

CASE NO. 09-0191

IN THE SUPREME COURT OF TEXAS

HYDE PARK BAPTIST CHURCH,

Petitioner/Defendant,

v.

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

Respondents/Plaintiffs.

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

**On Petition for Review from the
Third Court of Appeals at Austin, Texas
Case No. 03-07-00437-CV**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner Hyde Park Baptist Church, pursuant to Texas Rule of Appellate Procedure 11.

**IDENTITY AND INTEREST
OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of engaging in litigation in matters affecting the public interest. PLF's Free Enterprise Project was developed to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to the freedom of contract. Pursuant to this Project, PLF has participated in several cases before this Court and many other state supreme courts on matters affecting the expansion of tort causes of action and remedies, including *Bennett v. Reynolds*, docket no. 08-0074 (pending) (involving constitutional limits on punitive damages); *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009) (employer not liable for fatal car accident caused by off-duty, fatigued employee); *Trammell Crow Cent. Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008) (shopping center not liable for criminal acts of third party on the premises); *Loram Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593 (Tex. 2006) (employer has no duty to prevent employee's off-duty, drug-fueled shooting of a police officer); and *Western Investments, Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005) (landowner not liable for tenant-on-tenant crime). PLF attorneys have published articles on the dangers that a runaway civil justice system poses to American consumers and entrepreneurs. *See, e.g.,* Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal*

Acts on the Premises, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003).

Amicus believes that its public policy perspective and litigation experience will provide a useful additional viewpoint on the issues presented in this case.

INTRODUCTION

Sue Lowry was the lead teacher in the toddler day care at Hyde Park Baptist Church, where she had some history of being “rough” with the children in her care and had particular difficulty with one child, 21-month old Parker Curtis. One day, she threw her hip in Parker’s direction, intentionally knocking him to the ground, where he sustained a bump on the head requiring no treatment beyond the initial x-ray. *Hyde Park Baptist Church v. Turner*, 2009 WL 211586 *1 (Tex. App.-Austin 2009). When Parker’s mother was informed about this incident two weeks later, she sued. *Id.* at *2. She settled with the judgment proof teacher for \$5,000 (Petitioner’s Brief on the Merits at 32) and took the church to trial for negligent supervision. The jury awarded damages for medical expenses (to test for an injury, which was never found beyond the bump) and then awarded \$100,000 for the child’s future mental anguish, for which it found the church 80% liable, and the teacher who intentionally caused the injury 20% responsible. *Hyde Park*, 2009 WL 211586 *3.

The court below recognized that the jury used Lowry’s intentional act as a springboard to reach the deeper pockets of the church which acted with simple negligence. *Id.* at *5. The court even suggested that had the church objected to the combined question presented to the

jury, the objection would have been sustained; but since no objection was made, the court essentially said, “tough luck.” *Id.* The adverse public policy consequences of condoning this award – expanding the availability of mental anguish damages (notoriously difficult to define or calculate) to cases involving insignificant physical harm; inviting deep-pockets lawsuits against less culpable, but wealthier defendants; increasing costs in the already overburdened daycare industry – are such that this Court should grant the petition, find that the trial court erred in permitting the jury to rely on Lowry’s intentional acts to hold the simply negligent church 80% responsible, and hold that – objection or not – this award is unjust and violates the public policy of this State.

ARGUMENT

I

MENTAL ANGUISH DAMAGES SHOULD NOT BE AVAILABLE AGAINST DEFENDANTS WHO WERE NOT MALICIOUSLY OR GROSSLY NEGLIGENT AND WHERE THERE IS NO SERIOUS PHYSICAL INJURY

