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

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This statement is offered because Hyde Park's brief omits some of the required elements. TEX. R. APP. P. 55.2(d)(2)-(3) & -(5)-(8).

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 teacher, on its premises, against a child entrusted to its care. The judgment 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.).

STATEMENT OF JURISDICTION

Hyde Park's six-page argumentative "statement of jurisdiction" is an improper attempt to expand the page limits. TEX. R. APP. P. 55.2(e) ("the brief must state, *without argument*, the basis of the Court's jurisdiction") (emphasis added).

The judgment below is a final judgment, and the Court has appellate jurisdiction under Texas Government Code §22.001(a)(3) because Hyde Park's third issue turns on construction of the Texas statute governing proportionate responsibility.

ISSUES PRESENTED

1. Hyde Park's negligent retention contributed to cause the intentional, physical abuse of a child entrusted to its care. The damages included mental anguish. Is Hyde Park or another childcare provider categorically excused from paying mental-anguish damages suffered due to its own direct negligence?

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 consistent with Texas law?

    b. If so, is an employer really less culpable as a matter of law when it retains an employee known to behave maliciously or even criminally toward children than if it had retained one who was merely clumsy toward them?

NEW AT THE MERITS STAGE

3. Issue 2 in Hyde Park's merits brief (about expert testimony of causation) was not advanced in its petition, and the Court never granted a motion for Hyde Park to amend its petition. Was this issue waived?

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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. Hyde Park now asks to be absolved, not because it was innocent, but because it was so negligent that it chose to keep the children entrusted to its care in the hands of an employee it knew to have a propensity to be physically abusive.

That theory is wrongheaded: "Obviously, the defendant cannot be relieved from liability by the fact that the risk . . . to which the defendant has subjected the plaintiff has indeed come to pass." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 303 (5th ed. 1984). Hyde Park's theory would lead to terrible incentives and is contrary to Texas law.

STATEMENT OF FACTS

Hyde Park's statement may mislead the Court about which factual matters are contested and which are conceded on appeal. This appeal does not dispute that Hyde Park was negligent or that its negligence caused at least some compensable damages.[1]

A. Hyde Park's Prior Knowledge of Lowry's Abusiveness to Children

This story begins long before P.C. was born. As far back as 1995, Hyde Park had been warned by other teachers about Belinda Sue Lowry's inappropriate conduct toward the children under its care.[2]

The directors of Hyde Park's program were repeatedly informed of Lowry's bad treatment of small children, but chose to leave children in her care. 4.RR.57, 59-61, -63, -66 (Ratliff); 4.RR.106, -120, -123-24, -131 (Delaney); 3.RR.59 (Miller); 5.RR.125, -129, -132-35, -140 (Braden); 6.RR.66-68 (Johnson); 6.RR.14-17, 21 (Basham).

One of those directors testified that parents regularly complained about Lowry's treatment of children, including "flinging" a child across a room. 6.RR.14-17, -19, -21 (Basham). Another testified about several meetings dating back to 1995 with Lowry to "correct" her behavior. 6.RR.110-13 (Gamble). In those meetings, Lowry was warned

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[1] In the court of appeals, Hyde Park elected to challenge only two of the elements of damages — future medical expenses and future mental-anguish damages — leaving two other elements unchallenged. App'nt Br. 12, 30, 48 (prayer).

[2] Hyde Park's assertion that Lowry "would never be accused of intentionally harming children" and its use of ironic quotes around the word "assault," Pet. Br. 1, are inexplicable on this record. Indeed, later in its brief, Hyde Park describes Lowry's conduct towards P.C. as "intentionally criminal behavior" and says Lowry "singled [P.C.] out" and "targeted him." Pet. Br. 47-49.

about her "intense body posture" with children. 6.RR.110 (Gamble). A teacher reported that Lowry had physically thrown small children to the ground from several feet in the air, pushed children off stairs, withheld food from hungry children, pinned children against walls, and forced a child to drink milk until he was gasping for air. 4.RR.106, -120, -123-24, -131 (Delaney). The concern about Lowry's conduct was so great that a teacher presented a written list of concerns to Hyde Park's directors. 6.RR.117-18 (Gamble). From the earliest days, Hyde Park warned Lowry that she was close to being terminated — but did not follow through. 6.RR.110 (Gamble).

B. Before the P.C. Incident, Hyde Park Made a Conscious Decision To Leave Lowry in the Classroom With Small Children

Unlike many negligent retention or supervision cases, this includes at least one concrete decision point at which Hyde Park considered its knowledge of Lowry's abusiveness to children and, in its words, "let [her] off with only a warning." Pet. Br. 4.

Hyde Park director Virginia Braden confirmed that Lowry's employment file reflected a long history of inappropriate, questionable, and troubling behavior with children. 5.RR.124-49. She testified that, before P.C. entered Lowry's classroom, several teachers had already requested transfers out of Lowry's classroom; parents reported seeing Lowry fling a child across a room; parents reported Lowry's "too rough treatment" in disciplining children; four separate Hyde Park teachers reported Lowry pushing or shoving small children in her care; Hyde Park teachers reported Lowry bumping children and intentionally tripping children; and Hyde Park teachers reported Lowry dragging children on the pavement. 5.RR.125, -129, -132-133, -135, -140.

At one point, Hyde Park actually held an internal hearing, at which Lowry was confronted with some of the allegations against her. 4.RR.131-33 (Delaney). At this hearing, Delaney related "all the things I had seen [Lowry] do in front of her . . . [a]nd by the time I got it all over with, they — they were just quiet." 4.RR.131-33. Ultimately, Hyde Park "let [Lowry] off with only a warning." Pet. Br. 4.

C. Eventually, Lowry's Abuse of P.C. Reached the Point Where Even Hyde Park Decided To Take Action. But Hyde Park Did Not Report This Ultimate Incident To Authorities — Or to P.C.'s Parents.

