

No. 09-0191

**In The  
Supreme Court Of Texas**

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**HYDE PARK BAPTIST CHURCH,**

**Petitioner/Defendant,**

**vs.**

**TARA TURNER AND TERRY CURTIS,  
INDIVIDUALLY AND AS NEXT FRIENDS  
OF PARKER CURTIS, a Minor,**

**Respondents/Plaintiffs.**

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**On Petition for Review from the  
Third District Court of Appeals  
at Austin, Texas**

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***AMICUS CURIAE* BRIEF OF IMPERIAL FIRE  
AND CASUALTY INSURANCE COMPANY IN  
SUPPORT OF PETITIONER'S PETITION FOR REVIEW**

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**DISCLOSURE OF IDENTITY AND INTERESTS OF AMICUS CURIAE**

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, Imperial Fire and Casualty Insurance Company ("Imperial Fire") hereby discloses that this brief is filed on its behalf. Imperial Fire, which has paid the fees for the preparation of this Brief, is a Louisiana-based insurance company with its principal place of business at 4670 I-49 N. Service Road, Opelousas, Louisiana, 70570. Imperial Fire also operates out of its Dallas Regional Office, located at 14800 Quorum Drive, Suite 250, Dallas, Texas, 75254. Imperial Fire's interest in this case is that Imperial Fire has defended its insureds in many personal injury suits in which plaintiffs have sought the recovery of mental anguish damages.

The Court of Appeals' decision below follows a dangerous line of minor precedents allowing the recovery of mental anguish damages in relatively minor personal injury cases.

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

*Amicus Curiae* Imperial Fire and Casualty Insurance Company (“Imperial Fire”) respectfully submits this *Amicus Curiae* Brief pursuant to Rule 11 of the Texas Rules of Appellate Procedure in support of granting a Petition for Review.

**SUMMARY OF THE ARGUMENT**

Although the Court of Appeals purports to follow this Court’s opinion in *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), regarding the liability standard for the recovery of mental anguish damages in personal injury cases in Texas, the Court of Appeals actually lowered the standards set forth in *City of Tyler*, by holding that a plaintiff is entitled to recover mental anguish damages without proof of significant physical injury nor proof of malice. Because the Court of Appeals’ opinion improperly loosens the applicable legal standard governing the recovery of mental anguish damages under Texas law, this Court should grant the Petitioners’ Petition for Review and, accordingly, reverse the Court of Appeals decision.

**ARGUMENT AND AUTHORITIES**

**I. Mental Anguish Damages Should Be Closely Scrutinized**

This Court has consistently admonished intermediate appellate courts to “closely scrutinize” awards for mental anguish damages given the inherent difficulty associated with verifying such damages. *See, e.g., Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997); *City of Tyler*, 962 S.W.2d at 495. While the Court of Appeals’ opinion below purports to follow the “high level of culpability” standard set forth in *City of Tyler*,

the Court of Appeal's holding pronounces legal standards that are far too liberal to withstand "close scrutiny" under this Court's previous holdings related to mental anguish awards. Thus, the case presents the Court with the opportunity to address the legal criteria for recovery of mental anguish damages under Texas law, and provide guidance to both the litigants and the courts of the State of Texas concerning the highly controversial recovery of mental anguish damages in cases of very "minor" personal injury arising out of simple negligence.

## **II. The Court of Appeals Abandoned and Failed to Abide by This Court's Requirements in *City of Tyler v. Likes***

In *City of Tyler*, this Court held that mental anguish damages must be "highly foreseeable" (e.g., cases involving injuries of such a "shocking and disturbing nature") or involve a "high level of culpability" to be recoverable in personal injury cases. 962 S.W.2d at 495-96. The undisputed evidence in this case does not even remotely approach the requisite "high level of culpability" necessary to recover mental anguish damages under Texas law. See *City of Tyler*, 962 S.W.2d at 495. The undisputed evidence, instead, is that the Petitioner was guilty, if at all, of nothing more than simple negligence.<sup>1</sup> The Court of Appeals' decision therefore directly contradicts this Court's decision in *City of Tyler*, and also the Court's decision in *Boyles v. Kerr*. See *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (holding that mental anguish damages are not recoverable in cases of simple negligence alone).

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<sup>1</sup> *Amicus Curiae* Imperial Fire adopts the Statement of Facts as set forth in the Petition for Review as if similarly set forth herein.

Moreover, this is a case where a small child received a “bump” on the head, with no discernible physical injury, and yet the jury awarded significant mental anguish damages. It is simply not “highly foreseeable” that a small child who “bumps” his head will incur such damages. By allowing the mental anguish damages to stand, the Court below has established a precedent which, if not reversed here, will fundamentally change the application of the *City of Light* decision so as to significantly expand recovery of mental anguish damages in cases of only “minor” injury, and will eat away at this Court’s decision in *Boyles v. Kerr* that mental anguish damages may not be recovered in cases of simple negligence.

### **III. The Restatement of Torts and Courts in Other States Impose Standards Which Require Physical Injury Or Other Objective Criteria**

Courts in many states have recognized the problem of out-of-control mental anguish awards. Therefore, many states impose a requirement for some *significant physical injury* or *objective manifestation* before they allow a recovery of mental anguish damages based upon a negligence claim. For example, in Washington, the courts require some bodily injury for claims alleging mental anguish caused by negligence. This objective manifestation is not required in intentional infliction cases. In *Trowbridge v. Nalco Co.*, 2009 WL 799678 (W.D. Wash. 2009), the court explained how this rule works in Washington:

A Washington plaintiff can recover for negligent infliction of emotional distress if he proves: (1) negligence, i.e., duty, breach, proximate cause, and injury; and (2) the additional requirement of *objective symptomatology*. *Kloepfel v. Bokor*, 149 Wash.2d 192, 199, 66 P.3d 630 (2003) ... The *Kloepfel Court* considered the question of whether claims for intentional

infliction of emotional distress (outrage claims) require a showing of objective symptomatology as is required in claims for negligent infliction of emotional distress.

