
NO. 09-0191

**IN THE
SUPREME COURT OF TEXAS
Austin, Texas**

**HYDE PARK BAPTIST CHURCH,
Petitioner/Defendant,**

VS.

**TARA TURNER AND TERRY CURTIS,
INDIVIDUALLY AND AS NEXT FRIENDS
OF PC, a Minor,
Respondents/Plaintiffs.**

**On Petition For Review From The
Third Court of Appeals At Austin, Texas
Case No. 03-07-00437-CV**

PETITIONER'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is a personal injury case utilizing negligence to recover damages for “mental anguish.” Two year old PC sustained a “bump” on his head when his preschool teacher, Belinda Sue Lowry, intentionally knocked PC down in an incident in a preschool classroom. The Child and his parents sued the Teacher for assault, and sued Hyde Park Baptist Church for negligent supervision.

The Teacher settled prior to trial. The Jury found the Teacher’s intentional acts caused PC’s injuries, and that the Church was negligent, but not grossly negligent. In the fault apportionment, the Jury apportioned fault: Teacher 20% / Church 80%. The Jury awarded the Child and his parents damages, including \$34,980 for future medical expenses, and \$100,000 for future mental anguish. Despite motions for new trial and two motions for J.N.O.V, judgment was entered on the verdict in favor of Plaintiffs.

The Church appealed. The Court of Appeals affirmed the trial court’s judgment in all respects. The Church now petitions this Court for review.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to Section 22.001(a) (2) and (6) of the Texas Government Code. As to (a)(2), the decision of the Court of Appeals directly conflicts with this Court's holdings in *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997) and *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993), both of which restrict awards of mental anguish to certain types of cases. This Court has been reluctant to allow the mixture of a subjective type of fault (negligence) and a recovery of a subjective form of damages (mental anguish). Previously this Court has generally prohibited recovery of mental anguish damages under a theory of negligence. *Boyles v. Kerr, supra*. Instead, recovery of mental anguish damages is reserved for certain types of cases that meet objective criteria, such as cases with *significant bodily injury*, cases where the defendant was guilty of *intentional misconduct* (assault, battery, etc.), and cases involving shocking injuries where mental anguish is highly foreseeable (sexual assault). *City of Tyler v. Likes, supra*.

Over time, lower courts and federal courts have strayed from these objective requirements for recovery of mental anguish damages. For examples, see pages 20-22, *supra*.

In recent years, various Texas litigants have sought clarification from this Court regarding legal restrictions on mental anguish damages in minor personal injury cases. But, each time the question has gone unanswered for purely procedural reasons. For example, in the prior case of *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008), the Petitioners sought application of the limits of *City of Tyler v. Likes* to vacate an award of

mental anguish in another case involving only minor personal injuries (carpet burns and scratches). Other *Amici* (including an insurer) joined in that *Pleasant Glade* petition, arguing that claims for mental anguish are out of control and inflate minor injuries. This Court granted that Petition for Review, but decided that case on unrelated grounds. *Id.* 264 S.W.3d 1 (Tex. 2008) (decided on Constitutional law issues regarding Freedom of Religion.) That disposition left unanswered the question of whether mental anguish damages are permissible in cases involving only minor personal injuries: a scratch, a bump on the head, etc.

The question of liability standards for recovery of mental anguish damages almost returned to this Court in *Adams v. YMCA*, where the plaintiff recovered mental anguish damages even though he had no significant bodily injury. The child plaintiff had been “humped” briefly by a fully clothed camp counselor. In a *per curiam* opinion, this Court reversed the Court of Appeals holding about mental anguish damages. That case turned on the anomaly that the jury awarded no damages for mental anguish in the *past*, but awarded damages for the *future*.¹ However, whether the YMCA was substantially liable for any such damages was not touched by this Court. The controlling issues about liability were remanded to the Court of Appeals. A settlement then precluded any ultimate answer on the critical liability question. Thus, the questions about the legal standards for the recovery of mental

¹ “The court of appeals appeared to acknowledge that the evidence would support a claim for past mental anguish, but concluded that the jury's denial of mental anguish in the past meant there was insufficient evidence of a compensable injury in the future. Based on the evidence presented, we disagree.” *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008).

anguish in cases of negligence, without significant bodily injury, remain unanswered.²

Now, the Court of Appeals, below, has added a *new category* where mental anguish damages can be awarded. Now, a *negligence* claim is sufficient for an award of mental anguish damages if *some other party* acts intentionally. Thus, because the *teacher* (acting outside of the course and scope of her employment) acted *intentionally*, then the Church is somehow liable. This is a common fact pattern for negligent supervision/negligent hiring claims. The employee goes off and does something intentionally wrong, and the employer is punished for its negligence in hiring and supervision.

Strangely, the Court of Appeals, below, cited this Court's opinion in *Adams v. YMCA*, expressly claiming that this Court has now *negated* any requirement for significant bodily injury in these negligent supervision cases. The Court of Appeals citation to *Adams* wrongly adds the key phrase "even in the absence of bodily injury", as follows:

See *Adams v. YMCA*, 265 S.W.3d 915, 915 (Tex. 2008) (*per curiam*) (expert testimony regarding reasonable probability of future mental anguish, coupled with testimony of family members regarding behavior after abuse, sufficient to survive no-evidence challenge, *even in absence of bodily injury*).³

Hyde Park Baptist Church v. Turner, 2009 WL 211586, 5 (Tex.App.–Austin 2009) (Appendix

C) If that citation is truly correct, then this Court should decline this Petition For Review, at

² Trial courts see many such claims. See, for recent example, two recent cases from Houston district courts. (Appendix F)

³ In *Adams*, this Court was only holding that there was some evidence of mental anguish, not stating substantive standards for imposing liability. Beside, cases involving sexual assaults are those rare cases that present injuries of a "shocking and disturbing nature" under *City of Tyler v. Likes*. They are not precedents to control common cases where preschoolers get a bump on the head.

least on this first mental anguish issue. That is, if this Court has now decided to relax the requirements so that a plaintiff can recover for negligently inflicted mental anguish (without any bodily injury), then the Court of Appeals was largely correct. But, it is rather odd to think that the *per curiam* opinion (that remanded all liability issues to the Court of Appeals) actually announced a large substantive change in Texas law. Did it overturn cornerstone precedents, such as *Boyles v. Kerr* and *City of Tyler v. Likes*?

Also, this Court has jurisdiction over this appeal under §22.001(a) (6) of the Government Code. The Court of Appeals committed *errors of law*, and such errors are of great importance to the jurisprudence of the state and need to be corrected. The errors of law include two important areas, both of which are common in Texas personal injury litigation. First, as mentioned above, the Court of Appeals erred in applying the legal standards for awards of mental anguish damages in cases involving minor personal injuries. This Petition will demonstrate that subjective psychological diagnoses are now commonly used to produce large mental anguish awards, even in cases with relatively minor personal injuries: a bruise, a scratch, a bump, or no bodily injury at all. This is a marked departure from the *Restatement (Second) of Torts*, which imposes a bodily injury requirement for mental anguish to be recovered in cases of negligence.

Next, the Court of Appeals sets poor precedent for the proper standards for appellate review for the statutory apportionment of fault between an *employee* who engages in intentional wrongdoing, as compared to an *employer* who is only guilty of negligently failing

to stop the employee. This is a very common “deep pockets” litigation scenario in negligent hiring/negligent supervision cases. Under the typical *deep-pockets* approach to litigation, the solvent employer is sued for negligence after one of his employees engages in intentional wrongdoing, such as an assault on a plaintiff. The standard litigation tactic is to settle with the guilty employee for a small sum (because he is judgment proof), and then seek a large judgment against the *deep-pockets* employer under a theory of negligent hiring/negligent supervision. The employer’s only fault was *failing to stop* the employee, who acted outside of the course and scope of his employment. Yet, some errant juries will give into the closing argument request to saddle the employer with most of the fault, as here.

There is no Texas case law on how an appellate court should review a mis-apportionment of fault. Courts in other states, mainly California, have reversed mis-allocations of fault by returning to basic cornerstones of tort law. In California, jury verdicts are reversed if they violate basic precepts of fault, such as the fact that an *intentional* wrongdoer is generally more at fault than a *negligent* wrongdoer. Following California tort reform legislation similar to Texas, California overturns jury verdicts that simply shove liability on the deep-pocket, and largely negate fault of the actual wrongdoer. The verdicts are simply at odds with the undisputed evidence. California appellate courts adopt the “radical” approach that the jury’s verdict should be founded on the evidence, not on desires to get to deep pockets. This Court should provide judicial guidance on dealing with jury verdicts that mis-apportion fault, and simply shove fault on whatever deep-pocket is targeted by the plaintiff’s counsel in closing

arguments. This case has implications for many deep-pocket cases where a negligent defendant is, in essence, held liable for the acts of some intentional wrongdoer. This includes virtually all cases involving negligent supervision and cases involving negligent failure to keep premises secure from attacks.

ISSUES PRESENTED

ISSUE NO. 1:

The Court Of Appeals Erred In Affirming A Judgment Awarding Mental Anguish Damages Against A Negligent Employer, On The Basis That The *Employee* Acted Intentionally. There Was No Evidence Of Malice By The Employer Nor Any Significant Bodily Injury.

ISSUE NO 2:

**There Is Legally Insufficient Evidence On Causation.
The Expert Testimony Was Flawed On Its Face.**

ISSUE NO 3:

The Court Of Appeals Erred In Failing To Reverse The Jury's Mis-allocation Of Fault.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Hyde Park Baptist Church, Defendant/Petitioner, respectfully files its Petitioner’s Brief
On The Merits.

STATEMENT OF FACTS

Since the Jury resolved the contested testimony in favor of the Plaintiffs, and against the Church, the facts must be summarized in favor of the Plaintiffs. Given that assumption, the facts showed that PC, then less than two years old, was enrolled by his parents in the Hyde Park Baptist Church preschool, CDC, based upon assurances that this preschool presented a safe and loving environment for their child. (RR 6, pgs. 206-210)

This safe and loving environment was particularly important to Tara Turner, the mother, because she is an attorney who regularly works with cases involving abused children. She works with CPS and is attuned to allegations of child abuse. (RR 7, pgs. 77-74)

PC was eventually assigned to the class of Belinda Sue Lowry, a long time teacher at the Church. While Ms. Lowry would never be accused of intentionally harming children in the sense of beating them or sexually abusing them, she would ultimately be accused of “assault” in terms of throwing her hip in a manner that knocked PC down. He hit his head on the floor and this caused a “bump” on his head. (RR 4, pg. 49)⁴ The term “bump” is the term subsequently used in his medical records, when his parents ultimately took PC to the doctors that searched for an injury. (Appendix D.)

⁴ Citations to the Record are: RR is for Reporter’s Record; and CR is for Clerk’s Record.

