

09-0191

In the
Supreme Court of Texas

HYDE PARK BAPTIST CHURCH,
Petitioner,

v.

TARA TURNER AND TERRY CURTIS, INDIVIDUALLY AND AS
NEXT FRIENDS OF P.C., A MINOR,
Respondents.

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

RESPONSE TO PETITION

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STATEMENT OF THE CASE

- Nature of the Case:* Physical abuse of a child in a daycare center
- Trial Court:* Honorable Stephen Yelenosky, Judge Presiding,
353rd Judicial District Court of Travis County, Texas
- Trial Court Disposition:* Rendered judgment against the daycare center. The jury found that Hyde Park bore 80% of the legal responsibility for this abuse inflicted by its employee, on its premises, against a child entrusted to its care.
- The jury awarded \$34,980 for medical expenses, \$25,000 for past mental anguish, and \$100,000 for future mental anguish.
- Parties in Court of Appeals:* *Appellant:* Hyde Park Baptist Church
Appellees: Tara Turner
Terry Curtis
P.C. (a minor)
- Court of Appeals:* Third Court of Appeals at Austin, Texas
- Court of Appeals Disposition:* On appeal, Hyde Park challenged only the award for future damages; it did not challenge the finding of liability or the assessment of past damages.
- Affirmed in a memorandum opinion. Justice Henson wrote for a unanimous panel, joined by Justice Patterson and Justice Waldrop. *Hyde Park Baptist Church v. Tara Turner, et al.*, No. 03-07-00437-CV (Tex. App.—Austin 2008, pet. filed) (mem. op.).

ISSUES PRESENTED

1. Hyde Park's negligent supervision led to the intentional, physical abuse of a child entrusted to its care. The damages included mental anguish.
 - a. Is Hyde Park categorically excused from paying damages it caused that were intentionally inflicted by its employee?
 - b. Did Hyde Park preserve this error after failing to request a different jury charge? [Unbriefed]
2. Texas has a comparative-responsibility statute that asks the fact-finder to weigh "negligent act[s] or omission[s]," "other conduct or activity that violates an applicable legal standard," and "any combination of these." TEX. CIV. PRAC. & REM. CODE §33.003(a).
 - a. Without addressing this statute, Hyde Park asks the Court to "admonish the courts of appeals to weigh the evidence" using "three historical standards" it extrapolated from California cases. Is that Texas law?
 - b. If so, is an employer really less culpable as a matter of law when it hires and retains an employee who acts maliciously or even criminally toward children than if that employer had hired one who was merely clumsy?

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Hyde Park admits that its teacher physically abused this child; liability is not in question. Nor does the petition challenge how mental-anguish damages are calculated.

The petition would absolve Hyde Park, not because it was innocent, but because it was so negligent that it kept the children entrusted to its care into the hands of an employee who intentionally physically abused one of them. That makes little sense, and it is contrary to Texas law.

STATEMENT OF FACTS

In place of Hyde Park's argumentative statement, the Court should credit the factual summary given by the court of appeals. *See* Op. 2-6.

As the petition acknowledges, “[Hyde Park] was negligent in supervision, because there had been prior misconduct by [Lowry] the Teacher in the course of her teaching for 12 years. . . . [T]here had been prior instances of rough treatment of children” Pet. at 1. “There was evidence that [Hyde Park] knew of some of the prior incidents and had previously held a hearing, somewhat like a trial. . . . The Teacher was allowed to continue, after being admonished” Pet. 1.

The court of appeals’s summary confirms that Hyde Park’s teacher had been physically abusive to this child (among others) for months, and that Hyde Park repeatedly refused to take action when made aware of the problem. Op. 3-6. When Hyde Park learned about the final incident in this case, in which its teacher intentionally knocked down a two-year-old child hard enough to cause a physical head injury that persisted ten days later, Hyde Park chose not to inform the parents, preventing them from seeking more prompt medical treatment or evaluation. Op. 2-3.