Hyde Park placed P.C. under Lowry's control when he was first enrolled at the age of one, where he was left for for approximately six months. Lowry's pattern during this time, as Hyde Park had been informed, was to single out P.C. for particular mistreatment; she was even seen pushing P.C. to the ground before this final incident. 6.RR.66-68; *see also* 4.RR.59-61 (Ratliff). Another teacher often saw P.C. crying in Lowry's class. 4.RR.98-118, -158.

On January 18, 2005, this came to an end. Ratliff witnessed Lowry intentionally knock P.C. — a child of less than two years — to the ground, causing him to strike his head against the hard tile floor loudly enough that Ratliff could hear the impact. 4.RR.48-61 (Ratliff). Ratliff reported the injury to P.C.'s head to the lead teacher, Shelly Miller. 6.RR.18-19 (Miller). The same day, Miller relayed this to Hyde Park's director Johnson. 6.RR.63 (Miller). Miller told Johnson she feared this would "ruin the [day care] program," and brought up an incident form that Hyde Park used for abuse or neglect. 6.RR.20 (Miller).

Hyde Park did not send a copy of that form to P.C.'s parents, nor did Hyde Park seek first aid or medical attention for P.C. Instead, P.C. was left in Lowry's class for the next few days, with no additional supervision or protection. 6.RR.21-22.

During that time, Hyde Park instead tried to figure out how to protect itself. Director Braden testified that she and the other Hyde Park directors were aware of Lowry's abusive act on January 18, but did not report it to the parents or the appropriate authorities despite a state law requiring any suspected abuse to be reported within 48 hours. 5.RR.114-120; 6.RR.21. Indeed, Hyde Park specifically directed one teacher not to disclose Lowry's abusive act of January 18, 2005. 4.RR.149 (Delaney). Nonetheless, a teacher reported this final incident to Child Protective Services, which began investigating Hyde Park and Lowry and visited the campus.[3] 6.RR.26.

On January 19, 2005, Hyde Park directors held a closed-door meeting about Lowry. Instead of notifying the authorities or P.C.'s parents of any abusive incidents, Hyde Park called its lawyer on January 21, 2005. 5.RR.155. Finally, on January 21, 2005, Hyde Park placed Lowry on administrative leave for her failure to complete some paperwork about P.C.'s head injury. 5.RR.127-28.

Hyde Park directors Virginia Braden, Wanda Johnson, and Janie Basham all testified that Hyde Park concealed Lowry's abusive treatment of P.C. from P.C.'s

[3] Hyde Park tries to create the impression that P.C.'s mother had a hand in this escalation, indicating that "she is an attorney who regularly . . . works with CPS," Pet. Br. 1, and later giving her the dubious honorific "attorney/mother," Pet. Br. 5. But it was one of Hyde Park's employees who called CPS before Turner was even informed about the incident.

parents, child protective services, and the police. 5.RR.137, 144, 169; 6.RR.18-19, 29-30; 6.RR.75, 80, 82, 88.

Ultimately, Director Braden met with Lowry to fire her for her misconduct, but Lowry submitted a letter of resignation. 5.RR.150.

D. <u>It Is Only By Chance (and By Persistence) That P.C.'s Mother Learns About This Incident and Hyde Park's Cover Up.</u>

Hyde Park never did contact P.C.'s mother, Tara Turner. She only learned any of this information by chance — she noticed that Lowry was no longer in her son's classroom, and she was persistent enough in asking employees (who referred her to management) that she ultimately got an answer. 6.RR.221-24. It was in a face-to-face meeting weeks after the final incident that Hyde Park's director Braden told Turner that Lowry had abused P.C. and that the abuse had been serious enough that Lowry was removed from the classroom. 6.RR.221-24, -228-29.

E. <u>Medical Tests Done Ten Days Later Still Showed Physical Evidence Confirming the Abuse.</u>

Having learned of this head injury to her child, P.C.'s mother sought a medical evaluation. P.C.'s pediatrician recommended a head x-ray. 7.RR.33-34 (Turner). Even weeks later, the lingering damage from Lowry's final injury to P.C.'s head was still visible on radiology film. 7.RR.32-33.

F. <u>Expert Testimony About the Lingering Effects of This Abuse</u>

Dr. Mary McCarthy, a psychologist who treats young children, confirmed that the mistreatment and abuse experienced by P.C. at Hyde Park proximately caused a serious psychological and developmental injury to P.C. that would require years of treatment.

See 7.RR.177-78 (McCarthy). Indeed, three psychologists offered evidence confirming that P.C. suffered psychological damage from this pattern of abuse. 7.RR.128-188 (McCarthy); 3.RR, Ex. 3 (Dr. Susan McMillan); 3.RR, Ex. 4 (Dr. Cheryl Dalton). (Hyde Park's brief does not mention the evidence documented by Dr. McMillan or Dr. Dalton.)

Dr. McCarthy reached her conclusions after conducting extensive psychological testing of P.C., conducting interviews of his parents, observing him with his parents, and observing him at school. *See* 7.RR.140, -157-58, -163-64 (McCarthy). Dr. McCarthy considered whether P.C.'s condition was caused by more typical sources of stress and concluded that, within a reasonable degree of medical certainty, the most likely cause of P.C.'s condition was the abuse he suffered at Hyde Park while under Lowry's care. 7.RR.145-46 (McCarthy). She also concluded that P.C. would require regular therapy in order to treat, learn to live with, and overcome this condition. 7.RR.187-88 (McCarthy).

G. The Judgment

The verdict confirmed that Hyde Park was itself directly negligent and that its negligence contributed to cause these injuries. CR.32. The fact-finder apportioned responsibility 80% to Hyde Park and 20% to Lowry. CR.33. The trial court entered judgment on that verdict. CR.157-58.

SUMMARY OF THE ARGUMENT

Although Hyde Park has conceded its own legal negligence, it spends an inordinate amount of energy trying to deflect blame and protest its moral innocence. It goes so far as to say that "many parents and teachers loved" this teacher — whom Hyde Park now asserts behaved criminally toward children — "as a firm teacher." Pet. Br. 2. And Hyde Park belittles much of the intentional physical abuse that this adult teacher inflicted on tiny children, Pet. Br. 2-3 — even though its administrative reaction was to get rid of her, cover it up, and then refuse to answer questions about the abuse.

