law. In *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995), the Florida Supreme Court remarked that "to suffer an impact, a plaintiff may meet rather slight requirements" and that "[t]he essence of impact . . . is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the plaintiff's body." *Id.* at 1050 n.1 (citing *Eagle-Picher Indust., Inc. v. Cox*, 481 So. 2d 517, 527 (Fla. 3d DCA 1985)); *see also Willis* 967 So. 2d at 857 ("where there is impact or an unauthorized touching, there is no need to demonstrate physical injury,"). Here, the central thrust of

Plaintiffs' case – that Plaintiffs were physically restricted by Defendants from having access to one another during Lisa's dying hours with no plausible justification – constitutes an "outside force" that physically prevented Janice, Danielle, Katie, and David from having access to Lisa, and vice-versa. Although Lisa was only yards from her children, her life partner and her health care surrogate in an empty bay in the emergency room at Jackson Memorial, she was physically restricted from access to them and they were likewise restricted as well by coded security doors and strident denial of access to Lisa.

Further, the Amended Complaint alleges numerous other examples of physical impact to Lisa sufficient to support their claims as to her. Plaintiffs have alleged, for example, that "Lisa 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." (Am. Compl. ¶107.) Defendants argue that these allegations fail to establish the requisite "physical impact" because they do not amount to a "prohibited or negligent touching" or "injuries." (Mot. to Dismiss at 10 n.3.) Defendants' interpretation, which appears to require a battery to satisfy the impact required, is unsupported by Florida law. In *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846 (Fla. 2007), the Florida Supreme Court reaffirmed its holding that "for a plaintiff to have endured an impact or contact sufficient to render an action sustainable the 'plaintiff may meet rather slight requirements,'" and found that touching the plaintiff's body to search for "money or other belongings" and making "contact with her left temple with his gun . . . more than satisfies" *Zell*'s definition of "physical impact" *Id.* at 850-51 (citations omitted); *see also See Hagan* 804 So. 2d. at 1241(finding an impact by the ingestion of soda contaminated with what appeared to be a condom even though the item itself did not make the women sick). In *Zell*, the court found the impact sufficient, even though the distress was caused by the over-all distress of being robbed and not tied to the precise touching that the court acknowledged. In the instant case, Plaintiffs have alleged that

Defendants physically touched and otherwise impacted Lisa in the eight hours that this family was restrained from being together as a result of Defendants' conduct including the placement of Lisa in restraints. (Am. Compl. ¶61). As these allegations are sufficient to preclude application of the "impact rule," dismissal on this grounds is inappropriate.

VII. ALLEGATIONS THAT LISA SUFFERED SEVERE EMOTIONAL DISTRESS AS A RESULT OF DEFENDANTS' ACTIONS ARE SUFFICIENT TO OVERCOME A MOTION TO DISMISS.

Defendants seek to avoid liability for the harm inflicted upon their patient by relying on the fact that she never regained consciousness. This argument is without merit. For obvious policy reasons, including that foreclosing awards based on a victim's state of consciousness would allow persons to commit untold injuries upon unconscious or semi-conscious patients, Florida law allows recovery for harm caused even where a person does not recover from his or her injuries. *See, e.g., Nimnicht v. Ostertag*, 225 So. 2d 459 (Fla. 1st DCA 1969) (affirming award of $50,260 for the decedent's pain and suffering where the decedent lived 23 hours after the collision, during all of which time she was either completely unconscious and in a deep comatose condition or in a state of semi-consciousness only). Indeed, it is universally recognized that damages may be awarded for pain and suffering if the injured person was partly conscious, had intervals of consciousness, or was conscious for a short time before death.[13] Here, Plaintiffs allege that Lisa suffered "psychological trauma and severe emotional distress" during the eight hours that she was isolated from her family as she lay dying (Am. Compl. ¶108), and they intend to provide evidence of this, as well as Lisa's state of consciousness, at trial. The existence of that emotional distress is a fact question which cannot be decided on motion to dismiss.[14]

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[13] *See, e.g., Dullard v. Berkeley Assocs. Co.*, 606 F.2d 890 (2d Cir. 1979); *Bingaman v. Grays Harbor Cmty Hosp.*, 699 P.2d 1230 (Wash. 1985); *Holston v. Sisters of Third Order of St. Francis*, 650 N.E.2d 985 (Ill. 1995); *Slaseman v. Myers*, 455 A.2d 1213 (Pa. 1983); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. App. Ct. 1978).