At trial, Hyde Park denied that its teacher had acted intentionally. Op. 2n.3. The jury found otherwise, and after hearing evidence about the conduct of both defendants, it apportioned 80% of the responsibility to Hyde Park. Op. 6.

SUMMARY OF THE ARGUMENT

The petition asks the Court both to rewrite *City of Tyler v. Likes* and to undermine the Texas comparative-responsibility statute, on which countless judgments rest every year. It should be denied.

First, Hyde Park’s apportionment issue makes no sense under Texas law. Texas already has a comparative-responsibility statute that covers the factors urged by Hyde

Park—and leaves weighing them to the fact-finder. Hyde Park does not even attempt to reconcile its theory with this controlling statute. And, in any event, this record supports the finding that Hyde Park had a pivotal role in causing these injuries.

Second, in *City of Tyler v. Likes*, the Court described a framework for when mental-anguish damages are appropriate, with several instructive examples. Within that framework, the physical abuse of a child by child-care-center staff is surely among the situations in which mental-anguish damages would be foreseeable and appropriate. Yet Hyde Park seeks a categorical rule that no childcare center in its position could be subjected to mental-anguish damages. That is not the law—and is a remarkably bad idea.

Nor is there any jurisprudential reason to take this petition. The federal cases that Hyde Park says show confusion about “mental anguish” were actually about the elements needed to establish liability for the tort of negligent supervision—not mental anguish as a category of damages.¹ *See* Pet. 3-4. Hyde Park, by contrast, did not even preserve an issue about its liability. Nor is there any disagreement among Texas courts about Hyde Park’s novel apportionment theory. *E.g.*, Pet. 13 (“There are no similar cases in Texas . . .”). This petition should be denied.

¹ The defendants in those cases—unlike Hyde Park here—argued that they could not be liable at all for negligent supervision unless there also happened to be a physical injury. *Verhelst v. Michael D’s Rest. San Antonio, Inc.*, 154 F. Supp. 2d 959, 968 (W.D. Tex. 2001) (“it appears that the defendant’s position is based on an older understanding of the claim of negligent hiring and supervision”); *see also Nichols v. Apartment Temporaries, Inc.*, 2001 WL 182701, at *6 (N.D. Tex. 2001) (sexual-harassment claim aimed at a supervisor).

I. BECAUSE HYDE PARK CONCEDES THAT LOWRY’S CONDUCT WOULD SUPPORT MENTAL ANGUISH, THE APPORTIONMENT FINDING IS FATAL.

This petition begins and ends with apportionment. There were two related defendants here—Hyde Park and its teacher, Brenda Sue Lowry. Both were at trial; both names were presented to the jury as responsible parties under the apportionment statute.

The jury found that Lowry acted intentionally. Op. 6. And it found that Hyde Park—which supervised and retained Lowry, covered up her abuse of this child, and kept news of it from the parents—was 80% responsible for the damages. Op. 6.

Unlike at trial, Hyde Park now concedes that Lowry engaged in that behavior and that, because that behavior was intentional, her conduct could support mental-anguish damages under Texas law. And Hyde Park concedes its own negligence. Those concessions undermine the petition.

That’s because the apportionment of 80% responsibility to Hyde Park makes it jointly and severally liable for the portion of the compensatory damages caused by Lowry. *See* TEX. CIV. PRAC. & REM. CODE §33.013(b) (“Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly a severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if: (1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent....”).

The Court need not spend much time on this petition. Unless Hyde Park can win its (entirely novel) apportionment argument, the Court would never even reach mental

anguish. And Hyde Park’s apportionment issue is so facially weak that its petition should be denied without the burden of further briefing.

II. HYDE PARK’S APPORTIONMENT THEORY CANNOT BE SQUARED WITH THE TEXAS STATUTE.

The petition urges the Court to establish not one but three new tests for reweighing apportionment findings. But it does not even begin to explain how its “three historical tests” can coexist with Texas’ comparative-responsibility statute, which establishes a comprehensive system for the fact-finder to make precisely those determinations.² TEX. CIV. PRAC. & REM. CODE §33.003.