Accepting responsibility can be hard to do. But when you hold yourself out as a facility for the care of small children, you are under a legal duty to keep them safe. The trial court held that Hyde Park failed in that obligation. The court of appeals rejected Hyde Park's appellate challenges and affirmed. This Court should deny review.

First, this petition is such a poor vehicle that the Court can never reach Hyde Park's issue under *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997). That argument is knocked out by a one-two punch: Hyde Park concedes that mental-anguish damages are proper against Lowry, and the apportionment finding makes Hyde Park jointly and severally liable for those damages. And, even if Hyde Park's challenge to that apportionment had merit — which it does not — the result would be a remand, not this Court's rendering some different apportionment percentage that might clear a path to reach the *Likes* question.

Nor is there any merit to the *Likes* issue. In *Likes*, the Court described a framework for when mental-anguish damages are appropriate, with several instructive examples. 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—nor should it be.

Second, Hyde Park's expert-witness issue is new at the briefing stage — it was omitted entirely from the petition for review. It has been waived. And, in any event, it would blink reality to require an expert about mental-anguish damages to offer proof that the plaintiff lived in a bubble and did not have other stresses in life.

Third, Hyde Park's apportionment theory, which it lifts from a collection of California decisions under a different regime, makes no sense when transplanted to Texas. The Texas Legislature has already enacted a comparative-responsibility statute that covers this situation. And it did not adopt the kinds of blunt, clumsy pseudo-philosophical tests urged by Hyde Park. Instead, the Texas Legislature built its statute on causation to fold as many potential responsible third-parties into the jury charge as possible, whether those actors behaved intentionally or even criminally. Hyde Park does not even attempt to reconcile its theory with this controlling statute.

ARGUMENT

I. THIS PETITION SHOULD BE DENIED.

A. The First and Third Issues Are Linked: The Court Cannot Reach *Likes* Because of the Apportionment Finding.

The first and third issues are linked in a way that undermines the petition. Either way the Court ends up resolving the third issue, it would not reach the heart of the *Likes* issue. Here's why: With regard to its first issue (about *Likes*), Hyde Park concedes that Lowry is responsible for mental-anguish damages. The apportionment finding that Hyde Park was 80% responsible for the abuse in its childcare center makes it jointly and severally liable for the compensatory damages inflicted by Lowry.[4] Thus, if the Court decides against Hyde Park on apportionment, Hyde Park is jointly and severally responsible for the damages inflicted by Lowry.

On the other hand, if the Court decides in Hyde Park's favor on apportionment, it must confront the question of what remedy is appropriate. In the court of appeals, Hyde Park advanced this as a pure question of factual-sufficiency. App'nt Br. xi, 12, 31-33, 47 (all referring to "great weight and preponderance"). And that is indeed the proper way to think about its complaint. *See* Part IV. On a question of factual sufficiency brought to this Court, the proper relief would be a remand to the court of appeals to reconsider its own factual-sufficiency analysis — not rendition of a new apportionment percentage that might make the *Likes* issue relevant.

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[4] TEX. CIV. PRAC. & REM. CODE §33.013(b) ("[E]ach liable defendant is, in addition to his liability under Subsection (a), jointly a severally liable for the damages recoverable by the claimant . . . if: (1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent….").

B. The Second Issue Is Simply Waived.

The petition omitted the second issue. It took more than six more months for Hyde Park to even mention it — in an unsolicited supplemental brief. *See* Part III.

C. Hyde Park's Refusal To Contest Negligence or the Computation of Damages Makes This a Bad Vehicle To Reach Any Broader Issues.

Although Hyde Park's rhetoric defends its innocence and attacks the parents' motives, none of its legal issues do so. And the facts conceded here do not lend themselves to a narrow holding; for Hyde Park to win, the Court would have to announce a sweeping new rule of law about mental anguish. These are terrible facts for such a rule. There were two culpable actors here — a childcare worker who was intentionally physically abusive, and a childcare center that knew she had that tendency but left her in the classroom and then later covered up the abuse. Mental anguish is a natural result when a child is intentionally, physically abused by an adult authority figure over a period of months.

II. ISSUE 1: HYDE PARK'S MENTAL-ANGUISH THEORY MISREADS *LIKES*.

A. This Judgment Is About Hyde Park's Direct Negligence — Not Vicarious Liability or Negligent Infliction.

Hyde Park has an independent duty to provide children under its care with a safe environment. The fact-finder was asked whether Hyde Park's negligence was a direct cause of these harms; the affirmative answer has been conceded on appeal. CR.32.

It is misleading for Hyde Park to try to recharacterize this case as being about merely vicarious liability. Pet. Br. 25. Vicarious liability was never pleaded or advanced at trial. Nor do the words "vicarious liability" even appear in the court of appeals'

decision. The judgment was based on Hyde Park's direct negligence, and that negligence is not in dispute.

By the same token, Hyde Park's assertion that this case is about "negligent infliction of emotional distress," Pet. Br. 13, is completely baseless. Hyde Park would equate *any* award for mental-anguish damages following negligence to an award for negligent infliction. But as this Court noted in *Likes*: ". . . even where the defendant's conduct was merely negligent, 'Texas has authorized recovery of mental anguish damages in virtually all personal injury actions.'" 962 S.W.2d 489, 495 (Tex. 1997) (citing *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex. 1995)).

Hyde Park may believe that invoking "vicarious" liability creates an illusion of distance between Hyde Park and the abuse that P.C. suffered in its childcare center, and it knows that negligent infliction is not recognized in Texas. But those causes of action are not before the Court. Why does Hyde Park want to change the subject? Because the judgment is that Hyde Park breached its own, nondelegable duty to P.C. – the duty to use reasonable care in staffing and managing its day care center.

