

H**Briefs and Other Related Documents**

District Court of Appeal of Florida,
Fourth District.
HUMANA HEALTH INSURANCE COMPANY OF
FLORIDA, INC., a Florida corporation,
Appellant,
v.
Mark CHIPPS, individually and for the use and bene-
fit of Caitlyn Chipps, a
minor, Appellee.
No. 4D00-866.

Dec. 26, 2001.

Insured brought action against health insurer to re-
cover on theories of breach of contract, fraud in the
inducement, unfair claims practices, intentional in-
fliction of emotional distress, and promissory estop-
pel after the insurer terminated coverage for child
with cerebral palsy. The Fifteenth Judicial Circuit
Court, Palm Beach County, [James T. Carlisle](#), J.,
entered judgment on jury verdict awarding compensa-
tory and punitive damages. Insurer appealed. The
District Court of Appeal, [Polen](#), C.J., held that: (1)
awarding damages to child for intentional infliction
of emotional distress was improper in light of parent's
complaint seeking damages for himself, not as next
friend of child; (2) instructions on punitive damages
invaded the province of the jury; (3) mitigating evi-
dence to rebut testimony that insurer's managed care
practices violated industry standards should have
been admitted; (4) testimony by the parents of several
critically ill children about their negative experiences
with their health insurers was irrelevant and unduly
prejudicial; and (5) evidence of insurer's indemnity
agreement with parent company was relevant.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Infants  **92**

[211k92 Most Cited Cases](#)

Awarding damages to a child for intentional infliction

of emotional distress was improper in light of parent's
complaint seeking damages for himself, not as next
friend of child; the parent never pleaded a claim for
the child's damages.

[2] Trial  **194(20)**

[388k194\(20\) Most Cited Cases](#)

[2] Trial  **196**

[388k196 Most Cited Cases](#)

Instructions on punitive damages invaded the
province of the jury by characterizing insurer's con-
duct as so gross and flagrant as to show a reckless
disregard of human life or the safety of persons ex-
posed to the effects of its conduct and an entire lack
of care such that the insurer must have wantonly and
recklessly disregarded the safety and welfare of the
public; even though a default judgment on liability
for punitive damages was entered against the insurer,
the court did not instruct the jury that it had the dis-
cretion to decline to assess punitive damages or to
award only a nominal amount.

[3] Damages  **91.5(1)**

[115k91.5\(1\) Most Cited Cases](#)

(Formerly 115k91(1))

To assess punitive damages, a jury must evaluate the
degree of malice, wantonness, oppression, or outrage
demonstrated by the evidence in the case.

[4] Insurance  **3381(4)**

[217k3381\(4\) Most Cited Cases](#)

Mitigating evidence to rebut testimony that health in-
surer's managed care practices violated industry
standards should have been admitted in suit by in-
sured; the testimony reflected on the egregiousness of
the conduct and, thus, could have impacted the
amount of damages.

[5] Insurance  **3381(4)**

[217k3381\(4\) Most Cited Cases](#)

[5] Insurance  **3576**

[217k3576 Most Cited Cases](#)

Testimony by the parents of several critically ill chil-
dren about their negative experiences with their
health insurers was irrelevant and unduly prejudicial

in insured's suit against a different health insurer, even though the insurers shared the same parent company; the parent was not a party to the suit although it allegedly schemed to end coverage for child, and the testimony was an overt appeal to the jurors' sympathy. [West's F.S.A. § 90.403](#).

[6] Trial ↪ **304**

[388k304 Most Cited Cases](#)

Health insurer made a sufficient showing for a juror interview when it learned that a juror had been sued in another county by a health care provider for allegedly failing to pay her daughter's medical bills, even though she had claimed during voir dire that she was never a party to a lawsuit. [West's F.S.A. RCP Rule 1.431\(h\)](#).

[7] Insurance ↪ **3381(4)**

[217k3381\(4\) Most Cited Cases](#)

Evidence of insurer's \$1.7 billion indemnity agreement with parent company became relevant as to insured's punitive damages claim, once the insurer claimed that a large award would hurt or bankrupt the company financially.

***493** [Jane Kreuzler-Walsh](#) of Jane Kreuzler-Walsh, P.A., West Palm Beach, [Sylvia H. Walbolt](#) and [Robert E. Biasotti](#) of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., St. Petersburg, for appellant.

Marjorie Gadarian Graham, P.A., Palm Beach Gardens, Ricci, Hubbard, Leopold, Frankel & Farmer, P.A., West Palm Beach, and [Joel D. Eaton](#) of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for appellee.