And, this was not the first instance of the Teacher, Belinda Sue Lowry, having troubles with rough treatment of children. She had been a teacher for 12 years. During those many years there had been various incidents. On the one hand, many parents and teachers loved her as a firm teacher. (RR 5, pg. 186; RR 7, pgs. 220, 231; RR 8, pgs. 12, 19) But, during these 12 years, there had been prior instances of rough treatment. She had previously flipped a cushion on which a child was crawling, sending the child sprawling to the floor, though he was not injured. And, she had previously instructed teacher's aids to continue pulling on a line that caused one child to be dragged one or two feet along the ground, though the child was not injured. (RR 4, pgs. 17-18) And, she had once kicked a chair out from under a child over an argument about a hat that the child insisted on wearing, where she insisted that the child remove the hat. The child was not injured. (RR 4, pgs. 98-101)

There was evidence that the Church knew of *some* of incidents, but was faced with conflicting information. (RR 4, pg. 170; RR 6, pg. 41) For example, the Plaintiffs' main witness about the prior incidents with the Teacher was Renee Ratliff Kelso, a former teacher's assistant who had worked at the Church. She testified about the prior incidents, and the Teacher's poor conduct with the children. She testified about her conversation with Janie Basham, one of the assistant directors of the school at the Church. She admitted that she had not told the church about many of the incidents to which she later testified in court:

Q. {By counsel for the Plaintiffs} Did you – did you tell her [Janie Basham, assistant director] that, in your classroom, that children were being knocked over?

A: I don't believe – No, I didn't say they were being knocked over, and I

don't know, at that point at the meeting, that I had seen any being knocked over at that point.

Q. My question is specifically, had you – did you – at this meeting with Janie before January 18, 2005 [when PC was knocked down] did you say, I have seen Sue knock kids over or –

A. No, but that could have been and probably was before I had seen any. So, I, of course, wouldn't say that if I hadn't seen any yet."

(TR 4, pg. 83)

Similarly, the Plaintiffs called ex-teacher aid Amber Braeckow Delaney to testify against the Church. Amber testified at long length about the many, many bad things that the Teacher did against various children: denying certain children food as a form of punishment (RR 4, pgs. 105-110), kicking a chair out from under one little girl over a dispute about a hat (RR 4, pgs. 98-101), making this child sleep on the cold hard floor (RR 4, pg. 110), throwing another child onto a sleeping mat (RR 4, pgs. 117-118), etc. The problem was, these tales were so unusual, even *she* testified that management had a hard time believing her. (RR 4, pg. 119)

She raised these complaints with management of the school at the church. The church did not disregard the warnings. To the contrary, they had a little hearing. It was much like a trial. Sue Lowry got to confront the accusations, hear the evidence against her, and tell her side of the story:

Q. Okay. Who was in the conference?

A. [By Amber Braeckow Delaney] Ginny Basham, Janie, – No, Janie Basham, Ginny Braden, Sue and I.

Q. Sue and yourself.

A. Yes.

Q. Okay. And what was – why did y'all have this conference?

A. It seemed to me that they wanted me to verbally say all the things that I had seen Sue do in front of Sue to management. They wanted to – me to repeat myself and talk about everything that I've seen Sue do. And by the time I got it all over with, they – they were just quiet. They didn't say anything. And at the end, they look to Sue and they said, Is this true? Were you doing this? And Sue said no. And then I went on with more stuff that I've seen. And I think I was crying by then. I was humiliated.

Q. Do you feel that the Directors did not believe you?

A. Yes.

Q. And when you at this time gave – you know, continued to describe things you had witnessed, what happened then?

A. They looked concerned, the management. They – they looked a little bit troubled by what I was saying. And they looked at Sue and they said, Well, now Sue, if this really is happening, it needs to stop. And Sue said okay, you know, just like that. And it was over.

(RR 4, pgs. 131-133) Thus, management of the Church was in the situation where *some* persons accused the teacher of misconduct. Management listened, but had a hard time believing the accusations. (RR 5, pgs. 132-133) The Teacher herself denied it. (RR 4, pgs. 132-133) The evidence was undisputed that the Church was faced with conflicting information. The teacher was let off with only a warning.

Ultimately, a series of teachers aids came to complain about the particular incident that occurred with PC on January 18, 2005. (RR 3, pg. 74; RR 4, pg. 49; RR 4, pg. 147) The Church conducted a second investigation. Some of these other incidents were reported to the Church *for the first time*. For example, though the incident with the Teacher flipping the foam

cube and causing the child to go sprawling had occurred earlier, it was only reported at the time of PC's incident. (RR 5, pg. 205)

The Church then fired the Teacher. (RR 6, pg. 28). The Church was then sued by PC and his parents. They secured the jury verdict that the Teacher *intentionally* injured PC, and the Church had been negligent (but not grossly negligent) in its reporting and supervision. (See Appendix B)

In terms of medical treatments, the undisputed facts are that there were *no* significant medical treatments. While thousands of dollars were spent on X-rays and various tests *looking* for something significant, what they found and reported was a "bump" on the head. Thus, the medical records actually state that he had a "bump." (Appendix D.)

There was no significant medical aid rendered for this bump on the head. No band aids were dispensed. But, PC's parents, especially his attorney/mother, insisted that he had sustained "mental anguish" and "psychological injury" from this whole ordeal. The exact nature of this psychological injury remained vague, even through trial.

The incident was only brought to the mother's attention weeks after the event. There was no immediate connection between any behavior by PC and the old bump on his head. No phrenology was involved. To state the obvious, at no time did PC do anything that directly linked misbehavior to his bump.

During this same time period, PC's parents were going through a divorce. Tara Turner was operating as a single mom, and trying to make sure that all domestic arguments with her husband were not carried out in front of PC. First they divorced (just a "business decision"),

but ex-husband and ex-wife continued to live together. “We wanted to have a good environment for PC.” (RR 6, pg. 198) Then, they had a major flood at their house. This emergency required a change of residence so that the whole family moved in with her mom. (RR 8, p. 136) Not surprisingly, they soon had “in-law issues that came up that really caused us problems ... and we decided we were going to get space, physical space and move into separate residences.” (RR 6, pg. 198) This meant PC was, again, moved to a new residence and his parents separated. (RR 8, p. 137)

During this same time, PC was not immune from the normal pitfalls of life. He had two major accidents, one of which chipped three of his four teeth and sent him to the hospital for dental surgery. (RR 8, pg. 137)

Prior to his bump on the head, PC had behavioral problems stemming from aggression. Prior to the incident, his mother states that he had become “willful, and aggressive, and a bit defiant.” (RR 8, pg. 133) This aggression caused problems due to anti-social behaviors, everything from stealing toys from other children to *biting* other children. (RR 4, pg. 60; RR 8, pg. 72). At least by one account, his habit of taking toys from other children was the source of some of the friction between PC and his Teacher. (RR 4, pg. 53)

By all accounts, his mother was very nurturing. His mother is never harsh with him, even when PC hits her in the face. Her response to his violence is to put him into a “thinking spot” (like “time out”) so he can think about his behavior. But, it doesn’t work too well, as shown below. (She now blames his misbehavior on the incident at the Church.) The following discourse is taken directly from the mother’s e-mails to one counselor on a particularly bad

day. This behavior was introduced by *the Plaintiff* as Plaintiffs' Exhibit 4, to show PC's problem behavior *after* the incident:

02/16/06 at 10:59 AM

Hi Dr. McMillan . . .

PC is really opposing rules and laughing as he does it, then laughing as he gets right up out of the "thinking spot" and runs away. If you ask him to do something, he pretty much does the opposite. . . . Lately, he's been hitting me in the face pretty hard as I'm carrying him to the thinking spot. . . . Today I am going to try the Dr. Phil method [taking away toys], if you approve....

Do you have any thoughts or ideas? Any help would be greatly appreciated.

Thanks, Tara

Just ten minutes later, PC had locked himself in a room:

02/16/06 at 11:09 AM

I just got up to let him out of the thinking spot after 3-4 minutes and he wasn't there. It turns out he'd gotten up himself and went to his dad's office. The door is locked from the inside and he doesn't answer. I'll have to go around to the side of the house and crawl in a window, then I guess take him to the thinking spot again? Please help! Tara

And, later that day, he decided to throw food around the kitchen:

02/16/06 at 7:14 PM

Dr. Susan, Thanks for your response earlier.

I'm concerned that PC's behavior is getting into the realm of not normal for a 3 year old. . . . After I took a phone call tonight, I came into the kitchen to find him putting an entire tub of canola margarine, a new bunch of cilantro, and about 9 peeled bananas into the crock pot and then throwing bits of the mixture all around the kitchen. I'm not sure what to do in that kind of a situation since the "thinking spot" isn't working and all his toys are "gone." I just told him that he now won't be getting that one toy he was eligible for at pajama time. (This incident probably had a lot to do with loving to feel mushy bananas in his fingers, but I know he knew it's against the rules.)

His mother “reacts” by singing Amazing Grace:

He also earlier took a pen from my desk and scribbled all over the leather couch. I know some of these behaviors are expected of three year olds but I feel that the amount of them and the degree of them are not the usual. . . .

For instance, after the crock pot incident, PC stood in the middle of the kitchen and screamed non stop for about 5-10 minutes in a very high pitched, very loud voice. It was the kind of sound that hurt your ear and you could tell would not be good for your hearing. Instead of saying anything as I used to when he did that, I just quietly put wadded up paper towels into my ears and began singing “amazing grace.” PC got so upset and started wailing for me to stop singing it. I just kept on. Then he got interested in the ear plug thing and made some for himself, so that stopped the screaming.

Do you think that the extra amount of this stuff he’s been doing the last couple of days be connected in any way to him starting school again?

*Also, do you associate these oppositional behaviors to the abuse he went through?
Thanks for your help, Tara*

(From Plaintiffs’ Exhibit 4, pgs. PX004-046 through 048)

At other times, PC would be aggressive toward the family dog, including hitting and hurting the dog. (RR 6, pg. 213) Apparently, things were so bad with the dog, and Tara Turner so mistrusted her husband regarding the dog, PC was not allowed to be around the dog. This prohibition was actually written into the divorce decree, to force the husband to comply in keeping the dog away. (RR 8, pg. 130)

Again, his mother was the model of patience, and always exhibited extremely nurturing behavior toward him in these difficult situations. And, she took him to *lots* of counseling to address these behavior issues, spending thousands of dollars.

All the damages awarded in this case stem from mental anguish. His mother took PC in for counseling for being a victim of “child abuse,” and spent thousands of dollars for counseling services. The evidence showed that the psychological assessment of PC’s Condition was very *subjective*. Dr. McCarthy, Plaintiffs’ psychological expert, noted that PC always collected the exact same toys and carefully lined them up the same way. She then concluded that he had an “adjustment disorder with anxiety.” (RR 7, pg. 141) Psychological tests were administered. They identified his anxiety, but the tests do not point to any cause. Causation was not the subject of any of the Adjustment Disorder test.