B. Hyde Park Breached Its Own Duties to P.C.

Hyde Park's duty to the children in its care exists separate and apart from Hyde Park's potential vicarious liability for the conduct of its employees. Hyde Park management has the exclusive right to hire, supervise, and retain the teachers in the center. Hyde Park then invites parents to leave their children in its care. When Hyde Park knows that one of its teachers has the propensity for abusive behavior towards

young children, Hyde Park alone has the power – and the duty — to remove that abusive teacher before a child is harmed.

Hyde Park retained and failed to supervise Lowry. Hyde Park cannot escape liability for damages by blaming Lowry for engaging in the very criminal conduct that other Hyde Park teachers warned management about. The situation is analogous to a negligent entrustment case. *See* William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 BAYLOR L. REV. 617, 618 (2003). An owner who negligently entrusts his vehicle a twelve year-old driver is not liable to third parties unless the driver actually causes damages to a third party. But when that happens, the vehicle owner is not off the hook. To the contrary, the vehicle owner is a but-for cause of the injury. But for Hyde Park's failure to respond to many reports of Lowry's abusive tendencies, P.C. would never have been injured under Hyde Park's care.

C. There Is No Categorical Rule Exempting Hyde Park from the Mental Anguish Damages It Contributed To Cause.

Hyde Park contends that months of physical and emotional child abuse — categorically — cannot support an award for mental anguish damages unless the abuser sufficiently physically maims a child. Pet. Br. 18 (emphasizing the word "serious" in "serious bodily injury").

Hyde Park would find such a rule in *City of Tyler v. Likes*. But the *Likes* Court refused to state a list of exclusive categories. Instead, it gave guidance to lower courts

about the situations that might warrant mental-anguish damages. The physical abuse of a small child is surely among the situations in which mental-anguish damages can naturally be expected. The Court should reject Hyde Park's request for a new categorical rule that would exempt itself — and all other childcare providers — from responsibility for is own negligence.

1. P.C.'s Injuries Were More Serious Than Hyde Park Admits.

In what can only be called a jury argument on appeal, Hyde Park repeatedly derides P.C.'s injury as a "bump on the head." Pet. Br. 17. Contrary to Hyde Park's claim, the evidence shows that P.C. sustained a real injury. The medical evidence confirms that P.C. suffered such a severe blow to the head that it was still visible on radiology films taken weeks later. 7.RR.32-33. Perhaps if Hyde Park's refusal to inform the parents had not prevented P.C. from getting prompt medical attention, there might be a more contemporaneous medical record describing the injury when it was fresh. A blow to a child's head can result in permanent neurological impairment, intracranial bleeding, and even death. This Court should not embrace Hyde Park's flippant attitude toward a head injury to a one-year-old child left in its care.

2. Awarding Mental Anguish Damages for Child Abuse Is Consistent With *Likes*.

Hyde Park builds its argument on the erroneous assumption that *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997), establishes an exclusive list of four categories of cases in which mental anguish is available." But that cannot be squared with even a cursory reading of *Likes*. This Court stated expressly that it was *not* setting out an

exhaustive list, but merely setting the stage for its own disposition of the *property* damage claim before it:

> 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.

Likes, 962 S.W.2d at 496. Hyde Park's entire argument is built on the contrary view.

And, even if the Court now adopted Hyde Park's view that *Likes* established rigid categories, the circumstances here fit within them. P.C. suffered a head injury on January 18, 2005 that did not subside for weeks. 7.RR.33; 3.RR, Ex. 2. Hyde Park's teachers verified that P.C. endured emotional and physical mistreatment throughout the six month period Hyde Park placed him in Lowry's care. *See* pp. 3-5, *supra*. The combined effect was a psychological disorder at a critical developmental stage in his life that warranted mental-health therapy. 7.RR.137-44, -187-88.

The other examples offered in *Likes* are also implicated here. P.C. had a special relationship with Hyde Park that might give rise to a heightened tort duty; the law recognizes heightened tort duties in regard to children. And outright child abuse falls under the category of injury "of such shocking and disturbing nature that mental anguish is a highly foreseeable result." *Likes*, 962 S.W.2d at 495-96. Finally, this case involves the intentional assault of a child, at a childcare center where it was widely known that this teacher had a propensity for abuse. Hyde Park admits that Lowry acted intentionally to assault P.C. Hyde Park cannot disassociate its negligence in retaining a teacher with a

propensity to commit child abuse from the consequences of the abuse. This fact pattern fits within the concerns of the Court in *Likes.*

3. The Court Has Confirmed That Mental Anguish Is Possible from Child Abuse, Even Without Serious Bodily Injury.

The court of appeals below cited *Adams v. YMCA*, 265 S.W.3d 915 (Tex. 2008) (per curiam), for the proposition that expert testimony regarding the reasonable probability of future mental anguish damages, coupled with testimony of family members regarding the abused child's behavior after the abuse, was sufficient to survive a no-evidence challenge, "even in the absence of bodily injury." *Hyde Park Baptist Church v. Turner*, 2009 Tex. App. LEXIS 586, *9 (Tex. App – Austin, 2009). Hyde Park concedes that if the court of appeals is correct in this citation of *Adams*, "then this Court should decline this Petition for Review." Pet. Br. xvii. This citation is correct, and as Hyde Park admits, the Petition should be denied.

Some context is helpful. In the Court below, Hyde Park relied heavily on the San Antonio Court's decision in *YMCA of San Antonio v. Adams*, 220 S.W.3d 1 (Tex. App.—San Antonio 2006), to support its central thesis that "evidence . . . from a psychologist" actually "amounted to *no evidence* of future mental anguish." Hyde Park App. Br. 25 (emphasis in the brief). This Court later reversed the San Antonio Court's decision, holding that the evidence was indeed legally sufficient to show future mental anguish. *See Adams*, 265 S.W.3d at 917-18. This Court credited testimony that the child would suffer mental anguish later in life, even if the incident was still "in a vault" and the emotional processing had not yet begun. *Id.* at 917. The Court found that "emotional

outbursts and phobic anxiety, coupled with expert testimony" were evidence of future mental anguish damages in child abuse cases. *Id.* at 918. In *Adams*, the Court credited testimony that child-abuse victims "are often not diagnosed with depression and anxiety until they are adults in their thirties, forties, and fifties." *Id.* at 917.