[14] In addition, Florida law is well established that damages in a personal injury action are properly for discretion of the jury. *See Nimnicht* 225 So. 2d at 461 ("The answer to the defendant's said contention is, of course, that damages in a personal injury action are for the discretion of the jury"); *accord Little River Bank & Trust Co. v. Magoffin*, 100 So. 2d

To the extent that Defendants rely on *Sch. Bd. of Miami-Dade County, Fla. v. Trujillo*, 906 So. 2d 1109 (Fla. 3d DCA. 2005) to avoid liability for harm inflicted on Lisa, this reliance is misplaced for three reasons. First, the plaintiffs in *Trujillo* had an opportunity to prove damages, but were unable to do so. Here, Plaintiffs have yet to be afforded the opportunity to show that Lisa suffered severe emotional distress during the hours at issue. Secondly, *Trujillo* applies only to negligence actions and Plaintiffs have sufficiently alleged intentional actions against Defendants Frederick, Cruz and Zauner. *See Abril*, 969 So. 2d at 206-07 ("[T]he impact rule does not apply to any intentional torts, such as defamation, invasion of privacy, and intentional infliction of emotional distress."). Third, even where the impact rule is applicable to bar emotional injury based on negligent actions, as set forth above, the Florida Supreme Court has noted that the "special professional duty" created by a relationship between the parties "coupled with the clear foreseeability of emotional harm" allows an exception to the "harsh artificial doctrine" that is the impact rule. *Rowell*, 850 So. 2d at 480. For the reasons set forth above, at this stage of the proceedings it would be error to dismiss the Complaint on the ground that Lisa is no longer alive to testify about the injuries she sustained.

VIII. PLAINTIFFS HAVE STATED VIABLE CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST FREDERICK, ZAUNER AND CRUZ.

To state a cause of action for intentional infliction of emotional distress (IIED), a complaint must allege four elements: (1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused the emotional distress; and (4) the distress was severe. *Liberty Mut. Ins. Co. v. Steadman*, 968 So. 2d 592, 594 (Fla. 2d DCA. 2007). As Plaintiffs have sufficiently

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626 (Fla. 1958) ("It has long been the settled rule in this jurisdiction that damages in a personal injury action are for the discretion of the jury."). *See also MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 2008 WL 2678024, at *2 (Fla. 2008) (noting that the "fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which gives rise to the action.").

alleged all four elements, Defendants' only argument is that the allegations do not rise to the level of outrageousness. Thus, Defendants seek to convince this Court that, as a matter of law, refusing to allow a spouse or life partner who was pleading over and over to have *any* access to their life's love in that person's dying hours – and without *a shred* of medical or legitimate justification – is not outrageous and utterly intolerable in a civilized society. Likewise, Defendants seek to dismiss the obvious outrage in denying a dying woman a last chance to see and say goodbye to her children, and in denying them the opportunity to be with their mother for even a few moments during her last hours, for absolutely no legitimate reason. Finally, Defendants callously claim there is no problem with denying a dying patient the comfort of a spouse or life partner as she passes from this world. Defendants' position, like the conduct of their employees, is simply outrageous.