**ON APPELLEE'S CONSOLIDATED MOTION
FOR REHEARING AND MOTION FOR RE-
HEARING EN
BANC**

[POLEN](#), C.J.

Following this court's September 19, 2001 opinion, appellee has moved for rehearing and rehearing en banc. We grant the motion for rehearing in part, deny the motion for rehearing en banc, and substitute the following in lieu of the original opinion:

Humana Health Insurance Corporation ("Humana")

timely appeals after a jury awarded Mark Chipps, individually and for the use and benefit of his minor daughter, Caitlyn Chipps, \$1,028,763 in compensatory damages, and \$78,500,000 in punitive damages on Chipps' third amended complaint. ***494** We reverse both aspects of the award.

Background

Chipps' daughter, Caitlyn, was born with cerebral palsy. He and Caitlyn had been covered by his employer's predecessor group health insurance company until Chipps was informed that his employer planned to switch plans to Humana effective January 1, 1994. He elected coverage with Humana after its representatives assured him in person that Humana would continue to cover Caitlyn with no loss of benefits. Humana subsequently sent Chipps a letter confirming that it accepted Caitlyn into its Medical Case Management program, available for catastrophically ill children, and that it could not terminate her from the program unless one of three express conditions were met. [\[FN1\]](#) It is undisputed that these conditions were never met.

[FN1](#). The conditions for terminating the member's participation in the Medical Case Management program were:

- a. The member or guardian did not wish to accept recommended care or treatment, in which case the member would return to regular plan benefits;
- b. Coverage under the policy ended; or
- c. The individual lifetime maximum benefit had been reached.

For almost two years, Caitlyn's speech, occupational, and physical therapy was covered by Humana. However, On December 1, 1995, two days before her fifth birthday, Humana terminated her from the Medical Case Management program and also her benefits for speech, occupational, and physical therapy. Humana explained that it was terminating such coverage because Caitlyn did not meet Humana's criteria for the program.

Chipps then sued Humana for breach of contract, fraud in the inducement, unfair claims practices, in-

tentional infliction of emotional distress, and promissory estoppel. Humana's liability for compensatory damages on all claims, and for punitive damages under the fraud in the inducement and unfair claims practices counts, was determined by the trial court's striking Humana's pleading as a sanction for discovery violations, and entering a default judgment. Humana then took an interlocutory appeal, resulting in an affirmance by this court. [Humana Health Ins. Co. of Florida, Inc. v. Chipps](#), 748 So.2d 280 (Fla. 4th DCA 1999).

Trial proceeded on the amount of damages to be awarded. Chipps first withdrew his individual claim in Count IV for intentional infliction of emotional distress and proceeded on this claim only on behalf of Caitlyn. Humana objected that this claim had not been pleaded. The court agreed. Chipps' counsel then read language from what the court believed to be the default order which suggested that the court already had ruled on this issue in the Chipps' favor. (Counsel was actually reading from proposed jury instructions.) The court, apparently believing it had already entered a default on this claim, allowed it to proceed.

Chipps showed that after Caitlyn was unilaterally terminated from the Medical Case Management program, she regressed both physically and emotionally. He also showed that Humana's parent company, Humana Inc., made the decision to cut Caitlyn and up to 100 other catastrophically ill children from the Medical Case Management program in an effort to save the company over \$78.5 million. Over Humana's objection, some parents of these other catastrophically ill children testified that their children received similar treatment from their insurance companies as Caitlyn. Some of these children were not insured *495 by Humana, but rather by different subsidiaries of Humana, Inc.

Chipps' economic expert testified that Humana's net worth ranged from \$56.9 million in 1994 to \$43.4 million in 1998. However, he noted that Humana was the beneficiary of an indemnification agreement from its parent corporation, Humana, Inc., who agreed to reimburse Humana for any loss, claim, or demand it suffered in Florida, including punitive

damage awards, up to \$1.7 billion.

The court instructed the jury, in part, that Humana had intentionally caused Caitlyn to suffer "severe emotional distress." It further instructed that all of the other factors in the standard jury instruction on punitive damages were established as a matter of law, and that the Chipps were "entitled" to recover both compensatory and punitive damages as a matter of law. It did not instruct the jury that it had the discretion to decline to assess punitive damages.

The jury awarded \$1 million in compensatory damages on the claim for intentional infliction of emotional distress upon Caitlyn, \$28,763 on each of the four claims, and \$78.5 million in punitive damages. Post trial, Humana moved for a new trial and for remittitur. In the order denying the motions, the court found that Humana engaged in a scheme to defraud Chipps; that it denied Caitlyn her benefits solely to reduce the cost to the company of medical care it had promised to provide; that Humana's conduct was particularly reprehensible, flagrant, deliberate, and intentional; and that it exhibited a reckless disregard for human life and health as to warrant the substantial punitive damages award. It found that the disparity between the actual and threatened harm and the amount of punitive damages was both reasonable and constitutional. It concluded that the award was supported by substantial competent evidence and was not excessive. This appeal followed.