The present case offers an even stronger evidentiary basis than *Adams* in that it features concrete evidence of current, ongoing mental anguish.[5]

Hyde Park attempts to distinguish *Adams* on the basis that it involved sexual abuse of a child, which it claims is "an entirely different category" under *Likes*. Pet. Br. 22. But *Likes* does not list a separate "category" for sexual abuse, nor does it even discuss the possibility of abuse of children.

This slippery argument highlights the danger of adopting Hyde Park's treatment of *Likes* as an exhaustive list of the limited circumstances where mental anguish damages may be awarded. Even Hyde Park admits that child sexual abuse warrants mental anguish damages, but — unless the Court is willing to read *Likes* flexibly — it is not clear how such damages could be awarded for the conduct in *Adams*.

4. Reading *Likes* To Encompass the Possibility of Mental-Anguish Damages Matches Other Areas of Texas Law, Which Recognize That Child Abuse Damages the Mental Health of Children.

In a variety of contexts, Texas law recognizes that mental anguish is a natural and expected result of child abuse.

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[5] By contrast, the evidence in *Adams* was such that the jury declined to award past mental anguish damages at all. *Adams*, 265 S.W.3d at 916. The Court found that did not bar the recovery of future mental anguish.

(a) The Texas Family Code Recognizes Child Abuse as Uniquely Harmful to the Mental Health of Children.

The Texas Family Code recognizes the emotional harm caused by child abuse. Hyde Park violated the mandatory reporting statute, which requires child care providers to report any *suspicion* of child abuse within 48 hours. TEX. FAM. CODE §261.101 (emphasis added). But the mandatory reporting statute not only highlights the urgency of reporting and rapidly responding to child abuse, it acknowledges that child abuse causes mental anguish:

> "§261.101. Persons Required to Report; Time to Report
>
> (a) A person having cause to believe that *a child's physical or* ***mental health*** *or welfare has been adversely affected by abuse* or neglect by any person shall immediately make a report as provided by this subchapter.
>
> (b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001 or 261.401, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code…"

TEX. FAM. CODE §261.101(a), (b) (emphasis added).

The Texas Family Code echoes this acknowledgement in the penalty clause attached to the mandatory reporting law, which classifies Hyde Park's admitted failure to report the abuse in this case as a Class A Misdemeanor:

> "§261.109. Failure to Report; Penalty
>
> (a) A person commits an offense if the person has cause to believe that a *child's physical or* ***mental health*** *or welfare has been or may be adversely*

> *affected by abuse* or neglect and knowingly fails to report as provided in this chapter.
>
> (b) An offense under this section is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the child was a person with mental retardation who resided in a state supported living center, the ICF-MR component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect."

TEX. FAM. CODE §261.109(a), (b) (emphasis added).

Finally, the Texas Family Code also recognizes child abuse as a basis for terminating a parent-child relationship by the state:

> "(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
>
> (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual)…"

TEX. FAM. CODE §161.001(L)(ix).

(b) The Penal Code and the Texas Civil Practice and Remedies Code Also Have Provisions About Child Abuse.

Under Civil Practice and Remedies Code §33.013, a defendant can be jointly and severally liable, regardless of the percentage of responsibility assigned to them by the fact-finder, if the defendant intentionally injures a child (as defined under the Texas Penal Code §22.04). Elsewhere in the code, child abuse supports the award of exemplary damages. TEX. CIV. PRAC. & REM. CODE §41.008(c)(7). It would make little sense for

the Court to categorically exclude child abuse from recovery of mental anguish damages, when the Legislature has recognized that it warrants this heightened protection.

* * * * *

Hyde Park is taking the untenable position that Texas law does not recognize that child abuse causes mental anguish in children. But the Penal Code, the Civil Practice and Remedies Code, and the Family Code all carve out child abuse as an exceptional circumstance precisely because it causes mental anguish in children. Hyde Park would have this Court categorically exclude child abuse from mental anguish damage awards absent a "serious bodily injury." Under such a restrictive view, a child purposely locked in a dark closet alone, daily, for months on end, would not be eligible to recover mental anguish damages. Under Hyde Park's view, a child who is beaten multiple times a day could not recover mental anguish damages, absent broken bones or whatever arbitrary physical injury threshold Hyde Park believes should exist. It would be a dramatic departure from Texas law for this Court to retreat from the refrain of Texas law recognizing that child abuse causes mental harm to children.

C. <u>The Proof of P.C.'s Future Mental Anguish Was Significant.</u>

Despite admitting that P.C. was abused by Lowry, Hyde Park claims there was "no evidence" supporting the award of future mental anguish. In reviewing legal insufficiency of the evidence, the Court must "consider the evidence in the light most favorable to the challenged finding, except if the jurors could not disregard the contrary evidence." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998). When the evidence would enable the reasonable and fair-minded person to reach the

verdict under review, the evidence is legally sufficient. *See Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). A no-evidence challenge fails if more than a scintilla of probative evidence supports the finding. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.,*953 S.W.2d 733, 738 (Tex. 1997). An award of mental anguish damages will survive a legal sufficiency challenge when "the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine." *Houston Livestock Show and Rodeo, Inc. v. Hamrick et al.*, 125 S.W.3d 555, 579 (Tex. App.—Austin 2003, no pet.) *citing, Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995).