"The viability of a claim for intentional infliction of emotional distress is highly fact-dependent and turns on the sum of the allegations in the specific case at bar." *Johnson v. Thigpen*, 788 So. 2d 410, 413 (Fla. 1st DCA 2001) (citing *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1537 (S.D. Fla.1993)). Outrageousness is "[m]easured by the standards of human decency and societal expectations." *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 96 (Fla. 2005). Where no justification for denial of treatment or access exists, the defendants' actions have been found to be outrageous. *See Steadman*, 968 So. 2d at 594; *see also Dependable Life Ins. v. Harris*, 510 So. 2d 985, 989 (Fla. 5th DCA 1987) (holding that the insured sufficiently alleged a cause of action for IIED where the insurer rejected the insured's claim for disability payments without any justification). Courts in Florida allow recovery in cases where the defendant's conduct imply malice, and malice is imputed whenever the defendant acted with great indifference to the rights of plaintiff or plaintiff's property. *See Kirksey v. Jernigan*, 45, So. 2d 188, 189 (Fla. 1950) ("[W]e do not feel constrained to extend [impact] rule to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or

great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages.") (citing 15 Am.Jur., Damages, Sec. 179, page 596; Restatement of Torts, Section 47(b)). The *Kirksey* court pointed out that this is especially the case "where mental anguish ... is not only the natural and probable consequence of the character of wrong committed, but indeed is frequently the only injurious consequence to follow from it." *Id.*

In Florida, government employees have immunity from suit unless their actions acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Fla. Stat. §768.28(9)(a). Under the fact and circumstances alleged in the Amended Complaint, the conduct alleged – arbitrarily denying visitation of, and to, a dying family member for eight hours, contrary to hospital standards, their own posted visitation policies that expressly allowed for 15 minute visits every hour and despite their willingness to allow other families access to their loved ones – is an action that exhibits wanton and willful disregard of human rights, implies malice, lacks legitimate justification, and meets the legal threshold of extreme and outrageous as set forth above and more fully below.

A. The Particular Susceptibility to Emotional Distress of a Dying Patient and Her Family Provides Additional Support for a Claim of Intentional Infliction of Emotional Distress.

This Court must also look to the actor's knowledge that the person against whom the conduct is directed is peculiarly susceptible to emotional distress in determining whether the actions and inactions were extreme and outrageous. *See* 43 AMJUR POF 2d 1, Intentional Infliction of Emotional Distress §6 (citing Restatement (Second) of Torts § 46, comment f (1965)). In *Steadman*, *supra,* the court found comment "f" to section 46 of the Restatement (Second) to be instructive "because it explains how knowledge of a person's particular susceptibility to emotional distress is relevant to determining whether the conduct is sufficiently extreme and outrageous to

constitute intentional infliction of emotional distress." 968 So. 2d at 595.[15] Examples, by way of illustration only, where the status of the plaintiff was held to be particularly susceptible to emotional distress include conduct directed at the elderly;[16] sick people;[17] children;[18] and pregnant women.[19] Here, adding dying patients and their families to this list is entirely consistent with both these cases and the basis for this cause of action.

B. The Abuse of Defendants' Superior Positions over Plaintiffs Also Supports a Claim of Intentional Infliction of Emotional Distress.

Additional support for a finding that the allegations here rise to the requisite level of outrageousness is found in the recognized rule that particular conduct rises to the level of extreme and outrageous in the context of abuse by the defendant of a position, or a relation with the plaintiff, which gives him actual or apparent authority over the plaintiff, or power to affect his or her interests. *See, e.g., Steadman* 968 So. 2d at 596 ("[T]he unequal position of the parties in a relationship, where one asserts and has the power to affect the interests of the other, may also supply the heightened degree of outrageousness required for a claim of intentional infliction of emotional distress.") (*citing* Restatement (Second) of Torts, § 46 comment e) In *Gallogly v. Rodriguez*, 970 So. 2d 470, 472-473 (Fla. 2d DCA 2007), for example, the court reversed a dismissal of a claim for IIED by giving "greater weight to the fact that the defendants had actual or apparent authority over Gallogly as police officers" and reasoned that the allegations of abuse of this relationship of authority "if proven, goes beyond the bounds of decency." *See also Aguilera* 905

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[15] *See* Restatement (Second) of Torts § 46, comment f (1965) ("The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.")

[16] *See, e.g., Fitzpatrick v Robbins* 626 P.2d 910 (Or. 1981).