A. Hyde Park Argues That “Three Historical Tests” Mean It Could Never Be More Responsible Than Lowry.

Looking to California case law for inspiration,³ Hyde Park urges the Court to adopt what it names “the three historical tests for comparing fault” and to “admonish Courts of Appeals to weigh the evidence under these three historical standards.” Pet. 14.

Hyde Park’s suggested new rules of law are:

First, as a matter of law, intentional misconduct is worse than negligent misconduct. Second, active fault is worse than passive fault. Finally, criminal conduct is worse than mere civil misconduct.

Pet. at 14.

² The petition briefly cites Chapter 33 when trying to brush off a preservation-of-error defect. See Pet. 11n.10. But it never reconciles its “three historical tests” with the Texas statute.

³ For what it’s worth, the petition overstates California law. It relies on *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643 (Cal. App. 2nd Dist. 1994), which was really about a defective jury charge. The charge in that case actually prevented the jurors from weighing intentional torts alongside negligence, instead asking them to weigh negligence alone. *Id.* at 658-59. The Texas statute solves that problem.

Even beyond the lack of foundation, what’s striking about those “three historical tests” is that they focus on whether conduct is morally “worse”—not who had a greater role in causing the plaintiff’s damages. *Cf.* TEX. CIV. PRAC. & REM. CODE §33.003(a) (“with respect to each person’s causing or contributing to cause in any way”). None of Hyde Park’s “three historical tests” even address causation. Active conduct can have a smaller causal effect than passive conduct. Whether conduct happens to be classified as a crime has nothing to do with the chain of causation. Nor does a defendant’s state of mind. Hyde Park’s proposed tests do not fully capture comparative responsibility.

B. Texas’ Comparative Responsibility Statute Blocks This Theory.

Texas has adopted a statute that does not leave room for Hyde Park’s rigid rules. Instead, it lets the fact-finder weigh competing factors under the record in each case:

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person’s causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these

TEX. CIV. PRAC. & REM. CODE §33.003(a).

The Texas statute asks the fact-finder to weigh “each person’s causing or contributing to cause in any way” the injuries. *Id.* That encompasses “negligent act[s] or omission[s],” *id.*—foreclosing Hyde Park’s argument about active versus passive actions. It includes whether the action “violates an applicable legal standard,” *id.*, so the fact-

finder can already weigh whether tortious conduct is also alleged to be criminal.⁴ And it applies to both intentional torts and mere negligence. *Id.* §33.002(a) (“any cause of action based on tort”). Hyde Park’s simplistic tests would slice apart the comprehensive statutory scheme designed by the Legislature.

Certainly there are times when a party might argue that the evidence is legally insufficient to support an apportionment. But Hyde Park did not take that task seriously. It did not offer evidence to overcome the record of Hyde Park’s critical role in causing these damages.

C. Rigid Tests Would Mean Absurd Results and Bad Incentives.

Even ignoring the statute, there would be serious problems with Hyde Park’s rules. They are easy to say but difficult to apply.⁵ Worse, they are no reliable as measures of responsibility. For example, it is easy to think of situations in which one defendant’s mere negligence may have contributed far more to actually causing an injury than did another defendant’s intentional conduct. The apportionment statute wisely leaves those subtle, fact-specific determinations to the fact-finder.

⁴ Indeed, the Texas Legislature gave specific guidance that forecloses Hyde Park’s blanket rule. The statute says that some crimes—but not all—get joint-and-several liability under §33.013(b)(2) (listing crimes that qualified for this special penalty). The Legislature did not choose to let one defendant’s crime automatically reduce the liability of the other tortfeasors.

⁵ It is unclear how Hyde Park’s tests would apply here. For example, there is no finding that Lowry’s conduct is criminal, or that Hyde Park’s failure to report was not. There is no finding that Lowry was not also negligent (in addition to her intentional conduct); the jury was not asked to evaluate that. Nor is there any finding that Hyde Park’s affirmative decision to retain Lowry or its subsequent cover up was “passive” (it was not).