To develop this rule, the Washington courts turned to the law followed *in most states*:

[T]he general rule is firmly established that physical injury or bodily harm - 'objective symptomatology' - is not a prerequisite to recovery of damages where intentional (and, in most states, reckless) emotional harm has been inflicted. . . . [M]any states, including this one, have distinguished negligent infliction of emotional distress from intentional infliction of emotional distress by making bodily harm or objective symptomatology a requirement of negligent but not intentional infliction of emotional distress.

*Kloepfel v. Bokor*, 149 Wash.2d 192, 199, 66 P.3d 630 (2003), quoted and followed in 2009 in *Trowbridge*, *supra*, 2009 WL 799678 at 10 (dismissing claims for negligent supervision/mental anguish).

Due to this general rule, the treatise *Causes Of Action* warns that, to recover mental anguish in a negligent supervision claim, "it may be necessary to show that the plaintiff's distress was accompanied by a physical injury occurring contemporaneously with or shortly after the tortious act." 25 COA 2d 99, *Causes of Action*, "*Cause of Action for Injury or Death Resulting From Negligent Hiring, Supervision, or Retention of Employee.*"

But, some states have discarded the traditional requirement that there must be an objective physical injury to allow a recovery for mental anguish damages in negligence cases. *See Folz v. State*, 110 N.M. 457, 470, 797 P.2d 246, 259 (1990) (illogical to require as a threshold element the presence of physical injury to manifest the emotional trauma); *Leong v. Takasaki*, 55 Haw. 398, 403, 520 P.2d 758, 762, 94 A.L.R.3d 471

(1974) (physical injury requirement is artificial and should only be used to show degree of emotional distress); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 438 (Me. 1982) (proof of physical manifestations of the mental injury is no longer required); *Heldreth v. Marrs*, 188 W.Va. 481, 490, 425 S.E.2d 157, 166 (1992) (emotional distress can be severe and debilitating even absent physical manifestations of the emotional injury).

Historically, Texas has generally required a *significant physical injury* for cases where the plaintiff combines the negligence theory of liability with a claim for mental anguish damages. *See, e.g., Fitzpatrick v. Copeland*, 80 S.W.3d 297 (Tex. App. -- Fort Worth 2002, pet. denied) (car passenger witnessed the violent death of driver from an errant truck wheel that smashed through the car's windshield; recovery denied). This is because Texas courts have traditionally treated *City of Tyler v. Likes* as being authoritative in listing the types of cases in which mental anguish damages are recoverable. *Id.*, citing *City of Tyler, supra*. And, Texas courts have historically distrusted mental anguish claims. *See, e.g., Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995) (noting that historically, mental anguish claims were distrusted, and courts did not award damages); *Bassham v. Evans*, 216 S.W. 446, 451 (Tex. Civ. App. -- Amarillo 1919, no writ) (holding that mental anguish damages are not recoverable because suffering is not seen by the courts as resulting from an act, but rather as a remote contingency).

This physical injury requirement is consistent with the **Restatement (Second)** of

**Torts § 436A, "Negligence Resulting In Emotional Disturbance Alone,"** which states:

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Historically, the courts have required that the bodily injury be significant, or else it fails this test. Thus, for example, a mere TMJ condition is insufficient to meet this requirement for a significant physical injury. *Dekelaita v. BP Amoco Chemical Co.*, Slip Copy, 2008 WL 2964376 (S.D. Tex. 2008).

Traditionally, Texas courts have allowed the recovery of mental anguish damages only: "(1) as the foreseeable result of a breach of duty arising out of certain special relationships, such as the relationship between a physician and a patient; (2) for some common law torts that generally involve intentional or malicious conduct such as libel and, by analogy, for violations of certain statutes such as the DTPA; and (3) in virtually all personal injury cases where the defendant's conduct causes *serious* bodily injury." *Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 95 (Tex. App. -- Houston [14th Dist.] 1998, pet. denied) (emphasis added) (citing *City of Tyler*, 962 S.W.2d at 494-96).

This case, however, does not fall within *any* of the previously recognized categories, and therefore *significantly* expands the recovery of mental anguish damages in Texas. Now, the Court of Appeals, below, has decided that the bodily injury requirement need not be met, so long as *some actor* acted with intent or malice. Now, liability for mental anguish is allowed without any significant bodily injury, and without any malicious intent by the defendant being held liable. The Court of Appeals, below, cites

no authority for this new standard. This Court should grant the Petition for Review, and indicate whether the traditional controls on mental anguish damages have now been relaxed so that such damages are recoverable even if there has been no significant physical injury and no intentional or malicious conduct on the part of the defendant.


**CONCLUSION AND PRAYER**

WHEREFORE, PREMISES CONSIDERED, *Amicus Curiae* Imperial Fire Insurance Company prays that this Court grant Petitioners' Petition for Review and reverse the Court of Appeals' judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Amicus Curiae* Brief of Imperial Fire and Casualty Insurance Company has been sent via certified mail, return receipt requested, to Petitioner's counsel David M. Pruessner, the Law Office of David M. Pruessner, Three Galleria Tower, 13155 Noel Road, Suite 1025, Dallas, Texas 75240, and to Respondents' counsel Laurie M. Higginbotham, Archuleta & Associates, 1100 Lakeway Drive, Suite 101, Austin, Texas 78734 and Don Cruse, Law Office of Don Cruse, 603 W. 13th Street, #1A, PMB 436, Austin, Texas 78701 on this the 29th day of April, 2009.

  
**TIMOTHY R. GEORGE**