An Adjustment Disorder is a recognized DSM Diagnoses, from the Diagnostic And Statistical Manual of Mental Disorders.⁵ An Adjustment Disorder, by definition, is a short term phenomena, and must be over *within six months*. (See Appendix E.) (Otherwise, the condition would be some other disorder.) As of the trial (two years after the incident), it was simply impossible under the DSM for there to be a continuing “Adjustment Disorder” from the church incident. (Appendix E)

All of the Plaintiffs’ damages in this case are forms of mental anguish damages. For example, the future medical expenses are for future therapy. Dr. McCarthy recommended that PC “continue in individual play therapy,” because he did not have “fine motor skills.” When drawing, he “won’t grasp the pencil strongly.” (RR 7, pg. 182) She prescribed play therapy

⁵ Appellant moves the Court to take judicial notice of the DSM IV’s description of an Adjustment Disorder, pursuant to Texas Rule of Evidence 201. This standard reference book is relied upon by many authorities, including this Court in *S.V. v. R.V.*, 933 S.W.2d 1, 19 (Tex. 1996).

every week for years, costing tens of thousands of dollars. (RR 7, pgs. 182, 183)

The actual out-of-pocket expenditures are psychological treatments. Specifically, Tara Turner took PC in for counseling for being a victim of child abuse, and spent thousands of dollars for counseling services. The jury awarded the following damages:

Past medical care expenses	\$ 3,582.00
Future medical care expenses	\$ 34,980.00
Physical pain and mental anguish	\$ 25,000.00
Future mental anguish:	<u>\$100,000.00</u>
TOTAL:	\$163,562.00

And, the jury found that the Teacher *intentionally* injured PC. The Church was found to have been negligent (but not grossly negligent) in its supervision of the Teacher. (See Appendix B)

The Jury apportioned fault as follows: 80% to the Church that was merely *negligent*, and 20% to the Teacher who engaged in *intentional* misconduct (but who settled prior to trial). (See Appendix B, pg. 6) This jury finding was made in response to a specific request from Plaintiffs' counsel during closing arguments, who argued that anything else would constitute *approval* of the Church's conduct. (RR 9, pgs. 70-71)

The Church filed numerous post-verdict motions, raising the issues now brought forward on the appeal. Specifically, the Church filed a motion for new trial and two motions for J.N.O.V. and to disregard answers to jury questions. Judgment was entered on the verdict, awarding these damages. The Court of Appeals affirmed in all respects. (See Appendix C)

SUMMARY OF THE ARGUMENT

This Court has repeatedly expressed its concerns about the subjective nature of mental anguish damages and decided that they are recoverable only in certain types of cases. First, they are not recoverable in cases of simple negligence. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993). For mental anguish damages to be recoverable, certain *objective factors must* be met: such as a *significant* bodily injury, a shocking injury that is outrageous, a “special relationship,” or malice by the defendant. *City of Tyler v. Likes*, 962 S.W.2d 489, 495-96 (Tex. 1997). None of those situations is present here. But, recently some courts have ignored the requirement for a significant bodily injury, claiming this was an “older understanding” of Texas law. And, the Court of Appeals below misconstrues the recent *Adams v. YMCA* case to hold that mental anguish damages are generally recoverable in negligence cases (such as negligent hiring), “even in the absence of any significant bodily injury.” The Church submits that the “older understanding” of Texas law was correct, and that this new leniency towards awarding of mental anguish damages is misguided, contrary to this Court’s decisions, and contrary to the Restatement.

Second, the expert evidence (psychological testimony) on *causation* was flawed on its face. It was undisputed that the child has anxiety and misbehaves. The question is: what *caused* this condition. Tests can identify the fact that a condition *exists*, but do not identify the *cause*. The standard work for psychological diagnosis (utilized by the Plaintiffs) confines adjustment disorders to a period of *six months*, unless there is a continuous stressor, such as a divorce. Here, the experts say that the adjustment disorder has lasted for years, and will

persist toward adult hood. The experts in this case simply dismissed the divorce and other likely causes of anxiety with a waive of the hand. They were supposedly irrelevant, *ipse dixit*, simply because the experts said they were not the cause of the child's anxiety.

Finally, the Jury's allocation of Comparative Responsibility was simply contrary to undisputed evidence. While the jury is accorded wide discretion in apportioning fault between tortfeasors, the jury cannot ignore all the undisputed evidence. An intentional tortfeasor that intentionally engages in a criminal assault is simply *more at fault* than a party (such as an employer) that is passively negligent. Courts in California have overturned jury verdicts that involve such a mis-allocation of fault, because they are not based on the evidence. Texas courts have never spoken on this issue, and allow plaintiffs to shove liability on to the deep-pocket defendants: employers, churches, etc. The continuation of this "deep pockets" approach to litigation is contrary to the legislative intent behind the 1995 Tort Reform Legislation.

ARGUMENT AND AUTHORITIES

ISSUE NO. 1:

The Court Of Appeals Erred In Affirming A Judgment Awarding Mental Anguish Damages Against A Negligent Employer, On The Basis That The *Employee Acted Intentionally*. There Was No Evidence Of Malice By The Employer Nor Any Significant Bodily Injury.

(This particular Issue is directed at the award of \$100,000 for future mental anguish.)

A. This Is A Negligence Suit To Recover Mental Anguish Damages

This entire case is about the recovery of money for *mental anguish*. No significant sum was spent on medical care to cure the bump on the head, or to promote its healing. Instead, medical costs were incurred to *rule out* the possibility that there was any significant bodily injury. There was only a “bump” on the head. (Appendix D and RR 7, pg. 29)

The concern was for a vague form of psychological damage (*i.e.* mental anguish) sustained by PC. The jury awarded sums for past pain and suffering, including past mental anguish and sums spent on counseling. By far the largest item of damages was \$100,000 solely for “future mental anguish.” (Appendix B, pg. 8) This particular award includes no amounts of any future medical bill or any future “pain and suffering.” It is solely for future mental anguish. (See Appendix B, pg. 8.) Despite motions for new trial and for J.N.O.V., judgment was entered on the verdict.

Since the Church was only found liable for *negligence*, this award represents a recovery for *negligent infliction of emotional distress*. This Court, and other courts, have repeatedly expressed grave concerns over lawsuits that are mainly over claims for mental anguish, as

opposed to suits for **bodily injury** that also include resulting mental anguish. In pure mental anguish cases, a minor incident can be stretched completely out of proportion. Subjective psychological diagnoses, such as *Post Traumatic Stress Disorder* or *Adjustment Disorder*, can exaggerate civil awards, so that a minor scratch or bump on the head becomes a big case.

In *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996) this Court expressed serious concerns about the impact of psychological damages in personal injury cases. There, the court relied heavily upon the scholarly work by Dr. Alan A. Stone,⁶ Post-Traumatic Stress Disorder And The Law: Critical Review Of The New Frontier, 21 *Bulletin American Academy Psychiatry And Law* 23 (1993), which begins with a discussion about the “dramatic and pervasive impact” that psychological diagnoses have in increasing civil damage awards.⁷

The “dramatic impact” of the psychological damages can be seen in the numerous recent jury verdicts that award large dollars for relatively minor incidents. These cases involve no bodily injury. For example, in the case of *Olivarri v. City Public Service Board of San Antonio*, No. 2003-CI-15120, in Bexar County, Texas, the plaintiff proved that her supervisor “groped her” (patted her on the butt) and verbally harassed her (told lewd jokes). Of course,

⁶ Dr. Stone is a Professor of Law and Psychiatry, Faculties of Law and Medicine, Harvard University.

⁷ Other authorities agree that psychological damages are increasing:

[P]sychological injuries have received increasing attention in personal injury litigation, particularly in view of their importance in terms of the amount of recovery in an award of damages.

49 *American Jurisprudence Proof of Facts* 2nd 73 (updated Sept. 2005).

this conduct is reprehensible and the bad actor should bear individual liability. But, what sort of damages should his employer pay, under the theory that it was negligent? The claimant suffered no bodily injury. But, the plaintiff introduced evidence that she was traumatized by the event, now suffers anxiety, depression, poor self image and suicidal thoughts. As a result, she was awarded \$4.7 million from her ex-employer.⁸

Employers in Texas, like Hyde Park Baptist Church, are regularly hit with sizeable psychological damage verdicts, merely because they were negligent. Psychological damage claims now regularly appear in all sorts of Texas personal injury cases, even those involving no bodily injury. *See*, for examples, *City of Seguin v. Sewell*, 2002 WL 31253521 (Tex.App.–San Antonio 2002, no writ) (not designated for publication) (near drowning experience), *Fitzpatrick v. Copeland*, 80 S.W.3d.297 (Tex.App.–Fort Worth 2002, pet. denied) (un-harmed passenger witnessed sudden death of driver from impact by foreign object).

Even uninjured plaintiffs in typical car wrecks can now seek psychological damages, which can greatly increase damage awards. For example, the *Texas Lawyer* reported that a Fort Worth jury awarded the plaintiff \$84,500 for “fear of freeways” because she suffered continued anxiety as the result of a moderate car wreck on a freeway. *See Texas Lawyer*, July 29, 2005, Case Alert: *Award In Rear-End Includes \$84,500 For Fear Of Freeways*.

Courts in other states have found it necessary to limit these psychological/mental

⁸ *Texas Lawyer*, October 17, 2005 Verdict Search, Employment, Meter reader recovers \$4.7 million on sexual harassment claim. San Antonio Court of Appeals, Case No. 04-06-00085-CV, case subsequently settled during appeal.

anguish cases or reject the dubious expert testimony behind them. *See*, for examples, *Gutierrez v. Massachusetts Bay Transportation Authority*, 437 Mass. 396, 772 N.E.2d 552 (2002) (placing substantive restrictions on liability for mental anguish damages.) and *Lassiegne v. Taco Bell Corp.*, 202 F.Supp.2d 512 (E.D.La. 2002). In many of these cases, the courts steer away from *subjective* factors, such as the plaintiff's own version of their mental health. Instead, the courts impose objective requirements.

We urge this Court to return to such objective restrictions. Actually, this Court never actually abandoned such restrictions, but some courts believe otherwise, as shown below.

B. Error Was Properly Preserved - Standard Of Review

We pause for appellate housekeeping. The Church properly preserved error by moving for a judgment notwithstanding the verdict (twice!) on the grounds that there was no evidence to meet the Texas Supreme Court's requirements for recovering mental anguish damages. Specifically, the Church's original and its Second Motion For New Trial, Motion For Judgment N.O.V. And Motion To Correct The Judgment specifically moved for judgment on the grounds that (quoting from the motion):

- As A Matter Of Law, Mental Anguish Damages Cannot Be Based Upon A Negligence Finding, Unless There Is Serious Bodily Injury (Motion, pg. 1)
- under *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997) only four categories of cases qualify for the special categories of cases allowing recovery of mental anguish damages, and none of those categories is present here. (Motion, pg. 2)
- the award of future mental anguish is purely speculative and not reasonably based upon the evidence. The award of future mental anguish is not supported by any evidence, beyond a mere scintilla (Motion, pg. 10)

- in this case, there is no evidence that any future medical or psychological treatment for PC is either reasonable or necessary for the treatment of any condition proximately caused by any conduct of Defendant or of Ms. Lowry. (Motion, pg. 15)

The trial court erred when it overruled these multiple motions and wrongly entered judgment on the verdict. The Court of Appeals erred by refusing to reverse.