Texas courts are understandably cautious when it comes to expanding tort liability, and frequently have rebuffed plaintiffs’ arguments favoring broader liability. *See, e.g., Cain v. Hearst Corp.*, 878 S.W.2d 577, 579-80 (Tex. 1994) (declining to recognize the false light invasion of privacy action because it largely duplicates the right of recovery for defamation, but without the procedural limitations); *Boyles v. Kerr*, 855 S.W.2d 593, 596 (Tex. 1993) (refusing to recognize negligent infliction of emotional distress as an independent tort); *Coastal Corp. v. Torres*, 133 S.W.3d 776, 782 (Tex. App.-Corpus Christi 2004, rev. denied) (refusing plaintiffs’ invitation to impose liability on a parent company to

approve budgets for its subsidiaries to ensure that the subsidiaries repair defects on their premises); *RRR Farms, Ltd. v. American Horse Protection Ass'n, Inc.*, 957 S.W.2d 121, 133 (Tex. App.-Houston [14th Dist.] 1997) (declining to expand the malicious prosecution tort to include someone who was not a party to the underlying proceeding). In this case, plaintiffs seek to expand recovery for mental anguish for that claimed to be suffered by a toddler with a bump on the head (a minor physical injury from which he quickly recovered) – not from the person who intentionally caused the bump, but from the intentional tortfeasor’s employer, who at most acted with simple negligence for failure to supervise, but who has insurance. See Kent D. Syverud, *On the Demand for Liability Insurance*, 72 Tex. L. Rev. 1629, 1640 (1994) (noting that tort liability tends to follow the defendants who have insurance).¹

The court below mistakenly relied on this Court’s decisions in *Adams v. YMCA*, 265 S.W.3d 915 (Tex. 2008) (per curiam), and *City of Tyler v. Likes*, 962 S.W.2d 489, 495-96 (Tex. 1997), to hold that mental anguish damages may be appropriate in the absence of a physical injury. First, *Adams* is factually distinguishable. Most importantly, as a matter of common sense, a toddler’s bump on the head simply is not equivalent to sexual abuse. See

¹ The Petitioner’s characterization of the jury’s failure to apportion liability according to who actually caused the harm as “strange” (Pet. Brief on the Merits at 32) is actually less strange than to be expected if one accepts the premise that jurors are aware of the role of insurance (even though it may not be mentioned during the trial, Tex. R. Civ. Evid. 411) and assume that the church itself will not really have to pay. Roselle L. Wissler, et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 Psychol. Pub. Pol’y & L. 712, 723 (2000) (withholding information from a jury “is particularly unlikely to be effective with those matters, such as attorney fees and insurance, of which many jurors are aware”); John E. Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 686 (1967) (noting that modern juries may assume defendants are insured).

Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 36 n.52 (Tex. 2008) (“[T]he common law must be informed by common sense.”). Mental anguish damages are not intended to compensate for “the vicissitudes of daily life.” *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 445 n.10 (Tex. 1995). Anyone who has ever witnessed toddlers in action knows that they resemble pinballs in their daily life – careening from one location to the next with energy and enthusiasm far exceeding maneuverability and judgment. They frequently collide with other persons and objects and when they fall, they sometimes cry, but usually get right back up and resume their activity. Bumps on the head are not uncommon and most of the time – as, indeed, in this case – there is no lasting physical harm. *Cf. Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 797-98 (Tex. 2006) (upholding award of mental anguish damages where plaintiff was severely beaten, requiring multiple trips to the hospital for treatment of physical injuries to his head and body).

In *Tyler v. Likes*, this Court rejected the plaintiff homeowner’s request for damages for mental anguish allegedly suffered after her house was negligently flooded. 962 S.W.2d at 496. *Tyler* acknowledged that there was no unified theory for recovering mental anguish damages (*id.*), and despite the framework devised by the opinion, the court below pegs its decision on the fact that *Tyler* did not establish “an exhaustive list of the types of cases in which future mental anguish damages are available.” *Hyde Park*, at *5. Perhaps it was not exhaustive, but if the minor incident in this case justifies \$100,000 in future mental anguish, then there is an entire raft of cases that courts wrongly decided by failing to award mental anguish damages in far more serious circumstances. *See, e.g., Johnson v. Methodist Hosp.*,