The damage award for P.C.'s future mental anguish is supported by more than legally sufficient evidence. The Curtis family proved that Hyde Park's negligence in subjecting P.C. to Lowry's abuse for over six months caused a serious psychological disorder called adjustment disorder. 7.RR.140-43. At trial, a clinical psychologist specializing in treating children under five, Dr. Mary McCarthy testified that the physical and emotional abuse P.C. endured at Hyde Park would require at least four years of therapy to treat his psychological condition. 7.RR.187-88. In presenting qualified expert testimony that P.C. would need four years of future mental health care in order to overcome and live with his psychological damage, the Curtis family presented sufficient evidence that P.C. would be suffering from mental anguish in the future. Dr. McCarthy reached this conclusion after meeting with P.C. and his parents nine separate times over ten hours, observed him at school, and conducted a battery of objective diagnostic psychological testing of P.C. 7.RR.140; 157-58; 8.RR.163-64.

In addition to Dr. McCarthy's expert testimony and diagnostic testing, additional supporting evidence of P.C.'s mental anguish was presented through the medical records of two other treating psychologists, Dr. Carol Dalton and Dr. Susan McMillan. *See* RR 3, Ex. 4; Ex. 3.

Indeed, even the testimony of Hyde Park's expert forensic psychologist, Dr. Joann Ponder, further supports an award for mental anguish damages. Dr. Ponder testified repeatedly that Lowry's conduct, "if true," could be emotionally damaging to P.C.:

> Q. You agree that purposely knocking a child to the ground at [P.C.]'s age while he was in Sue Lowry's class can be damaging to a child?
>
> A. If that's what happened, yes.
>
> . . .
>
> Q. Now, you even agree that doing that to a child at [P.C.]'s age can be more than just physically damaging, it can actually be emotionally damaging? You agree with that too, don't you?
>
> A. Yes, if that's what happened to him.
>
> . . .
>
> Q. So you agree that if the child – a teacher like Sue Lowry is singling out a child she does not like and makes it clear to the child she does not like him, that could cause emotional harm to the child?
>
> A. If that's what happened…
>
> Q. So if it happened yes, it could cause emotional harm, couldn't it?
>
> A. Yes. Yes, it could."

8.RR.172-74.

It bears emphasis that Hyde Park's trial strategy was to deny that the abuse even occurred. On appeal, Hyde Park no longer denies that Lowry's abuse of P.C. occured —

Hyde Park now calls her treatment of P.C. "criminal misconduct" under the Texas Penal Code. Pet. Br. 47. But, because Hyde Park has shifted litigation positions, its own expert's testimony condemns its position and should remove any doubt that the abuse P.C. suffered at Hyde Park caused mental anguish damages.

A plaintiff can recover mental anguish damages if he was physically injured, as P.C. was. Mental anguish damages are recoverable in virtually all personal injury cases. *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997). In a suit for assault, plaintiffs can recover mental anguish damages even if the assault caused no physical injury. *Fisher v. Carrousel Motor Hotel,* 424 S.W.2d 627, 630 (Tex. 1967); *see Stokes v. Puckett*, 972 S.W.2d 921, 925 (Tex. App.—Beaumont 1998, pet. denied). To recover damages for future mental anguish, Plaintiff must prove that there is a reasonable probability that mental anguish will be suffered in the future. *Hicks v. Ricardo,* 834 S.W.2d 587, 590 (Tex. App.—Houston [1st Dist.] 1992, no writ). Here, the Curtis family presented evidence that within a reasonable degree of medical probability that P.C.'s ongoing mental health problems would require therapy for at least four additional years. 7.RR.187-88. The record is more than legally sufficient.

Dr. McCarthy also testified that P.C. exhibited other evidence of significant mental anguish that goes beyond "mere worry, anxiety, vexation, embarrassment, or anger." *Saenz v. Fidelity & Guar. Ins. Underwriters,* 925 S.W.2d 607, 614 (Tex. 1996). Dr. McCarthy spent numerous therapy sessions with P.C., conducted objective behavioral and developmental tests, interviewed his parents regularly, interviewed his teachers, and reviewed his medical records prior to concluding that he suffered from a significant

mental health disorder. 7.RR.137-44. Hyde Park's characterization of P.C.'s condition as anxiety without more is oversimplified and incorrect.[6] Dr. McCarthy testified that, in fact, P.C. suffers *significant* levels of anxiety, 7.RR.140-41 — the type of "high degree of mental distress" that supports a finding of future mental anguish. *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). Dr. McCarthy testified that P.C.'s adjustment disorder was not simple anxiousness or nervousness, but rather a behavioral disorder that was *significantly* and *statistically variant* from other children his age. 7.RR.141-42. Dr. McCarthy testified that *objective* testing she conducted for P.C. proved the significance of his disorder. 7.RR.141. P.C.'s psychological damage and mental anguish that resulted from it evidenced itself in relationships and interactions he had with others. Dr. McCarthy testified that his current day care teachers noted behaviors that reached an "at risk level" for depression. 7.RR.142.

Dr. McCarthy concluded that within a reasonable degree of medical certainty, P.C.'s adjustment disorder and mental health damage will continue for years even with appropriate treatment. 7.RR.187-88. Future mental anguish damages are recoverable if there is a "reasonable probability that the complainant will suffer from compensable mental anguish in the future." *Lubbock County v. Strube*, 953 S.W.2d 847, 857 (Tex. App.—Austin 1997, pet. denied). As Dr. McCarthy established at trial, P.C. passed this threshold for recovery.

[6] A substantial portion of Hyde Park's argument invites this Court to actually reweigh the factual evidence, which is inappropriate in this Court. Tex. Const. art. V, §6.

In addition to Dr. McCarthy's testimony, the record contained evidence from two treating psychologists confirming P.C.'s psychological damage as a result of Hyde Park's negligence. *See* 3.RR, Ex. 3 (Dr. Susan McMillan records); 3.RR, Ex. 4 (Dr. Cheryl Dalton records). Each of these providers treated P.C. for mental anguish directly caused by the abuse he suffered at Hyde Park. Thus, the jury received evidence from three psychologists regarding the mental anguish and damage suffered by P.C.