For employers, the incentives suggested by Hyde Park would be backwards. In a negligent-hiring context, they would make employers less liable for being more negligent. Here’s why: Hyde Park hired someone who acted intentionally to abuse a child. But by Hyde Park’s logic, it should be held less liable than if it had instead retained a merely clumsy employee whose accident hurt a child. That incentive would be wrongheaded. Defendants should not be less liable for being more negligent.

There may be cases when an employer should be held more liable than the errant employee, and some when it would be less. But Hyde Park is surely wrong that there is an “as a matter of law” rule that rewards employers for being more negligent in retaining and supervising an employee that abuses a child. Because this apportionment is supported by legally sufficient evidence, Hyde Park’s challenge fails.⁶

III. HYDE PARK’S MENTAL-ANGUISH THEORY MISREADS *LIKES*.

The Court should never reach the mental-anguish issue because the apportionment issue is fatal to Hyde Park’s claims. Hyde Park is jointly and severally liable for the damages attributable to Lowry’s conduct, which it concedes could support mental-anguish damages. *See* Part I, *supra*.

But in any event, Hyde Park’s mental-anguish theory starts from a mistaken premise. Hyde Park believes that *City of Tyler v. Likes* established four rigid, exclusive categories and that physical child abuse is not—as a matter of law—enough for mental-anguish damages. But *Likes* itself disclaimed any intention to set out an exhaustive list of

⁶ The issue Hyde Park advanced below was factual insufficiency. *See* Part IV.A, *supra*.

fact patterns. Indeed, this Court has recently confirmed that mental anguish damages can be appropriate for abuse of a child left in a childcare center. *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 916-17 (Tex. 2008) (per curiam).⁷

A. The Court of Appeals Did Not Add a “New Category” to *Likes*.

Hyde Park’s argument is built on a false premise—its assertion that *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), established four rigid “*Likes* requirements,” Pet. 7, forming an exclusive set of situations in which mental-anguish damages can be recovered. From that false premise, Hyde Park reasons that, by permitting an award of mental-anguish damages here, the court of appeals “added a *new category* to the group of cases” permitted to have such damages. Pet. ix (emphasis in original).

⁷ The petition’s half-hearted plea for “judicial notice” of a medical treatise, *see* Pet. 3n.2, ignores and subverts Texas’ expert-witness procedure. It is also irrelevant to the issues that Hyde Park chose to preserve in its petition. *See* Pet. xii (issues presented); *see also* Op. 9 (expert issue waived in trial court).

But that just isn't what *Likes* says. Contrasting the property-damage claim before it, the *Likes* Court gave some examples of fact patterns that would support mental-anguish damages. But it made clear that this list was “far from exhaustive,” and the Court disclaimed the “perhaps impossible task” of enumerating everything:

The preceding analysis is obviously far from exhaustive, for the law of mental anguish damages is rooted in societal judgments, some no longer current, about the gravity of certain wrongs and their likely effects. . . . Our opinion today does not attempt the perhaps impossible task of distilling a unified theory of mental anguish from the existing precedents. Instead, we seek merely to erect a framework of existing case law to assist in examining the claim before us.

962 S.W.2d at 496. Hyde Park's mechanical reading of *Likes* violates how the *Likes* Court described its own holding.

Likes did not try to list every possible fact pattern. Hyde Park's argument that the court of appeals “added a new category” is empty hyperbole.

B. This Award Is Consistent With the Court's Discussion in *Likes*.

It should be no surprise that mental-anguish damages might result from intentional physical abuse inflicted by a childcare worker. Far from being a “new category,” this is consistent with the examples given in *Likes*.

Likes made clear that damage inflicted intentionally can support mental-anguish damages. 962 S.W.2d at 495. There is no dispute that Hyde Park's teacher intentionally physically abused a two-year-old child. Yet Hyde Park argues—even though this mental

anguish resulted from intentional conduct—it should be off the hook because that mental state was held by its employee, not by the institution’s board of directors.⁸

But these two defendants were not strangers. This is not a case where two independent tortfeasors acted separately to cause an effect (like a three-way car accident, or two different construction defects leading to one building collapse). Hyde Park put Lowry in a position to do this harm, leaving her in authority long after concerns were raised about her rough treatment of children. Hyde Park then hid that conduct from authorities and even the child’s parents. Hyde Park’s actions were indispensable to this causal chain. The Court should not shield Hyde Park from mental-anguish damages that were a foreseeable result of its own actions.