We now turn to the standard of review. Review of the denial of motions for judgment n.o.v. is a “no evidence” review. *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990). That is, if PC put on some legally competent evidence about causation that justifies the conclusion that his future mental anguish is caused by the Church, then this Court must affirm that award. In those instances where the court is faced with conflicting *competent* evidence on causation, this Court is to disregard the evidence that tends to undercut the *causation* and consider only the competent evidence that supports the causation. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

Nonetheless, even in a “no evidence” review, an appellate court is required to consider and accept *un-controverted* evidence. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 52 note 1 (Tex. 1997).⁹ For example, in this case, the un-controverted fact is that PC did not sustain a significant *bodily* injury. And, the undisputed evidence is that PC had aggressive behavior (biting) before this incident and he experienced his parents going through a divorce. The

⁹ According to the Supreme Court in *Giles*, the appellate court is to follow the “undisputed evidence that allows of only one logical inference.” *See*, for example, *Y Propane Service, Inc. v. Garcia*, 61 S.W.3d 559, 565 (Tex.App.–San Antonio 2001, *no pet.*), quoting and following footnote one from *Universe Life Ins. Co. v. Giles*. *See also Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416, 421 (Tex.App.–Beaumont 1999, *pet. denied*).

controversies in this case were about the *causation* of PC’s anxiety. What causes PC to hit the dog, climb through a window, throw food, or refuse to sit in his “thinking spot.”

C. This Court’s Original Objective Requirements: *Likes v. City of Tyler*

In *Likes v. City of Tyler*, this Court explained that mental anguish damages are dubious, because they are so subjective. Fearing that mental anguish claims were a blank check for a jury, this Court decided to impose **objective tests**. The general rule is against recovery. *Id.* This Court held that mental anguish damages are recoverable only in special cases, such as those involving: (1) *serious* bodily injury, (2) a “special relationship” between the plaintiff and defendant, (3) “injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result” (such as a sexual assault), or (4) cases involving proof of “intent or malice” by the defendant. *Id.* These are the “*Likes* requirements.” None was present in this case.¹⁰

D. Significant Bodily Injury Should Be A Threshold Test In Cases Of Negligence

Historically, the *Likes* requirement for a *serious* bodily injury was fatal to mental

¹⁰ The body of this brief addresses two *Likes* requirements: significant bodily injury and malice. The remaining two categories do not apply. There were no shocking injuries to fit the *third Likes* requirement (those injuries of such a “shocking and disturbing nature that mental anguish would be a highly foreseeable result.”) A sexual assault is such a case. *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008). But a bump on the head hardly qualifies. Finally, *Likes* allows recovery of mental anguish damages when the defendant breaches a “special relationship” with the plaintiff. Here, the Plaintiffs have not plead, argued or proven any “special relationship.” Persons only have special relationships with people, such as doctors, not with institutions, such as hospitals or churches. *Johnson v. Methodist Hosp.*, 226 S.W.3d 525, 529-530 (Tex.App.–Houston [1st Dist.] 2006, *no pet.* Thus, our case qualifies for none of the *Likes* requirements.

anguish claims founded on negligence.¹¹ Thus, a negligent (and incorrect) medical diagnosis that a person had AIDS, did not permit a recovery of mental anguish damages. The patient had wrongly been told they had AIDS, and sued their medical provider. While the patient had needlessly suffered needle sticks, bruising, and pain from medical treatments, the patient did not have a *significant* bodily injury. Despite claims of negligent supervision, no recovery was allowed. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90 (Tex.App.–Houston [14th Dist.] 1998, pet. denied), citing the *Likes* requirements for significant bodily injury.

Historically, one could not bring a claim for negligent hiring/supervision if the only injury was mental anguish. *Verinakis, supra*. Thus, if a plaintiff sued an employer complaining of mental anguish from insulting remarks by an employee, a theory of negligent supervision failed as a matter of law. Negligent hiring/negligent supervision did not extend to protect against psychological injuries. *Sibley v. Kaiser Foundation Health Plan of Texas*, 998 S.W.2d 399, *403-404 (Tex.App.–Texarkana 1999, no pet.). This is also the Restatement view.¹²

Sibley, likewise cites *Verinakis, supra*. *Fitzpatrick v. Copeland* agreed. *Id.* 80 S.W.2d at 297. ***Thus, at least at one time in Texas, there was a requirement for significant physical injury.*** This traditional test was easily applied, and weeded out mental anguish cases involving

¹¹ And, in *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999) the Court reminded us that, “Absent physical injury, the common law has not allowed recovery for negligent infliction of emotional distress except in certain specific, limited instances. . . . There are few situations in which a claimant who is not physically injured by the defendant's breach of a duty may recover mental anguish damages.”

¹² See page 24, *infra*.

mere scratches or bruises.

E. Lower Courts Have Strayed From This Requirement For Significant Bodily Injury

The Court of Appeals, below, refused to impose the traditional *Likes* requirement for a significant physical injury. The Court of Appeals is not alone. Several lower courts apparently believe that this *Likes* requirement for a significant physical injury was somehow abandoned as an “*older understanding* of the claim for negligent hiring and supervision.” *Verhelst v. Michael D’s Restaurant San Antonio, Inc.*, 154 F.Supp.2d 959, 968 (W.D.Tex. 2001) (emphasis added.)¹³ Thus, a federal district court, applying Texas law, rejected both *Verinakis* and *Sibley* as an “*older understanding*” of the Texas negligent hiring/negligent supervision law. In the new understanding, a significant physical injury is no longer required. *Verhelst*, 154 F.Supp.2d at 968. Other federal district courts have likewise wandered down this new road, despite the lack of citation to any Texas Supreme Court case allowing a mental anguish recovery in cases for negligent hiring/negligent supervision. *See Nichols v. Apartment Temporaries, Inc.*, 2001 WL 182701 *6 (N.D.Tex. 2001).

Now Texas trial courts frequently allow negligence cases, such as negligent supervision, to be tried under the *assumption* that mental anguish damages are recoverable, even if the traditional *Likes* requirements are not satisfied. Two recent cases from Harris County provide adequate examples. Plaintiffs recovered substantial awards for future mental anguish damages

¹³ “Finally, the defendant argues that the plaintiff’s claim must fail as a matter of law because she was not alleged any physical injury. . . . it appears that the defendant’s position is based on an older understanding of the claim of negligent hiring and supervision.” (*Verhelst*, 154 F.Supp.2d at 968, relegating *Sibley* and *Verinakis* as cases now thrown into the bin of an “older understanding.”)

on theories of negligent hiring and negligent supervision, without any *Likes* requirements. For example, in *Vela v. Saniff*, the plaintiff-customer was chased by a outraged convenience store clerk, who shot at the customer, but missed. (Of course, under *Likes* the clerk himself could be liable for all mental anguish damages, because he acted intentionally in an assault.) But, the deep pockets store owner was sued merely for negligence in hiring and supervising the clerk.¹⁴ Under *Likes*, *Sibley* and *Verinakis*, this claim against the owner should fail, because the plaintiff suffered no physical injury.

But, for some reason, when **negligent supervision** is alleged, all of this *Likes* precedent is forgotten. Negligence is allowed to be the basis for a mental anguish recovery. (Appendix F)

Similarly, in *Parks v. Greater Houston Transportation*, No. 2007-77238, 234th Judicial District of Harris County, Texas (Doc. 41488796, 3/18/2009) (appealed to Tex.App.–Houston [1st Dist.], No. 01-09-00543-CV) the plaintiff-passenger was accosted by a outraged taxi cab driver. The passenger was forced to flee the cab.¹⁵ True to the deep pockets theory of normal litigation, the plaintiff-passenger subsequently sued the cab company for anxiety and post-traumatic stress disorder. The passenger recovered \$100,000 for “future pain and suffering” on a theory of negligent hiring. Again, the *Likes* requirements are somehow ignored in negligent supervision cases. (See Appendix F)

¹⁴ See Appendix F and (John Council (May 6, 2008). Texas Lawyer Blog: A Civil Experience. <http://texaslawyer.typepad.com/texas_lawyer_blog/2008/05/a-civil-experie.html>).

¹⁵ (See Appellant’s Brief, Tex.App.–Houston [1st Dist.], No. 01-09-00543, filed on 8/13/2009).

Now, the Court of Appeals' opinion, below, joins this anomalous body of precedent in negligent supervision cases. Worse, this Court's recent opinion in *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008) (a negligent supervision case) is now mis-cited in the court below, seemingly as confirmation that mental anguish damages are allowable, so long as there is "more than a scintilla" of proof that such mental anguish damages were sustained. The *Likes* requirement for significant bodily injury (in cases of negligence) has been abandoned. Thus, the Court of Appeals, below, held:

In light of this evidence, we hold that the Curtis family presented more than a scintilla of evidence of P.C.'s future mental anguish. See *Adams v. YMCA*, 265 S.W.3d 915, 915 (Tex. 2008) (*per curiam*) (expert testimony regarding reasonable probability of future mental anguish, coupled with testimony of family members regarding behavior after abuse, sufficient to survive no-evidence challenge, *even in absence of bodily injury*).

See Court of Appeals' Opinion, Appendix C at pg. 6 (emphasis added).¹⁶

Of course, cases such as *Adams v. YMCA* are distinguishable because they involve sexual assaults on children. These are unique cases. Cases involving sexual assaults on children fall into an entirely different category that was also described in *Likes*. As this Court noted in *City of Likes v. Tyler*, some cases fall within a category for "injuries of such a shocking and disturbing nature that mental anguish is highly foreseeable result." *Likes*, 962

¹⁶ Admittedly, the Court of Appeals below correctly stated that this Court, in *Likes*, did not purport to make an exhaustive list of all cases in which mental anguish damages might be recoverable. That is true, *Likes* did not purport to make such a definitive list. But, when the Court in *Likes* states a general rule that mental anguish damages are usually not recoverable, and excepts out cases with significant bodily injury, it does violence to then decide that *Likes* simply imposes no specific requirements. The case is one of many in which this Court has expressed concerns about all cases being blank checks for the recovery of mental anguish damages.

S.W.2d at 496. That is its own category. Clearly, cases where the plaintiff has been subjected to a sexual assault fit this category where mental anguish is “a highly foreseeable result.” Thus, in such case, damages for mental anguish are recoverable as against a negligent employer, even in the absence of other *Likes* requirements: intentional misconduct or significant bodily injury. Stated differently, a defendant that negligently fails to protect children from sexual assault would always be liable for mental anguish damages under *Likes*, because these injuries are of a “shocking and disturbing nature such that mental anguish is a highly foreseeable result.” Granting Hyde Park protection from mental anguish damages here would result in no protection to defendants in sexual assault cases, and would produce no inconsistency with *Adams v. YMCA*.