[17] *See, e.g., Dawson v Associates Financial Services Co.of Kansas* 529 P.2d 104 (Kan. 1974); *Interstate Life & Acc. Co. v Brewer*, 193 SE 458 (Ga. App. Ct. 1937).

[18] *See, e.g., Korbin v Berlin* 177 So. 2d 551(Fla. 3d DCA 1965); *Delta Finance Co. v Ganakas* 91 SE 2d 383 (Ga. App. Ct. 1956).

[19] *See, e.g., Vargas v Ruggiero* 197 Cal. App. 2d 709 8 (Ca. App. Ct. 1961).

So. 2d at 96 (allegations of insurer's conduct were outrageous due to position of power); *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1970) (attorney who "exploded into a torrent of abuse" directed at a client when she attempted to discuss a settlement of her pending divorce action was sufficiently outrageous); *Scheuer v. Wille*, 385 So. 2d 1076 (Fla. 4th DCA 1980) (finding IIED liability for conduct of funeral home in embalming a body without consulting deceased's family and in violation of their religious beliefs).

The conduct of persons in positions of power in hospital and health care settings is particularly susceptible to a finding of outrage sufficient to satisfy the legal requirement in alleging IIED. *See e.g., Steadman., supra* 968 So. 2d at 596 (refusal to authorize medical procedure where it was known that patient had a very limited life expectancy, and considering that patient "was well aware that the clock was ticking and that the additional emotional distress caused by the delay could well hasten her demise" was within the ambit of IIED).[20] This is so because courts consider the special duties owed by virtue of defendant's professional status in deciding what behavior vis-à-vis the plaintiff may be found to be extreme or outrageous. *See, e.g., Rockhill v. Pollard,* 485 P.2d 28 (Or. 1971) (special duties owed by a physician consulted in emergency); *De Cicco v Trinidad Area Health Ass'n.*, 573 P.2d 559 (Colo. Ct. App. 1977) (outrageous conduct found where local hospital ambulance service unnecessarily delayed transportation to plaintiff's critically ill wife.).

In addition, the courts have noted that, where the conduct in question was professionally unacceptable or improper, it was or could be found to be outrageous. *See, e.g., Dunbar v Strimas*, 632 S.W.2d 558, 560 (Tenn. App. 1981) (IIED sufficiently alleged where expert opinions of forensic pathologist "were entirely improper" and that approach to family was "less than

[20] *See also Grimsby v Samson,* 530 P.2d 291 (Wash. 1975) (complaint alleging that physician-patient relationship existed between defendant and plaintiff's deceased wife, that the defendant doctor outrageously breached that relationship by abandoning decedent and failed to provide her with medical care, as a result of which plaintiff was required to witness "terrifying agony" of dying wife, held to state cause of action for intentional infliction of emotional distress); *Hume v Bayer* 428 A.2d 966 (N.J. Super. Ct. 1981) (summary judgment for defendant in parents' action for IIED reversed where doctor, knowing that child had nothing more than mild appendicitis, told child's parents that child was suffering from rare disease which might be cancerous).

professionally acceptable"); *see also Rockhill,* 485 P.2d at 60-61 (physician's conduct held "outrageous in extreme" because he "met a distraught mother with an unconscious baby who was totally dependent on him to diagnose the baby's condition and do something about it. Defendant was under a professional obligation to plaintiff-they were not dealing at arm's length."). Even where a defendant does not have any formal relationship with, or occupy a position of authority over, or even know, the plaintiff, his status as a professional having power to affect the plaintiff's interests may have a bearing on the outrageousness of his conduct. *See, e.g., Banyas v. Lower Bucks Hospital*, 437 A.2d 1236 (Pa. Super. Ct. 1981) (allegations that physicians falsely prepared records indicating that the death was due solely to the injuries inflicted by plaintiff, as a result of which plaintiff was charged with murder, sufficient to state IIED, since an intentional misstatement of the cause of death would be "intolerable professional conduct and extreme and outrageous.").