P.C.'s parents also testified regarding P.C.'s mental anguish. Tara Turner, P.C.'s mother, testified that before her son attended Hyde Park he was a sound sleeper. Prior to attending Lowry's class at Hyde Park, Ms. Turner described P.C. as an outgoing, affectionate, happy child. 7.RR.38.

But after spending six months in Lowry's care at Hyde Park, P.C. experienced frequent nightmares, and general trouble sleeping. 7.RR.45. Ms. Turner testified that his relationships with those close to him began to change during the time he was under Lowry's care at Hyde Park and following his removal after the abuse.

P.C. used to be very affectionate and close with his grandmother before attending Lowry's class. 7.RR.40. Following six months of abuse in Lowry's Hyde Park class, the jury learned that P.C. would no longer allow his grandmother to hold him or hug him.[7] 7.RR.47. P.C. became more aggressive, sad, and violent. (7.RR.52-53).

Following Lowry's abuse at Hyde Park, P.C. began hurting the family dog for the first time. 7.RR.37-38. P.C. began hitting himself in the head and hitting his head on the

[7] Lowry was around the age of P.C.'s grandmother.

floor. 7.RR.53-54. Sadly, one of the first sentences P.C. uttered in his life was that "Sue hurt [him]."[8] 7.RR.61.

Ms. Turner testified that, following his time at Hyde Park, her son developed new behaviors. She testified that her son would try to completely control the environment around him. 7.RR.70. P.C. would lose control at the slightest deviation from routine. 7.RR.72. Dr. McCarthy confirmed these behaviors in her own private sessions with P.C. and testified that these behaviors were an *objective* manifestation of his adjustment disorder. 7.RR.150-151. Dr. McCarthy carefully explained to the jury that these behaviors exhibited by P.C. were not the types of "normal" disobedience that many children P.C.'s age exhibit. 7.RR.152. Rather, Dr. McCarthy testified that in order for the behavior to be *clinical*, as it is with P.C., the behavior has to be extreme enough to interrupt his development. 7.RR.152. She testified that P.C.'s psychological disorder and damage rose to this level and, in fact, was not a matter of choice. 7.RR.152.

P.C.'s mental anguish is severe, substantial, causes a significant disruption in his daily life, causes a significant disruption in his relationships with adults, and is "a high degree of mental stress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *See Saenz,* 925 S.W. 2d at 614. Moreover, the Curtis family presented ample evidence as well as competent, expert medical testimony that P.C.'s ongoing mental health problems would require therapy, within a reasonable degree of medical probability, for at least four additional years. *See Hicks v. Ricardo,* 834 S.W.2d 587, 590

[8] Belinda Sue Lowry went by "Sue" when she was P.C.'s teacher at Hyde Park.

(Tex. App.—Houston [1st Dist.] 1992, no writ) (to recover future mental anguish damages, Plaintiff must prove that there is a reasonable probability that mental anguish will be suffered in the future). As such, the Curtis family provided evidence that P.C. would be suffering mental anguish in the future. Accordingly, the Curtis family presented the jury with legally sufficient evidence to support the award for future mental anguish.

III. ISSUE 2: HYDE PARK WAIVED ITS CAUSATION CHALLENGE BY OMITTING IT ENTIRELY FROM THE PETITION FOR REVIEW.

In the court of appeals, Hyde Park advanced an expert-witness argument, attacking the reliability of Respondents' expert. App'nt Br. 19-25. Hyde Park lost, both on the merits and because it had waived this error at trial. Op. 8-9. When Hyde Park filed its petition for review, it made a strategic choice to entirely drop this issue. Instead, it presented two narrower issues — one about legal categories of damages (its *Likes* argument) and one about apportionment. Pet. xii. Neither of those issues "fairly includes" the adequacy of specific expert testimony to show a chain of causation leading to mental anguish. The expert-witness issue was waived. *See* TEX. R. APP. P. 53.2(f); TEX. R. APP. P. 55.2(f) (petition controls).

More than six months passed. Hyde Park then filed a supplemental brief discussing expert testimony — but never amended its petition or moved for permission to do so. *See* TEX. R. APP. P. 53.8. Now, Hyde Park inserts the issue into its merits brief, as though the Court's permission were not even necessary. The issue is waived.

A. This Issue Was Waived.

The smooth functioning of the Court's review process depends on the parties taking the petition seriously. The petition must state "all issues . . . presented for review." TEX. R. APP. P. 53.2(f). The briefing on the merits cannot insert new ones:

> The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.

TEX. R. APP. P. 55.2(f) (emphasis added).

The Court's rules are thus clear that a party's petition — not the merits briefs or some other filing —defines the issues. If a party wants to add a new issue, it must first ask to amend that petition under Rule 53.8, which requires a formal motion showing "good cause." TEX. R. APP. P. 53.8.

1. Hyde Park did not move for permission; a footnote wedged into a supplemental brief does not automatically amend a pending petition for review.

More than six months after filing its petition, Hyde Park filed an unsolicited supplemental brief containing (for the first time in this Court) some arguments about expert testimony and causation. Hyde Park did not move to amend its petition.[9] Nor did the Court treat Hyde Park's filing as a motion or issue an order approving an amendment.

[9] This brief included a footnote acknowledging that this was a new issue that had not been listed among those in the petition for review.

2. Hyde Park did not and could not show "good cause"; the supposedly new law it states is nothing of the kind.

Nor could Hyde Park have met the "good cause" standard set out in Rule 53.8. The only hint of Hyde Park's rationale comes from its supplemental letter, which asserts that adding a new issue might be justified by some intervening change in the law.

But Hyde Park is stretching to make such a claim. It points the Court to *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009), suggesting that this case contained a new legal principle "announced after . . . the opinion below." Hyde Park Supp. Br. 2. What is this supposedly new legal principle? Hyde Park suggests that *Pollock* supersedes the Court's previous decision in *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004), on which the court of appeals relied. *See* Op. 9 (citing *Coastal*). Hyde Park accuses the court of appeals of "mis-citing *Pollock's* predecessor decision, *Coastal* . . . for its holding that Dr. McCarthy's testimony could not be challenged on appeal." Hyde Park Supp. Br. 6.