Straying away from the *Likes* requirement for physical injury in negligence cases is not only contrary to *Likes*, it is contrary to the Restatement (Second) of Torts. **Restatement (Second) of Torts § 436A** *Negligence Resulting In Emotional Disturbance Alone*, 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.

Thus, *City of Tyler v. Likes* cites the *Restatement (Second) of Torts* in connection with its observation that, “Our decision today accords with the overwhelming majority of American jurisdictions.” *Id.* 962 S.W.2d at 499. Likewise, *City of Tyler v. Likes* is listed under the Restatement Annotations as one of many cases applying the Restatement standard. See Restatement (Second) of Torts, § 436A (Annotations).

In returning to the *Likes* requirement that the plaintiff suffer a *significant* bodily injury, the Court should recall that the term “significant” is significant. In *Likes*, the plaintiff suffered from sleeplessness as a result of her mental anguish. This Court held that “the minor physical symptoms she describes, such as difficulty sleeping, are not serious bodily injuries that can form the basis for recovering mental anguish damages.” *Id.* 962 S.W.2d at 496. Similarly, mere needle sticks or pain from medical procedures is insufficient to meet the significant bodily injury standard. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90 (Tex.App.–Houston [14th Dist.] 1998, pet. denied) (denying recovery for mental anguish in a negligence case, citing the *Likes* requirements for significant bodily injury). Similarly, a mere TMJ condition is insufficient to meet this *Likes* requirement for a *significant* physical injury. *Dekelaita v. BP Amoco Chemical Co.*, Slip Copy, 2008 WL 2964376 (S.D.Tex. 2008)

How do some courts skate around this *Likes* requirement for significant bodily injury? The Court of Appeals, below, claimed that the case fit *another* category under *Likes*: cases of intentional misconduct.

F. Substituting Vicarious Intent Is Wrong

We turn to the other *Likes* requirement: “intent or malice.” The Court of Appeals below found that this *Likes* requirements was somehow fulfilled, because the *Teacher* acted with “intent or malice,” even though the Church did not. (Appendix C) Because *someone* acted with such evil intent, a mental anguish recovery was allowed as against the Church.

But, is this true to the spirit of *Likes*? In *Likes*, this Court held that the normal fear of over compensation is overcome, because of the high degree of culpability *by that defendant*.

Likes, 962 S.W.2d at 495. In the scales of justice, the danger of an over-award is outweighed by the fact that the defendant acted intentionally and maliciously. Thus, this Court held:

This [mental anguish recovery against a malicious defendant] is appropriate because of the *high level of culpability* . . . and makes it just that the defendant should bear the risk of any overcompensation that an award of mental anguish damages might entail.

(Emphasis added.) But, the scales of justice are wrongly tilted if the negligence of the defendant-employer is not weighed. Instead, now the intentional misconduct of the errant *employee* is thrown into the scales of justice. Lumping the bad actor in with the employer is contrary to the Tort Reform mandate that fault be separated and apportioned as between different actors, so that a deep pocket does not end up paying for another's misdeeds.¹⁷

The Court of Appeals' approach was simply the imposition of *vicarious liability*, so that the bad acts and intentions of the employee are attributed up stream to the employer. However, in our case, it was always undisputed that the Teacher was acting *outside* of the course and scope of her employment. This is typical of most negligent supervision cases. An employee is *automatically* outside of course and scope when they engage in an assault. *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 494 (Tex.App.–Fort Worth 2002, *no pet.*)¹⁸

¹⁷ See 3 Scott A. Sherman, *Texas Tort Reform: The Legislative History*, at II-55. Ironically, Texas courts admonish liability insurers not to conflate the bad actions of an intentional employee with the mere negligent supervision of an employer. Each person should be viewed separately to see if he has truly engaged in intentional wrongdoing, or only been negligent in hiring. His conduct is “accidental.” See *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 189 (Tex. 2002).

¹⁸ Only unusual employees, such as security guards or “bouncers,” can commit an assault to further their employer’s business, and thereby remain in the “course and scope” of their employment. See *Kelly v. Stone*, 898 S.W.2d 924, 927 (Tex.App.–Eastland 1995, writ denied), and *Texas & Pacific Railway Co. v. Hagenloh*, 247 S.W.2d 236, 241 (Tex. 1952).

Neither the Plaintiffs' nor the Church ever contended the Teacher was acting in her "course and scope" in intentionally knocking the child down. Instead, the theory pursued against the Church was negligent supervision. Negligent supervision is dependent on separating out the acts of the employee from the acts of the employer. *Dangerfield v. Ormsby*, 264 S.W.3d 904, 912 (Tex.App.–Fort Worth 2008, no pet.). The employee is acting via an intentional assault; while the employer is guilty only of negligence that generally qualifies as an "accident." *King v. Dallas Fire Ins. Co.*, *supra*.

But, the Court of Appeals conflates the two by attributing the malicious intentions of the employee up to the employer. This attribution then renders the employer liable for a broader spectrum of damages that normally represents a risk of over-compensation. *Likes*, *supra*, at 495. This conflation is error.¹⁹

ISSUE NO. 2:

There Is Legally Insufficient Evidence On Causation. The Expert Testimony Was Flawed On Its Face.

After the parents learned of this bump on the head incident, they took the child to Dr. Mary McCarthy, a clinical psychologist, who diagnosed the child with a condition described as "adjustment disorder with anxiety." (Appendix E and RR 7, pg. 141)

Adjustment Disorders resolve in six months or less, unless there is a continuous stressor,

¹⁹ The Church did not object to form of the Charge. An appellant may advance a "no evidence" objection to *any* of the following four stages: a motion for instructed verdict, an objection of the charge to the jury, a motion for judgment notwithstanding the verdict, and a motion for new trial. *Cecil v. Smith*, 804 S.W.2d 509, 510-511 (Tex. 1991); *Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (rejecting the notion that an objection must be made at the time of submission to the jury. *No evidence* errors can be preserved in post-verdict motions).

such as a divorce. Appendix E of this Brief contains the relevant section of the standard psychological work, DSM-IV, and its description of Adjustment Disorder for this Court’s judicial notice under Texas Rule of Evidence 201.²⁰

The DSM is the “Black’s Law Dictionary” for psychological diagnosis. *U.S. v. Long*, 562 F.3d 325, 334 n. 22 (5th Cir. 2009) (“We take judicial notice of these [diagnostic criteria] as the DSM-IV’s authoritative nature makes the criteria ‘capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned’”); See *Osborne v. Twin Town Bowl*, 749 N.W.2d 367, 376 (Minn. 2008). Even though psychologists, psychiatrists, counselors and social workers may all disagree on what *causes* a condition or how to treat a condition, they uniformly unite to diagnose psychological conditions under a common diagnostic criteria under the DSM. *In re Detention of Hardin*, 907 N.E.2d 914, 920 (Ill.App. 2 Dist. 2009) (the DSM-IV is the standard for diagnoses in the United States by psychologists, psychiatrists, and social workers). This uniformity is critical when examining legal issues regarding psychological issues. *Long* at 332-45; *see also U.S. v. McBroom*, 124 F.3d 533, 551 n.16 (3rd Cir. 2006) (courts may properly look to DSM-IV to gain an appreciation and understanding of a defendant’s medical condition).

²⁰ Appellant moves the Court to take judicial notice of the DSM-IV’s description of an Adjustment Disorder, pursuant to Texas Rule of Evidence 201. This standard reference book is relied upon by many authorities, including this Court in *S.V. v. R.V.*, 933 S.W.2d 1, 19 (Tex. 1996). *U.S. v. Long*, 562 F.3d 325, 334 n. 22 (5th Cir. 2009) (taking judicial notice of diagnostic standards set forth in DSM-IV); *United States v. Johnson*, 979 F.2d 396, 401 (6th Cir. 1992) (same); *Malbrew v. Port Barre Mills*, 693 So.2d 259, 263 (La.App. 3 Cir. 1997) (same); *Babish v. Sedgwick Claims Mgmt. Serv.*, 2009 WL 563951, 3 (W.D. Pa. 2009) (same); *Guzman v. Lamarque*, 2009 WL 900729, 11 n.12 (E.D. Cal. 2009) (same); *Cobb v. State*, 2003 WL 23415204, 3 (Me.Super. 2003); *U.S. v. Eric Shawn Perry*, 1995 WL 137294, 12 n. 5 (D. Neb. 1995) (same); *In re Sawyer*, 829 N.Y.S.2d 865, 869 n.1 (N.Y.Sup. 2006) (judicial notice of DSM-IV is required).

But, as this Court has wisely observed, the DSM itself admits that there is an “imperfect fit” between diagnosing a person with some condition (such as depression) and the question about *what caused the condition* (environment, genetics, chemical exposure, finances, difficult family situations, etc.) This difference is huge. An expert can testify that they administered twenty tests to confirm their psychological opinions. But, psychological tests, like blood tests, identify conditions, not the causes of conditions. DSM IV, as quoted in *S.V. v. R.V.*, 933 S.W.2d at 17. A psychological test might identify depression, and a blood test may identify an AIDS infection; but tests do not identify the *causes* of medical or psychological conditions.

As to the more specific use of trying to attribute a certain disorder to a specific cause, this Court reminded us that the Manual of Mental Disorders advises: “Non-clinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the *causes* of the individual’s mental disorder Inclusion of a disorder in the Classification (as in medicine generally) does not require that there be knowledge about its etiology [*i.e.*, origin].” *S.V. v. R.V.*, 933 S.W.2d 1, 17 (Tex. 1996) (emphasis added).

At trial, Dr. McCarthy gave her opinion as to the *cause* of the child’s adjustment disorder. She blamed it on the situation at the Church. But, causation is largely a matter of eliminating competing causes. Analyzing competing causes is a critical component of a no evidence review of expert testimony on causation. As this Court explained in *Havner*:

[T]o survive legal sufficiency review, a claimant must do more . . . **if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.** See generally, *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex. 1995) (finding that the failure of the expert to rule out

other causes of the damage rendered his opinion little more than speculation); *Parker v. Employers Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 47 (Tex.1969) (holding that a cause becomes “probable” only when “in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result”).

Merrel Dow Pharm. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997). See also *Volkswagen of America v. Ramirez*, 159 S.W.3d 897, 909-13 (Tex. 2004), where this Court rejected expert testimony, as a matter of law, because it could not logically rule out other causes that might have led to the accident.

As the DSM recognizes, it is only continuous stressors, such as a *divorce*, that can cause adjustment disorders to last longer than six months. (See Appendix E) The parents divorce, which occurred during the middle of this entire episode, must be negated as a cause of PC’s generalized anxiety, or else this case fails a no evidence test.