Merits

[1] Humana argues the trial court reversibly erred when it instructed the jury to award Caitlyn damages for intentional infliction of emotional distress. It maintains that count IV of the third amended complaint alleged damages only suffered by Mark Chipps and not Caitlyn and, that, therefore, the issue had never been pled. [FN2] We agree. A fair and objective reading of the allegations shows that Chipps was seeking damages for himself individually and not as next friend to his daughter. Humana could not have reasonably anticipated that the prayer for relief in count IV encompassed damages to Caitlyn as opposed to and/or in addition to her father. Accordingly, we reverse the \$1 million compensatory dam-

ages award.

[FN2](#). Count IV alleged in pertinent part that Humana had "caused the Plaintiff's [sic] severe emotional distress." The prayer for relief sought damages only for "Plaintiff, MARK CHIPPS."

Because we are reversing this award, we also must reverse the \$78.5 million punitive damages award as well. The fact that the jury was allowed to hear evidence relating to Humana's alleged intentional inflict of emotional distress upon Caitlyn may have influenced it to award the Chipps such a large amount of punitive damages. [FN3](#)

[FN3](#). We note that by reversing on this issue we are not passing on the viability of such a cause of action if, on remand, the Chipps request and are allowed to amend their complaint to plead this count.

[\[2\]](#) Another significant reason to reverse the award of punitive damages is that the jury instructions invaded the province of the jury by characterizing the *496 conduct of the defendants. This was an unusual case in that the Chipps had been granted a default on their entitlement to punitive damages. [FN4](#) The trial judge instructed the jury that Humana's conduct was "so gross and flagrant as to show a reckless disregard of human life or the safety of persons exposed to the effects of its conduct." The court also told the jury that Humana's conduct "showed such an entire lack of care that Humana must have wantonly and recklessly disregarded the safety and welfare of the public." The court did not instruct the jury that it had the discretion to decline to assess punitive damages or to award only a nominal amount. [FN5](#)

[FN4](#). Only liability for punitive damages resulted from the default. In other words, the effect of the default was narrow in that it merely bypassed the need for bifurcation. The amount of the punitive damages to be awarded, on the other hand, still had to be determined by the jury in its discretion. The jury could have awarded no punitive damages if it had determined that Humana's

conduct was not as egregious as the court's instruction made it out to be.

[FN5](#). The standard jury instruction on punitive damages in a bifurcated proceeding indicates that even after a jury decides that punitive damages are appropriate, they may still decline to assess any amount in the second stage:

If you decide that punitive damages are warranted, we will proceed to the second stage during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instruction, after which you will decide whether in your discretion punitive damages will be assessed and, if so, the amount....

[\[3\]](#) To assess punitive damages, a jury must evaluate the degree of "malice, wantonness, oppression, or outrage" demonstrated by the evidence in the case. [Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483, 486-87 \(Fla.1999\)](#). The jury instructions here interfered with the jury's fact-finding function by characterizing and summarizing the evidence. While there is overlap between the issues of entitlement to punitive damages and the amount of such damages to be awarded, care should have been taken to let the jury arrive at its own decision regarding the egregiousness of the defendant's conduct. *See, generally, Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 532 (Fla.1985)*. [FN6](#)

[FN6](#). On remand, the court may turn to the following jury instruction for guidance in this regard:

You shall now determine the amount of punitive damages, if any, to be assessed as punishment and as a deterrent to others. This amount would be in addition to the compensatory damages you have awarded. In making this determination, you should consider the following:

- (1) the nature, extent, and degree of misconduct and the related circumstances; and
- (2) the defendant's financial resources; and
- (3) any other circumstance which may affect

the amount of punitive damages.

You may in your discretion decline to assess punitive damages.

See Fla. Std. Jury. Instr. (Civ.) PD (1).

[4] Along similar lines, we also note that the court improperly prevented Humana from introducing mitigating evidence to rebut testimony that Humana's managed care practices violated industry standards. This testimony reflected on the egregiousness of Humana's conduct, and, thus, may have impacted the amount of damages the jury awarded. The jury should have been allowed to consider any evidence which would have had the effect of "reducing or softening the moral or social culpability attaching to [the defendant's] act...." McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 608 (1930) (Cardozo, C.J., concurring); see also *497 St. Regis Paper Co. v. Watson, 428 So.2d 243, 246-47 (Fla.1983)(holding the jury, in assessing punitive damages, should consider "the nature, extent, and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident, as well as any mitigating circumstances") (citation omitted).