Independently, the *Likes* Court noted that some injuries are “of a shocking and disturbing nature [such] that mental anguish is a highly foreseeable result.” *Id.* at 496. As an example, the Court included claims brought by “bystanders for a close family member’s serious injury.” *Id.* (citing *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988)). The physical abuse of a child entrusted to a childcare center is outrageous in that sense.

Hyde Park also claims that the “special relationship” mentioned in *Likes* can never apply to an institution. But that does not follow. Surely an institution can undertake a heightened duty under tort law. We trust institutions with the things closest to us. Here, parents entrusted their children to Hyde Park on a daily basis. An institution that acts as a

⁸ *Likes* was a single-defendant case and so had no occasion to speak to employer-employee liability. 962 S.W.2d 492. In any event, Hyde Park is jointly and severally liable for damages caused by Lowry’s conduct, *see* Part I, *supra*.

childcare center should not be held to a lower standard of care than an individual who offers the same services.

* * * * *

The verdict was that Hyde Park caused the intentional, physical abuse of a child. Although Hyde Park's governing board may not have taken a vote about whether to abuse this child, it was the institution that kept an abusive teacher in the classroom (and then kept the child's injuries hidden from the parents).

The physical abuse of child, especially by a childcare provider, fits within any reasonable reading of *Likes*. This petition should be denied.

IV. OTHER PRUDENTIAL REASONS TO DENY.

A. The Critical Apportionment Issue Was Framed as Factual Sufficiency.

In the court of appeals, Hyde Park was very clear that its apportionment argument was a question of factual sufficiency. App'nt Br. xi, 12, 31-33, 47 (all referring to "great weight and preponderance"). And the court below addressed it on those terms. Op. 12.

Because Hyde Park chose to limit its challenge to factual sufficiency below, it can only prevail in this Court if the court of appeals applied the wrong standard. But the court of appeals was gracious to Hyde Park's rather novel arguments. After rejecting the suggestion that there was a bright-line requirement that an intentional tortfeasor always is more than 50% responsible, the court examined the record to explain why the jury's apportionment finding was not manifestly unjust. Op. 13. Unless the Court wants to create a new, bright-line rule of apportionment that is at odds with the statute, there is no basis to reverse the court of appeals on this question of factual sufficiency.

B. The *Amicus* Underscores Why This Petition Should Be Denied.

An *amicus* asks the Court to use this petition to make new law. But, if anything, its brief shows why this petition is a poor vehicle. It begins with a mistaken premise—one that shows why this case is not an example of the awards it decries:

It is simply not ‘highly foreseeable’ that a small child who ‘bumps’ his head will incur such damages.

Imperial Br. at 3. But, as explained by the court of appeals, this is not a case about a “bump” on the head. The injuries here were real, and established by expert evidence.

Nor, critically, is this a case where “a small child . . . ‘bumps’ his head.” This was not an accident. There were two culpable actors here—a childcare worker who was intentionally physically abusive, and a childcare center that kept the worker in that classroom and later covered up this abuse. “[E]ven a dog distinguishes between being stumbled over and being kicked.”⁹ The mental-anguish inflicted when a child is intentionally, physically abused by an adult authority figure, the culmination of a pattern of rough treatment tolerated by the school, is not comparable to a slip and fall.

Hyde Park did not preserve and does not advance any issues about the general evidentiary standards for proving mental-anguish damages. If the *amicus*’s concerns have any validity at all, they require a better vehicle. This petition would not permit a meaningful inquiry into those questions, and it should be denied.

⁹ O.W. HOLMES, JR., THE COMMON LAW 3 (Little, Brown, and Co. 1909) (1881).

PRAYER

For these reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 28, 2009, a true and correct copy of this **Response to Petition** was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below.

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