Dr. McCarthy acknowledged that the child’s parents had gone through a divorce prior to her diagnosis. (RR 7, pgs. 169-70) However, Dr. McCarthy excluded divorce as a significant factor because she had observed “how [the child] responded to his mommy, I ruled that out as being a significant source of the anxiety.” (RR 7, pg. 169) She therefore concluded that the incident at Hyde Park must be the cause of the child’s anxiety. (RR 7, pg. 144-46)

Dr. McCarthy does not explain any process or skill by which she can look at a mother-child interaction, and thereby divine that a divorce has not adversely affected a child. This testimony is flawed on its face! And, Dr. McCarthy was not provided all material facts about other possible causes prior to rendering her opinion. At trial, Dr. McCarthy testified that she was never told that the child had moved three times in connection with the divorce and

relocation, all before the age of two. And, she did not know that the child had undergone surgery, and had sustained unrelated injuries. (RR 7, pgs. 204-05) Nonetheless, Dr. McCarthy dismissed these factors with the conclusory dismissal that these events were “understandable” and, therefore, “didn’t contribute toward this situation.” (RR 7, pg. 204) This is the famous *ipse dixit*. A statement from an expert is supposedly true, simply because they are an expert, and they say it is true. *Ipse dixit* is the antithesis of scientific proof. *Havner, supra*, at 720.

The Court of Appeals relied on Dr. McCarthy’s testimony in finding that Plaintiffs put on evidence sufficient to establish *causation*. And, the Court of Appeals held that Hyde Park had *waived* its right to challenge the legal sufficiency of Dr. McCarthy’s testimony by not objecting to its admission during the trial.

Hyde Park filed its Petition For Review on April 1, 2009. One month later, this Court issued its opinion in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009). The *Pollock* decision clarified Texas law with respect to the legal sufficiency of expert testimony admitted without objection: expert opinions which are conclusory will not support a judgment, even if there is no objection to their admission. *Id.*

As this Court held in *City of San Antonio v. Pollock*, expert opinions which are *conclusory* will not support a judgment, even if there is no objection to their admission. Waiver does not create substantive evidence to support causation that is challenged via a “no evidence” review. *Id.* at 816-17. In *Pollock*, this Court elaborated on the nature of “conclusory” opinions. While some conclusory opinions are obvious and naked, others are dressed in clothes that seemingly provide “some basis.” But, this basis must actually support

the conclusion in some logical manner. If not, the “basis” does not cure the opinion from the realm of being conclusory on its face:

Bare, baseless opinions will not support a judgment even if there is no objection to their admission. ... [E]ven when *some basis* is offered for an opinion, if the basis does not, on its face, support the opinion, the opinion is still conclusory. ... [Such opinion] cannot be considered probative evidence, regardless of whether there is no objection. *Id.* at 816-18 (emphasis added).

Turning to the present case, Dr. McCarthy’s opinions that the child’s disorder was not caused by divorce (or other major disruptions in PC’s life) were all conclusory under the *Pollock* standard. The “basis” for her opinion was insufficient *on its face* to support her conclusions. One cannot claim merely to observe a mother and child, and divine that divorce has not adversely affected the child. One can not point to relocations or surgery, and deem them “understandable,” so somehow they do not create anxiety.

Dr. McCarthy’s opinion that the divorce of the child’s parents was not a significant source of the child’s anxiety is likewise unsupported on its face. Dr. McCarthy based her opinion on reports of “how [the divorce] was handled.” (RR 7, pg. 169). She believed that the divorce was “well-handled.” But Dr. McCarthy provided **no basis whatsoever** for her conclusion that a “well-handled” divorce cannot contribute to the anxiety of a two-year old. Without this essential conclusion, her opinion falls apart. Nevertheless, Dr. McCarthy presented her opinion – based on this entirely unsupported conclusion – to the jury as a scientific fact: the divorce was not a significant source of the present anxiety, so it must have been the bump on the head. (RR 7, pg. 169). This is precisely the type of conclusory testimony condemned by *Pollock*.

As this Court reiterated in *Pollock*, “a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.” *Id.* at 816. Dr. McCarthy’s opinion on causation was just that: baseless testimony masquerading as science. Under the standard set forth in *Pollock*, Dr. McCarthy’s opinion was conclusory and cannot support the judgment against Hyde Park.

The Court of Appeals erred by mis-citing *Pollock*’s predecessor decision, *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227 (Tex. 2004), for its holding that Dr. McCarthy’s testimony could not be challenged on appeal. This decision should be reversed, and judgment entered that Plaintiffs take nothing. Causation was not proven.

ISSUE NO 3:

The Court Of Appeals Erred In Failing To Reverse The Jury’s Mis-Allocation Of Fault.

The Teacher settled out prior to trial for \$5,000. Thus, her comparative fault had to be submitted to the Jury for purposes of finding Proportionate Responsibility under Texas Civil Practice & Remedies Code, Chapter 33. The jury had to allocate fault as between the intentional Teacher, and the negligent Church.²¹

At this point, the Jury did a very strange thing. The Jury found that the Teacher who committed the intentional assault bore only 20% of the responsibility. However, the Church that was merely negligent in failing to foresee the Teacher’s actions, was found 80% responsible! (See the Verdict, Appendix B.) In other words, the Church that failed to predict

²¹ As part of the Tort Reform mandate to compare fault of settling parties, the Legislature took specific aim to eliminate cases where the plaintiff settles cheaply with the real wrongdoer, then uses those funds as part of the war chest for pursuing the less responsible “deep pocket” for the big recovery. See 3 Scott A. Sherman, *Texas Tort Reform: The Legislative History*, at II-33.

injury was supposedly *four times* more responsible than the Teacher who directly and intentionally inflicted the injury!

No evidence supports this mis-apportionment. Instead, it was made in response to a specific request from Plaintiffs' counsel for this exact finding, who improperly argued that anything else would constitute *approval* of the Church's conduct. (RR 9, pgs. 70-71) The Church preserved this error via its original and its Second Motion For New Trial, Motion For Judgment N.O.V. and Motion To Correct The Judgment.

A. A Mis-Allocation Of Fault Is Correctable On Appeal

The Plaintiffs in this case have pursued the “deep pockets” theory of litigation that seeks to impose the largest liability on the defendant with the most money, regardless of who was truly more at fault.²² Courts in other states have rejected this “deep-pockets” theory of liability.

We turn to the California experience with deep-pockets litigation. California, like Texas, had a wave of tort reform statutes to negate out-of-control jury verdicts. One of the key statutory provisions in both states was largely to eliminate joint and several liability. This was done by having the jury assess the fault of each defendant or other bad actor, and then

²² Under the deep-pockets approach to litigation, a relatively innocent employer or landowner is held liable after a vicious attack by some actor who has far more guilt. See 3 Scott A. Sherman, *Texas Tort Reform: The Legislative History*, at II-33. This deep-pockets litigation has grown in many types of cases, including those involving sexual misconduct where a church, school or employer is bankrupted following some intentional misconduct by a guilty employee or third party:

“Business owners, commercial property owners, homeowners, health care providers, day care providers, school employees, law enforcement officers, and members of the clergy are increasingly finding themselves the objects of sexual assault claims resulting from the despicable acts of others.”

Janet Colaneri and Bobbi Reilly, 2 Tex. Wes. L. Rev. 279 (1995).

apportioning fault accordingly. Only a defendant found to be more than 50% at fault could be held “jointly and severally” liable for all of the plaintiff’s damages.

But, what does one do if the jury abrogates its duty to apportion fault as shown by the evidence? Juries are allowed wide discretion in many areas, but this does not allow them to simply disregard all evidence and enter whatever numbers come to mind. See *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002) (addressing damages).

We turn to the California experience in dealing with a jury’s mis-allocation. In *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125 (Cal. App. 4th 1994, rev. denied) the appellate court reviewed a case of child abuse. As in our case, the main complaint was that the negligent party was on notice that the intentional tortfeasor, a grandmother, used “excessive discipline” in dealing with a the child. The grandmother intentionally hurt the child, apparently in a misguided act of “excessive discipline.” *Id.* 27 Cal. App. 4th at 137. But, as here, that intentional wrongdoer had no money. The grandmother was judgment-proof. The “deep pocket” was the County, which was sued for negligence in failing to intervene and stop the “excessive discipline” that harmed the child. The County was allegedly negligent in failing to supervise.

The jury in the California *Scott* case did the same thing the jury did in our case, complying with the plaintiffs’ request to minimize the allocation of comparative fault to the intentional tortfeasor. The jury maximized the allocation of fault to the party that was merely negligent. The jury found Los Angeles County 75% at fault, quite similar to the 80% finding in our own case. *Id.* 27 Cal. App. 4th at 147. The County appealed and complained of the

bizarre mis-allocation of fault.

On appeal the California Court of Appeals found that the mis-allocation of fault was a “miscarriage of justice” *Id.* 27 Cal. App. 4th at 125. The court reviewed the evidence and called the jury’s verdict “unsupported and unsupportable,” and therefore, reversed for a new trial. *Id.* 27 Cal. App. 4th at 137. This reversal was based on a simple principle: the jury’s verdict must be supported by the evidence, and can not contradict the undisputed evidence.

The court in *Scott* relied upon a similar California case where another disproportionate allocation of fault was overturned. *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147 (Cal. App. 2nd 1994) also contained a mis-allocation of fault as between an intentional attacker, as compared to a landlord that was merely negligent. Pamela B. was raped in the garage of her apartment building, due to inadequate security. The jury found that the landlord was more at fault than the rapist!

The appellate court found that, at most, the landlord was guilty of passive negligence, failing to respond to prior complaints about security, and failing to do more to prevent attacks. But the rapist was an intentional/criminal wrongdoer. *Pamela B.*, 31 Cal. Rptr. 2d at 157. The California Court of Appeals reversed, and pronounced the jury’s apportionment of fault “blatantly unfair, inequitable and unsupported...” *Pamela B.*, 31 Cal. Rptr. 2d at 160.²³ *Scott*

²³ Courts in other states deal with this comparison between intentional tortfeasors and negligent tortfeasors in various ways. They generally agree that “any rational juror will apportion the lion’s share of the fault to the intentional tortfeasor when instructed to compare that fault of a negligent tortfeasor and intentional tortfeasor...” *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So.2d 712, 719 (La. 1994), quoted in *Rodenburg v. Fargo-Moorhead Young Men’s Christian Ass’n*, 632 N.W.2d 407, 418 (N.D. 2001). But, they deal with this problem in various ways. In some states, a negligent defendant is given a right to be indemnified from his fellow co-tortfeasor who acted intentionally. This shifts the entire loss

v. County of Los Angeles became a seminal case.

Recent California authorities confirm the ability of a tort defendant to challenge a jury's apportionment of fault between tortfeasors. This type of appeal is so standard in California that the California courts no longer publish their decisions that reverse jury findings on apportionment of fault. These are unremarkable appeals, and, therefore, not published. See, for examples, *Silvestro v. Kaiser Gypsum Co, Inc.*, Not Reported, 2009 WL 976820 (Cal.App. 2nd Dist. April 13, 2009) ("Kaiser Gypsum contends the evidence does not support the jury's allocation of 30 percent fault to Kaiser Gypsum. We agree.") See also *Christian v. Enterprise Rent-A-Car Co. of Los Angeles*, 2004 WL 1234136 (Cal.App. 4th Dist. 2004) ("We are hard-pressed to find sufficient evidence in the record to support the jury's apportionment of liability. Accordingly, the judgment must be reversed and remanded for a new trial on the apportionment...")