[5] Humana further draws attention to the court's having allowed the parents of several critically ill children to testify about their negative experiences with their health insurers. To the extent that these insurers were not the same as Humana, we hold the court erred. Although they shared the same parent company (Humana, Inc.) and although the Chipps argued that Humana, Inc. acted as an agent for its subsidiaries in scheming to cut Caitlyn and others from the Medical case Management program, Humana, Inc. was not named as a party to this lawsuit. There was no attempt to pierce the parent company's corporate veil or pursue a legal theory that would have allowed the jury to disregard the corporate structure and hold the subsidiaries responsible for each other's conduct. The evidence was irrelevant and unduly prejudicial. [FN7]

[FN7] Even if on remand the Chipps elect and are allowed to amend their complaint to allege a theory that would make the testimony of the other parents admissible, the

testimony of these other parents still should not be admitted to show the emotional suffering that their children endured as a result of being terminated from the program.

Such evidence would be irrelevant and unfairly prejudicial since it would appeal overtly to the sympathy of the jurors. See § 90.403, Fla. Stat. (1999).

[6] There was at least one other error made at the trial court level. During voir dire, one juror claimed she was never a party to a lawsuit when, in fact, she had been sued in Broward County by a health care provider for allegedly failing to pay her daughter's medical bills. After trial, when told of this information, the court denied Humana's request for a juror interview under Florida Rule of Civil Procedure 1.431(h). Humana made a sufficient showing such that the court should have allowed the interview. See De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla.1995). Because the juror's subject prior lawsuit occurred outside Palm Beach County, our conclusion here does not conflict with our recent opinion in Bornemann v. Ure, 778 So.2d 1077, 1079 (Fla. 4th DCA 2001)(holding lawyers must diligently check the clerk of the court's lawsuit index at some point in the lower court proceedings to determine whether that juror has previously been a party to a lawsuit)(citing Tejada v. Roberts, 760 So.2d 960 (Fla. 3d DCA), review granted, No. SC00- 1080, 786 So.2d 1188 (Fla. Nov. 13, 2000)).

Because of these errors discussed above, and given the severity of the total award, we cannot discern from this record whether any or all of these mistakes contributed to the jury's overall verdict. As such, we are constrained to reverse all of the awards and remand this case for a new trial.

[7] Although we are reversing, we address one other issue raised in this appeal that may likely arise at retrial. In this appeal, Humana argues that evidence of its \$1.7 billion indemnity agreement with its parent company, Humana, Inc., was irrelevant and should not have been admitted. We disagree. The purposes of punitive damages are served by awarding a sum of money from the defendant which, according to the defendant's financial ability, will hurt but not bank-

rupt that defendant. [Bill Branch Chevrolet, Inc. v. Burkert](#), 521 So.2d 153, 155 (Fla. 2d DCA 1988).

Once Humana claimed that a large award would hurt or bankrupt the company financially, *498 the agreement became relevant for purposes of proving otherwise.

This case is distinguishable from [CSX Transportation, Inc. v. Palank](#), 743 So.2d 556, 562 (Fla. 4th DCA 1999), review denied, 760 So.2d 946 (Fla.) and certiorari denied, 531 U.S. 822, 121 S.Ct. 65, 148 L.Ed.2d 30 (2000), upon which Humana relies. In *Palank*, this court held that the subject indemnity agreement was irrelevant when offered by the defendant corporation in order to show that a punitive damages award would not have hurt the company. We held that "[l]iability for punitive damages and the amount thereof is not determined from the assets of a third party nor from an agreement of a third party to pay such damages. In short, the indemnity agreement was not relevant evidence...." *Id.* at 562.

As *Palank* makes clear, the agreement was being offered for a different purpose and under entirely different circumstances. Thus, our holding in that case does not conflict with our conclusion here. In short, if there was evidence to rebut Humana's assertions that a large award would force the company into financial straits, then it should have been admitted. To hold otherwise would insulate such corporations from payment of these awards. Accordingly, we affirm on this issue.

AFFIRMED in part; REVERSED and REMANDED for further proceedings in accordance with this opinion.

[GROSS](#) and [TAYLOR](#), JJ., concur.

802 So.2d 492, 27 Fla. L. Weekly D63

Briefs and Other Related Documents ([Back to top](#))

- [4D00-866](#) (Docket) (Mar. 14, 2000)

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