226 S.W.3d 525, 530 (Tex. App.-Houston [1 Dist.] 2006) (pregnant woman falsely informed that she was HIV positive and treated with drugs for the disease could not recover damages for mental anguish); *Fitzpatrick v. Copeland*, 80 S.W.3d 297, 306 (Tex. App.-Fort Worth 2002, rev. denied) (passenger in car who witnessed driver (the passenger's best friend) killed by a wheel that flew through the windshield denied mental anguish damages because she personally suffered no injury); *Lions Eye Bank of Texas v. Perry*, 56 S.W.3d 872, 878 (Tex. App.-Houston [14 Dist.] 2001, rev. denied) (plaintiffs cannot recover mental anguish damages from Eye Bank that removed deceased son's eyes contrary to family's express wishes). However broadly *Tyler* may be read, if it is read to encompass a toddler's bump on the head, then there is no principled limitation left on the ability of a jury to award damages for mental anguish.

Moreover, if this Court does permit young Parker to recover mental anguish damages from the church, one can expect claims of mental anguish to proliferate against deep-pocketed, but relatively blameless, defendants. It has long been understood that permitting a novel claim to proceed against a defendant guarantees a proliferation of those claims. *See, e.g., AccuBanc Mortg. Corp. v. Drummonds*, 938 S.W.2d 135, 145 (Tex. App.-Fort Worth 1996) (noting that if the court adopts a rule that a plaintiff can sue a deep-pocketed private corporation in a *Bivens* action alleging constitutional tort claims, future plaintiffs will likely make the same choice as plaintiff Drummonds, who brought his *Bivens* action only against the private entity and not against the individual federal agents who actually harmed him); *Cravens/Pocock Ins. Agency, Inc. v. John F. Beasley Const. Co., Inc.*, 766 S.W.2d 309, 312

(Tex. App.-Dallas 1989) (refusing to adopt cause of action to allow employer to recover for loss of employee's services in part because "adoption of such a rule could cause the judicial floodgates to open and release a torrent of actions to swamp already crowded dockets.")). This caution – to prevent a proliferation of claims – undoubtedly underlies this Court's emphasis in *Boyles v. Kerr*, 855 S.W.2d at 605, that the decision was not "broadening a claimant's right to recover mental anguish damages caused by breach of a particular duty." *Id.* (noting that a mental anguish damages remain unavailable in cases involving negligent misrepresentation or under the Texas Deceptive Trade Practices Act, absent proof of a willful or grossly negligent violation). The court below, however, threw caution to the wind, risking tremendous expansion of subjective, fraud-prone mental anguish claims. This Court should grant the petition in this case to restore sensible boundaries to mental anguish claims.

II

MENTAL ANGUISH LIABILITY IN THIS CASE WILL HAVE A SEVERE, ADVERSE EFFECT ON A DAYCARE INDUSTRY THAT IS ALREADY INSUFFICIENT TO MEET THE NEEDS OF WORKING TEXANS

In *Boyles v. Kerr*, 855 S.W.2d at 605, Justice Gonzalez (conc. on mot. for reh'g) offered a realistic assessment of the deep pockets nature of the claim in that case, and how adoption of the plaintiff's theory would impact Texans in general:

[T]his 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 ones who should suffer, not the people of Texas in the form of higher insurance premiums for home owners.

Id. Applied to this case, the impact of higher insurance premiums for daycare centers could have a devastating effect on the industry, causing particular harm to working parents who cannot afford in-home care for their children.

In Texas, there are 1.26 million children under the age of 6 who need child care because their parents work. National Association of Child Care Resource and Referral Agencies and Texas Association of Child Care Resource and Referral Agencies, *2009 Child Care in the State of Texas* (March 2009) (citing 2007 American Community Survey conducted by the United States Census Bureau).² The average annual fee paid for full-time child care in a daycare center is \$6,000-\$7,000. *Id.* There are 9,281 daycare centers statewide, *id.*, added to 16,765 family childcare homes, providing care for a total of 929,381 children, but some 200,000 fewer places than the number of children actually requiring care. *Id.* Given the inadequate childcare facilities available at present, it makes little sense as a matter of public policy to unleash the plaintiffs' bar, with new and expanded power, to go after daycare centers for increasingly large damage awards.