But, this California approach should not be embraced in Texas, unless it is generally consistent with Texas jurisprudence. We now turn to Texas case law, to see if this California approach will fit within Texas practice and procedure.

B. The California Approach Fits Prior Texas Precedent

There are no cases in Texas addressing a gross mis-allocation of fault as between defendants. Although the *deep-pockets* theory of liability controls the vast majority of tort litigation on a daily basis, the mis-allocation of fault against a deep pocket has never been

to the intentional wrongdoer. *Fleming v. Thresherman's Mutual Ins. Co.*, 131 Wis.2d 123, 130 (Wis. 1986).

directly addressed by this Court.²⁴

This is not to say that Texas courts have never reversed a jury's allocation of fault. To the contrary, they have done so. But, in prior appeals, Texas courts reversed jury verdicts that saddled a plaintiff with too much fault, thereby barring his recovery. In such cases, appellate courts did not hesitate to reverse the defense oriented verdict. See, for examples, *Zamarron v. Adame*, 864 S.W.2d 173, 176-177 (Tex.App.–El Paso 1993) (collecting cases), and *Kehlenbrink v. Pickens*, 656 S.W.2d 668 (Tex.App.–Waco 1983, writ ref'd n.r.e.) (reversing a jury's apportionment of negligence 80 percent to plaintiff and 20 percent to defendant when plaintiff fell to his death); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). See also, *MacConnell v. Hill*, 569 S.W.2d 524 (Tex.Civ.App.–Corpus Christi 1978, no writ) (6 year old plaintiff failed to back away from a car fast enough to avoid injury, finding of negligence by the child was throw out.) Similarly, in *Roberts v. Texas & P. Ry. Co.*, 473 S.W.2d 567 (Tex.Civ.App. 1971), the Court of Appeals found that the jury's apportionment of responsibility was simply contrary to the evidence, and verdict had to be reversed.²⁵

Thus, Texas courts have had no problems reversing jury verdict were they improperly found the plaintiff too much at fault, barring his recovery. Are defendants to be barred from

²⁴ The closest was Justice Gonzalez' rejection of the *deep-pockets* approach in his concurrence in the mental anguish case, *Boyles v. Kerr*, 855 S.W.2d 593, 604 (Tex. 1993), where he explained, "Thus, this case has a lot to do with a search for a 'deep pocket' who can pay. If the purpose of awarding damages is to punish the wrongdoer and deter such conduct in the future, then the individuals responsible for these reprehensible actions are the one who should suffer . . .".

²⁵ The Texas Supreme Court did not disagree with this conclusion about the verdict, but ultimately reversed the Court of Appeals on the basis that a federal statute governed the standard of review, 481 S.W.2d 798 (Tex. 1972).

such appellate review, under the guise that juries are allowed wide discretion in apportioning fault? This Court has held repeatedly that the fact that a jury has wide latitude does not mean there are no boundaries to their discretion. See *Bentley v. Bunton*, 94 S.W.3d 561, 606 (Tex. 2002) (addressing damages).

To be sure, juries are allowed wide discretion in allocating fault. However, some verdicts do not reflect relative fault, they merely reflect who has the deepest pockets. These are the negligent supervision cases where the employee has engaged in intentional misbehavior, such as assault, and the employer is merely guilty of failing to stop him. We submit that a jury's mis-allocations of fault in these *deep-pocket* negligent supervision cases violate *three* historical tests for comparing fault. First, as a matter of law, intentional misconduct is worse than negligent misconduct.²⁶ Second, active fault is worse than passive fault.²⁷ Finally, criminal conduct is worse than mere civil misconduct. These three tests led the California courts to reverse improper jury allocations of fault between negligent-passive-civil wrongdoers, as compared to intentional-active-criminal wrongdoers. *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147 (Cal. App. 2nd 1994) and *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125 (Cal. App. 4th 1994, rev. denied).

²⁶ Hence, liability is imposed for intentional infliction, but not mere negligent infliction of emotional distress. *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997); *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993).

²⁷ See *Coastal States Crude Gathering Co. v. Williams*, 476 S.W.2d 339, 349 (Tex.Civ.App.—Corpus Christi 1972, writ ref'd n.r.e.); and *Atchison, T. & S. F. Ry. Co. v. Denton*, 475 S.W.2d 821, 832 (Tex.Civ.App.—Amarillo 1971, writ ref'd n.r.e.); and *Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 162 at fn 11 (2nd Cir. 2003) (interpreting Texas law).

Before we continue on this line of thought, we stop to ask a simple question: Why did the Jury in our case make this unusual allocation of fault? The answer is simple. The Plaintiffs' counsel *asked* the Jury to make this exact 80/20 finding, and he did so by resorting to an argument designed to mislead the Jury.

C. The Verdict Was Based On A Jury Argument

What evidence did Plaintiffs' counsel cite to support his request to the Jury? None. Instead, he resorted to an argument whereby the Church would be held *strictly liable* for the conduct of the Teacher, as if she were a dangerous wild animal. It was apparently a good jury argument, but the fact that he had to contradict Texas law, and resort to strict liability, is rather revealing. Here is the closing argument whereby the Plaintiffs' counsel asked the Jury for the unusual finding that the Church was 80% responsible, and the Teacher only 20% responsible:

Plaintiff' counsel, making closing arguments to the Jury:

“What I suggest you do is put 80 percent for Hyde Park and 20 percent for Sue Lowry. If you do not make Hyde Park more than 50 percent responsible in this case you will be telling them that what they did is *okay*.²⁸ That what they did is that it's okay for management to do what they did in this case. And that will be a slap in the face to every parent who has a kid in daycare, considering what they did to these children and what they did to PC.

Let me give you an analogy about this question. If somebody has a wild bull and they are the owner of a wild bull, they let him loose in a china shop and that bull

²⁸ Of course, at this point, Plaintiffs' counsel is dangerously close to informing the Jury of the effect of their answers. The problem is, he is actually *misinforming* them. He is implying that putting a larger percentage of fault on the Teacher will tell the Church it is “okay,” as if they will have no liability! And, this type of improper argument is incurable. One can hardly ask the trial court to *correctly* advise the Jury on the true effect of their answers to dispel the misdirection caused by the Plaintiffs' counsel. Instead, one moves for a new trial after the Jury handed down the improper verdict, which is precisely what the Church did.

just runs roughshod in that store and breaks everything in it. Hyde Park will be asking you to tell with this answer -- by putting less than 50 percent -- they will be asking you to say it's not the owner of the bull's fault, who let this thing loose in the china shop."

(RR 9, pgs. 70-71)

Of course, this false analogy was designed to lead the Jury astray from the correct legal standard. The standard that they invoked was the legal standard under the ancient common law for owners of wild animals, such as wild bulls. Under the common law, such owners were held strictly liable for the destructive actions of their wild animals. After all, no fault or moral responsibility rests on the animal. *Canefox v. Crenshaw*, 24 Mo. 199, 1857 WL 5303 (Mo. 1857) (owner strictly liable for damages caused by wild bull).

During arguments, the Plaintiffs acted as if Belinda Sue Lowry bore no moral responsibility. Why? Because she had no money. Of course, if Belinda Sue Lowry had been a millionaire, the Plaintiffs would hardly have settled with her for a mere \$5,000 and dismissed her so lightly. They would have sought to impose 100% of the fault on her, and even sought punitive damages against her. She would have been labeled the clearly culpable party.

But, she had no money. Hyde Park Baptist Church was the "deep pocket" and, therefore, was targeted by the Plaintiffs in their animal-owner analogy. Unfortunately, this invitation to the Jury to base its verdict on the animal analogy worked. The Jury gave the Plaintiffs exactly the percentages for which they asked: 80% on the negligent Church; 20% on the intentional Teacher.

However, the Jury is supposed to base its verdict on the evidence. This animal-owner

analogy, however colorful, is not evidence. We turn to the evidence, and how the law has historically compared co-tortfeasor liability.

D. The Jury's Allocation Of Fault Fails Under All Of The Three Historical Approaches To Comparing Fault

Hyde Park Baptist Church submits that there are three different ways that appellate courts have historically reviewed comparative fault as between co-tortfeasors in these types of cases. If our Jury's verdict made sense under *any* of these three approaches, then our verdict should be affirmed. After all, a jury certainly has wide discretion. But, its discretion in weighing the evidence is not unlimited. It cannot reject every conceivable method of weighing the evidence, and replace it by relying upon an animal analogy. In these types of cases, there are three main ways to compare the fault of two co-tortfeasors.

1. Intentional Wrongdoers Are More At Fault Than Negligent Wrongdoers

As a matter of law, an intentional wrongdoer (such as an employee who engages in an assault) is more at fault than a negligent wrongdoer. From the very first weeks in law school we learned that intentional torts, assault, battery, false imprisonment, libel, slander, etc., involve an intent that often leads to awards of punitive damages, precisely because the misconduct is intentional, not accidental.

As previously noted, this case is about mental anguish. The Texas Supreme Court explained why mental anguish damages are not recoverable in cases of simple *negligence* (unless they involve serious bodily injury), but are recoverable in cases of *intentional torts*. Texas does not recognize negligent infliction of emotional distress, but does recognize

intentional infliction of emotional distress. Why? As the Supreme Court explained, unlike negligence, an intentional tort (assault, battery, etc.) involves a “high degree of culpability.” *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997). The persons who commit these intentional torts are simply more guilty than those who are simply negligent, so the law expands the range of damages to include mental anguish:

This is appropriate because the high level of culpability affects the determination of proximate cause, and makes it just that the defendant should bear the risk of any overcompensation that an award of mental anguish damages might entail.

Likes, 962 S.W.2d at 495.

Faced with comparing fault, most juries simply find the intentional wrongdoer more at fault than a party who is merely negligent. For example, in *Adams v. YMCA* the jury found that the counselor for “dry humped” the camper was found 95% at fault, while the YMCA was found only 5% at fault. That makes sense. The YMCA did not decide to climb on top of a little boy, the counselor did.²⁹ Most verdicts will follow this common sense, but not all.

One has to look far and wide for a jury that strives to push the majority of fault on the negligent party, rather than the intentional wrongdoer, merely because the negligent party has deep pockets. We find those cases in California, where the appellate courts have not hesitated to reverse jury verdicts that violate the tort reform mandate that juries allocate fault, according

²⁹ In the *Adams v. YMCA* case, the trial court simply disregarded the jury’s allocation of fault, and saddled the YMCA with all of the damages as if they were 100% at fault. The details of that error are not relevant here. It is sufficient to say that, in negligent supervision case, trial courts remain confused about the allocating fault as between the intentional employee and the negligent employer. In our own case, this manifested itself when the Court of Appeals found that the employee acted with intentional misconduct, and so a negligent employer could be liable for mental anguish under the *Likes* requirements for intentional misconduct.

to the evidence. See *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125 (Cal. App. 4th 1994, rev. denied), and its progeny, discussed above at pages 34, 35, 36, 38.