C. Defendants' Actions Were Extreme and Outrageous and Beyond the Bounds of Decency in Refusing To Allow a Dying Patient and Her Family To See Each Other for Eight Hours and by Refusing To Provide Information and Services.

Applying the law and legal principles set forth above, Plaintiff alleges that Drs. Zauner and Cruz, as Lisa's treating physicians, were in a position of complete authority over her and her family and that they refused to allow her to have her children or her life partner visit her for even a few moments over the eight hours that she lay dying in their hospital.[21] Defendants knew that their dying patient and her family were particularly susceptible to emotional injury in their vulnerable states. Plaintiffs allege that the doctors' actions were unacceptable, unprofessional and improper and will so prove at trial. Plaintiffs further allege that there was absolutely *no* medical, or legitimate reason that justified this conduct and that malice can be imputed by these Defendants' actions.

[21]C4Plaintiffs allege that Defendants had absolutely nothing whatsoever to do with, nor were they aware of, Janice's ability to briefly sneak into Lisa's room under the cloak of a clergy person to witness the sacrament of last rites. Thus, the Complaint alleges that Defendants provided their patients no access to her family or them to her for eight hours – until Lisa's sister arrived and gained access. (Am. Comp. ¶¶40, 50, 53, 55)

With respect to Defendant Frederick, Plaintiffs allege that he is the hospital's social worker whose job it was to serve as a liaison to this family and provide support services as they dealt with this medical crisis and tragedy. Dr. Frederick's professional obligations, as set forth in Jackson Memorial's policies were, at a minimum, to:

- provide "crisis and bereavement counseling"; (Am. Compl. ¶20.)
- "work with individuals and families in dealing with personal and interpersonal crises caused by illness and hospitalization"; (Am. Compl. ¶20.)
- facilitate family involvement with the entire treatment team; (Am. Compl. ¶20.)
- keep the family apprised of the patient's progress" during a patient's hospital stay; (Am. Compl. ¶20)
- "help patients and families help themselves" and "assist in acquiring the tools to cope with troubling situations such as … traumatic illness [and] bereavement." (Am. Compl. ¶20.)

Instead of providing *any* of the services he was required to provide, or meeting even *one* of his obligations as a professional social worker in an emergency room setting, Dr. Frederick hurled one dismissive and telling comment: *You are in an anti-gay city and state.* He then simply walked away from these children, and this family, who were in crisis and filled with panic, fear, pain, and grief, never to be seen or heard from by them again. Dr. Frederick's actions in completely refusing to meet his professional obligations to this family are certainly outrageous. Frederick's words alone and out of context, without the insulting and demeaning tone alleged, may not rise to the level of outrageousness; indeed, Plaintiffs assert that they are indices of the motivation for the unequal and outrageous treatment this family received. Frederick's words, taken in context, certainly added grievous insult to injury. As the liaison between patients' families and their treating physicians, as well as the person in charge of providing any and all crisis and bereavement counseling, Dr. Frederick was a person in a position of authority with regard to the family's access to their mother and partner, as well as information about her condition,. As a trained mental health care

professional, he certainly knew that this family was particularly susceptible to severe emotional distress in the circumstances. Such actions and inactions are well beyond the bounds of decency and utterly intolerable in a civilized society.

IX. CONCLUSION

For the above-stated reasons, this Court should deny Defendants' Motion to Dismiss on all grounds, and grant such other relief as the Court deems appropriate. In this event, the Court were to grant relief to any aspect of Defendants' Motion, Plaintiffs request leave to replead said claim.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that I have conferred via electronic mail with Erica Zaron, Esq., counsel for Defendants, regarding the substance and relief sought by this Motion in a good faith attempt at resolving the issues raised herein, and she represented that she agrees to the relief sought herein.

By: /s/ Donald J. Hayden
Donald J. Hayden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 17th, 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 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.

By: /s/ Donald J. Hayden
Donald J. Hayden

SERVICE LIST

JANICE LANGBEHN, et al. vs. THE PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY
CASE NO. 08-21813-CIV-JORDAN/MCAliley
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

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