Childcare centers frequently are insured, of course, but this does not mean that money judgments have no impact. Increasing insurance costs are one significant reason why day cares may either close their doors or price themselves out of the range where most families can afford them. See Ralph A. Winter, *Liability Insurance, Joint Tortfeasors and Limited Wealth*, 26 Int'l Rev. L. & Econ. 1, 2 (2006) ("If liability risks are sufficiently high, a single economic agent with limited wealth may respond to a further increase in risk by decreasing

² Available at <http://www.naccrra.org/randd/data/docs/TX.pdf> (last visited Jan. 27, 2010).

its insurance purchases, perhaps dropping insurance altogether and relying instead on limited liability to limit its contingent losses.”). This was certainly the case in the 1980s, as day cares reeled from the hysteria resulting from highly publicized abuse allegations and insurance premiums went through the roof. Lois Timnick and Carol McGraw, *Initial Hysteria Provoked Positive Changes in Day Care*, Los Angeles Times at 18 (Jan. 19, 1990) (“Liability insurance premiums soared – forcing many small operators out of business and causing others to go underground, remaining open but unlicensed and uninsured. Large daycare operations moved toward self-insurance; church-run centers found protection under the umbrella of their church’s insurance policies.”); *see also* John B. Mitchell, *What Would Happen If Videotaped Depositions of Sexually Abused Children Were Routinely Admitted in Civil Trials? A Journey Through the Legal Process and Beyond*, 15 U. Puget Sound L. Rev. 261, 329 (1992) (identifying several responses to increased insurance premiums, including day cares that close; day cares that go without insurance (thus losing the ability to be licensed), consolidated insurance pools, and larger daycare centers replacing more intimate family daycare providers).

More and more families find themselves in need of childcare solutions as the work requirements of the federal welfare law demand that mothers seeking public assistance go to work. Angela Hooton, *From Welfare Recipient to Childcare Worker: Balancing Work and Family under TANF*, 12 Tex. J. Women & L. 121, 129 (2002) (citing U. S. Gen. Accounting Office, *Welfare Reform: Implications of Increased Work Participation for Child Care* 3 (1997)). The inability to find affordable childcare falls “heavily on poor, working

single-parents because of the inverse relationship between declining income and caregiving demands that conflict with work.” Hooton, at 133. To the extent that families are priced out of licensed daycare facilities, they will place their children in unlicensed facilities or perhaps will simply be unable to work.³ The facts presented in this case do not warrant an expansion of mental anguish damages that would work such a potentially devastating result on a service required by so many working Texans.

CONCLUSION

Under the circumstances presented in this case, an award of mental anguish damages would greatly expand any previous such award in Texas jurisprudence. The ripple effects through the daycare industry would be severe, undoubtedly causing some centers to close due to the inability to afford insurance to cover the “anguish” suffered by bumped toddlers.

³ Many families seek to take advantage of government subsidies for child care, but these subsidies do not provide for every family that requests them. *See, e.g.*, Melissa Ludwig, *Paying for child care not hopeless*, San Antonio Express-News at 1B (Nov. 5, 2008) (2,300 children on the waiting list, with the wait averaging three to four months at Workforce Solutions Alamo, which serves about 10,000 children a day in Bexar and 11 surrounding counties); Adrienne Nettles, et al., “*We just don't have any other option*”: *Some families struggle to find and pay for child-care services*, Ft. Worth Star-Telegram A16 (July 22, 2007) (Tarrant County Child Care Management Services helps pay childcare expenses for 6,300 children at 975 childcare centers and licensed homes and has 3,800 children on its waiting list).

For the reasons set forth above, the petition should be granted and the decision below reversed.

DATED: February 4, 2010.

Respectfully submitted,

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I HEREBY CERTIFY that I have served true and correct copies of this Brief Amicus Curiae in support of Petitioner on this 4th day of February, 2010, by United States mail, postage prepaid, on the following counsel of record:

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