Of course, California courts are not the only courts who view intentional tortfeasors as more culpable than negligent tortfeasors. In some states, a negligent defendant is given a right to be indemnified from his fellow co-tortfeasor who acted intentionally. This effectively shifts the entire loss to the intentional wrongdoer. As the Supreme Court of Wisconsin explained in *Fleming v. Threshermen's Mutual Ins. Co.*, 131 Wis. 2d 123, 130 (Wis. 1986):

[W]e hold that a negligent tortfeasor has a right to indemnity from an intentional joint tortfeasor. . . . ***we believe that shifting the full responsibility for the loss to the intentional tortfeasor serves the policy of deterring conduct which society considers to be substantially more egregious than negligence.***

Id.

Texas follows a slightly different approach, but with the same goal in mind. The Church does not get a right of indemnity against the Teacher, as they would in Wisconsin. Instead, the Texas statutory system envisions that the Church's liability will be decreased, up front, by the comparative fault of the co-tortfeasor, the Teacher. But, in adopting this statutory system, the Texas legislature envisioned that a jury would hand down verdicts in accordance with the evidence.

Instead, the Texas statutory system envisions that the Church's liability will be decreased, up front, by the comparative fault of the co-tortfeasor, the Teacher. 3 Scott A. Sherman, *Texas Tort Reform: The Legislative History*, at II-55 (quoting Senator Sibley, "In the past what we've had is people joined in court who had deep pockets. And it may somebody

else just as much at fault, and we're going to allow the defendant to bring them in..."). For example, the Legislature lamented that, under then-existing tort law, "...the ones that really did it, but who don't have the deep pockets, wind up paying settlements that are small. They become part of the war chest that then funds the case against the defendant whose only real fault is having deep pockets." *Id.*, at II-33 (quoting Senator York). In response, the Legislature sought to break free of the system where plaintiffs manipulated the scales of justice. The last thing the Legislature intended was for the comparative fault statute to be used as a shield for future manipulation.

In enacting the statute, the Texas Legislature envisioned that a jury would hand down verdicts in accordance with the evidence, so that negligent tortfeasors would be found less at fault than an intentional tortfeasor. But, the Legislature never intended to place the jury's allocation beyond the reach of judicial review. *Id.*, at II-141 (quoting Senator Cross, "the jury is operating within the law. The jury has got to follow the law."). Unsupportable jury allocations were not made sacrosanct. Instead, the jury's discretion was to be bounded by the usual restraint that is placed on all verdicts: they must fall within the spectrum of *reasonable* discretion. Unfortunately, the case at bar, and others cited in this Brief, demonstrate that lower courts are turning a blind eye to allocations of fault which cannot be supported by any rational view of the evidence. The Legislature intended for courts weed out jury verdicts that grossly mis-allocated fault among tortfeasors, not to enshrine them.

2. Even As Between Two Tortfeasors, An Active Tortfeasor Is More At Fault Than A Passive Tortfeasor

Even as between two tortfeasors who are both negligent, the one who engages in *active* misconduct that directly inflicts the injury is more culpable than the one who merely engages in “*passive negligence*.”

In our case, the Plaintiffs faulted the Church for being passive and not actively intervening to exercise more control over the Teacher, or firing her. Their closing arguments were replete with the phrases that complain of sins of omission, “Hyde Park Baptist Church looked the other way,” “allowing a teacher with suspicious and questionable tactics to continue to run a classroom,” “ignoring and looking the other way,” “failure to supervise”, etc., etc. (Closing Arguments, RR 9, pgs. 47-52) This is passive fault.

On the other hand, Sue Lowry’s conduct was undisputably active. No one claims that Sue Lowry merely failed to come to PC’s aid. The complaint is that she *actively* inflicted harm directly upon him.

Texas law, and all of tort law, clearly recognizes the obvious, the difference between mere *passive* indifference, and *active* misconduct.³⁰ In the rape in the parking garage case, *Pamela B. v. Hayden, supra*, the court partly based its decision on the difference between the

³⁰ The distinction between passive and active misconduct is huge. For example, one can passively watch a person drown, and escape tort liability. In general, one can remain passive even in the face of a person in plight. RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1965); Prosser & Keeton, The Law of Torts 378-82 (5th Ed. 1984). But, an active step that increases his likelihood of drowning does not just cross a vague tort line, such a life threatening action becomes homicide! The line between passive indifference and active misconduct is not some thin line, it’s a significant distinction in the eyes of the law.

rapists active misconduct and the landlord's misconduct, which was only passive in failing to safeguard his invitees.

Under Texas law, a passive tortfeasor was once given a right of indemnity as against his co-tortfeasor who was actively negligent. Although both were negligent, the "quality" of their negligence was not the same, so the less guilty defendant was given a right of indemnity against his fellow, but active, tortfeasor. See the extensive discussion of this old common law right of indemnity in *Coastal States Crude Gathering Co. v. Williams*, 476 S.W.2d 339, 349 (Tex.Civ.App.–Corpus Christi 1972, writ ref'd n.r.e.); see also *Atchison, T. & S. F. Ry. Co. v. Denton*, 475 S.W.2d 821, 832 (Tex.Civ.App.–Amarillo 1971, writ ref'd n.r.e.) ("Under the common law, as between two parties who may be liable to a third party for tort, and one of the two parties is the active perpetrator of the wrong and the other is guilty of an omission of a duty, the active wrongdoer is liable to 'indemnify the one whose wrong is only passive.'")

As noted by later courts, the old common law right of indemnity as between co-tortfeasors has now been replaced by the Texas comparative responsibility statute, which envisions that the active tortfeasor will now be held more liable to begin with, eclipsing the need for a right of indemnification. *Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 162, n. 11 (2nd Cir. 2003) (interpreting Texas law, and explaining how the Texas comparative responsibility statute replaced the old court created right of indemnity by the passive tortfeasor against the active tortfeasor). But, once again, this statutory replacement of the right of indemnity assumes that the jury correctly does its job, and places more responsibility on the active tortfeasor, not on the passive tortfeasor.

Here, the jury failed in that job.

3. Criminal Misconduct Is Worse Than Civil Misconduct

Teacher Sue Lowry engaged in intentional criminal behavior that injured PC. The Jury found intentional acts by Sue Lowry injured PC, and the law makes criminal any intentional act that causes “injury to a child.” Texas Penal Code Section 22.04.

Plaintiffs used this criminal misconduct to their advantage. They called Teacher Sue Lowry to the stand, and forced her to invoke her Fifth Amendment Rights, in front of the Jury. But, notice that these questions never touch the Church:

Q. [By Plaintiffs’ counsel] Ms. Lowry, I would like to get right to the heart of what is concerning to everyone. On January 18, 2005, isn’t it true that you purposefully bumped PC on the ground, causing him to hit his head.

A. [By Teacher Sue Lowry] I invoke the Fifth Amendment.

Q. Ms. Lowry, isn’t it true that before January 18th you had bumped PC is to the ground on other occasions?

A. That’s not true.

Q. Ms. Lowry, isn’t true that before January 18th, you were emotionally abusive to PC?

A. I invoke the Fifth.

Q. Ms. Lowry, you singled out PC and mistreated him more than any other child in class; isn’t that true?

A. I’m invoking the Fifth.

Q. Ms. Lowry, the truth is that you abused PC for six months, didn’t you?

A. I invoke the Fifth.

Q. Let me ask you some questions about some of the other children in your class. Ms. Lowry, you purposefully dumped Alex out of a cube on January 17, 2005, didn't you?

A. I invoke the Fifth.

Q. Ms. Lowry, you dragged a child named Grace by a walking robe one, two feet in the pavement in November of 2004; isn't that true?

A. I invoke the Fifth.

Q. Ms. Lowry, you have pinned children against the walls of your classroom before, haven't you?

A. I'm invoking the Fifth.

Q. Ms. Lowry, you threw a child named Tyler on her mat because she wouldn't nap at nap time; isn't that true?

A. I invoke the Fifth.

Q. Ms. Lowry, you have shut children's fingers in drawers to teach them not to open drawers; isn't that true?

A. I invoke the Fifth.

Q. Ms. Lowry, you have deprived children of food at lunch; isn't that true?

A. I invoke the Fifth.

Q. Ms. Lowry, you forced a child named Cole to finish his milk by holding the cup to his face until he drank all of it; isn't that true?

A. I invoke the Fifth. ...

(RR 5, pgs. 31-34)

At this time, the Plaintiffs had already settled with Sue Lowry. They wanted her to invoke her Fifth Amendment right in front of the Jury so the stench of criminal misconduct

would waft over the court room. It worked! The Jury was certainly inflamed. But, the Teacher had settled and the Jury could not direct their anger in her direction. Then Plaintiffs' counsel implied in closing arguments that anything less than a finding of 80% against the Church would be a find that the whole situation was "okay." The Church was the only party left to punish.

In a civil case, a jury is allowed to hear this type of exchange, and infer that Sue Lowry engaged in criminal conduct, which she is now concealing. But, notice in reviewing the above testimony, that no adverse inference can be drawn as against the Church.³¹ She was never asked any questions about whether the Church did, nor did not, do anything, or whether the Church knew anything or not. And, no person from the Church ever invoked the Fifth Amendment nor testified that the Church engaged in criminal misbehavior.

Thus, it is clear that the Teacher engaged in criminal conduct, but the Church engaged only in negligence. Again, this is the type of comparison that mandated reversal by the California courts in *Pamela B. v. Hayden*, 31 Cal. Rptr. 2d 147 (Cal. Rptr. 2nd 1994) (criminal rape) and *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125 (Cal. App. 4th 1994, rev. denied) (criminal child abuse).

The evidence showed that Sue Lowry had intentionally singled CP out, and targeted him. When she was frustrated, she would lose her patience with him more easily than other students. (RR 4, pgs. 50, 60) In contrast, there is no evidence that the Church singled out CP,

³¹ When an ex-employee invokes the Fifth Amendment, it cannot be taken as inferring guilt by his ex-employer. Note, *Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 Notre Dame L. Rev. 370, 386-87 (1985).

or even knew that the Teacher disliked him.

Thus, no matter how one reviews the evidence, the Jury's apportionment of fault contradicts both the law and the undisputed evidence. No evidence supports this mis-allocation of fault. It must be reversed.

This Court should grant the Petition For Review, and admonish Courts of Appeals to weigh the evidence under these three traditional standards. Such an examination would end the "deep pockets" theory of liability in these types of cases, whereby a person is faulted mainly because of his ability to pay a judgment. Meanwhile, the intentional wrongdoer largely walks away, leaving his employer to pay.

PRAYER FOR RELIEF

Petitioner Hyde Park Baptist Church prays that this Court grant its Petition For Review, reverse the Court of Appeals, render judgment in favor of the Church, and grant such other and further relief to which it shows itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of Petitioner's Brief On The Merits has been sent via certified mail, return receipt requested, 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 4th day of December, 2009.

DAVID M. PRUESSNER