But this is a false legal premise. There was no great transformation in the law from *Pollock* to *Coastal* — certainly not on this question. To the contrary, the *Pollock* decision was an explicit application of the rule set down in *Coastal* — not a change in law. *Pollock*, 284 S.W.3d at 816-18 & nn.15-16, 19-27. Not only did *Pollock* cite *Coastal*, not only did it quote *Coastal*, but *Pollock* actually lifted its statement of the governing law as an extensive series of block quotes from *Coastal. Id.* at 816-17 (almost a full-page lifted directly from *Coastal*, complete with internal citations). To state the

obvious: *Pollock*'s direct quotation of the legal standard from *Coastal* did not "announce" a new legal test warranting the extraordinary amendment of a petition.

And, in any event, an intervening change in the law should rarely be a valid reason to add a wholly new issue to a petition. If the Court really had announced a new legal test for expert-witness testimony, would every petitioner whose trial happened to include such testimony be permitted to amend— even after choosing to waive that issue at an earlier stage? Hyde Park certainly thinks so. It offers no limiting principle explaining why it should be allowed to amend but a flood of other litigants, after *Pollock* and after future cases, should not. The better course is to continue to require litigants to preserve error when they want to advance an argument to change the law.

Nor is Hyde Park's unexplained delay consistent with "good cause." TEX. R. APP. P. 53.8. Even after the supposedly landmark *Pollock* decision came out in June 2009, Hyde Park chose to wait <u>four more months</u> before mentioning this issue. During those months, the Respondents filed a responsive brief based on the petition and the Court's staff conducted its own review. Hyde Park's delay in raising this question undermines any inference that it had "good cause" beyond its own litigation strategy.

If Hyde Park wanted to argue for a change in the law, it should have done what this Court requires litigants to do every day — raise the issue in the trial court, preserve its objections, raise the issue in the court of appeals, and state the issue in its petition.

B. <u>In Any Event, Hyde Park's Expert-Witness Position Is Meritless.</u>

Because this issue was so clearly waived at the petition stage, this brief will not dwell on it too long. In any event, the court of appeals was correct about it being waived, Op. at 8-9, and about it lacking merit, Op. at 9. Two other points bear note.

First, Hyde Park's theory invites scientific folly. It asks the Court to take "judicial notice" of a chapter from DSM-IV and then accept its expertise — as lay appellate counsel — about how to apply the record to that chapter to reach a medical diagnosis that no expert witness at trial was asked to make. That is, to say the least, not how learned treatises are usually handled. *Cf.* TEX. R. EV. 803(18). The rules of evidence wisely contemplate that such treatises will be "called to the attention of an expert witness," "established as a reliable authority by the testimony or admission of the witness," and then ultimately "may be read into evidence but may not be received as exhibits." TEX. R. EV. 803(18). Judicial notice is not appropriate for the substance of a learned treatise or for the expert judgments necessary to apply such a treatise to the particular facts of a particular patient. Permitting that for the first time on appeal would elevate "trial by ambush" into "appeal by ambush."

Indeed, the DSM-IV itself warns against laypersons trying to take a chapter out of context and reach specific medical or legal conclusions with the benefit of an expert. The treatise includes a "Cautionary Statement" warning against precisely that:

> The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills.

DSM-IV-TR, at xxxvii ("Cautionary Statement").

Second, Hyde Park confuses a yes/no question of legal causation — whether a particular chemical, for example, caused a particular disease — with the kind of graduated harm that can be inflicted as mental anguish. There is no missing analytical step when an expert opines that a particular child's mental anguish is attributable to physical abuse in a child-care center. Hyde Park was free to suggest, offer evidence, or argue to the fact-finder that some of the child's problems might have been due to other life stresses.[10] But, taken alone, that just goes to the level of anguish felt, not to a question of scientific causation that would be disproven if some alternative "cause" could not also be eliminated.

IV. ISSUE 3: HYDE PARK'S APPORTIONMENT THEORY CANNOT BE SQUARED WITH THE TEXAS STATUTE.

Hyde Park discusses apportionment as if the Court were writing on a blank slate of common law. But the Texas Legislature has enacted a proportionate-responsibility statute. *See* TEX. CIV. PRAC. & REM. CODE §33.001, *et seq*. And the Texas proportionate-responsibility statute sets out a framework under which Hyde Park loses.

Hyde Park assembles some California cases and urges adoption of three hitherto unknown "historical tests" for when an appellate court could set aside a fact-finder's apportionment decision "as a matter of law." Pet. Br. 38. But Texas law already has a more flexible and much more nuanced tool for appellate courts to weigh the justice of the fact-finder's apportionment based on the unique circumstances of the record, namely, factual-sufficiency review. The court of appeals here conducted precisely that analysis

[10] Indeed, Hyde park did so — through the testimony of its own expert. 8.RR.112-30.

and concluded (as it should) that this apportionment was not against the great weight of the evidence. The judgment should be affirmed.

A. **The Court of Appeals Has Already Done the Factual-Sufficiency Review That Is Appropriate (and That Hyde Park Requested Below).**

On appeal, Hyde Park does not challenge the judgment that it was negligent and that its negligence directly contributed to P.C.'s damages. Rather, in the court of appeals, Hyde Park argues that the apportionment of 80% responsibility was against the great weight of the evidence. App'nt Br. xi. Hyde Park was very clear that it was framing its argument in terms of factual sufficiency. App'nt Br. xi, 12, 31-33, 47 (all referring to "great weight and preponderance").

The court of appeals explained why, under the deferential factual-sufficiency standard, this apportionment was not manifestly unjust:

> The Curtis family presented evidence that Hyde Park administrators had received numerous complaints from parents and teachers regarding Lowry's inappropriate and abusive behavior towards toddlers in her care. Despite these reports, which spanned a period of ten years, Hyde Park chose to retain Lowry as a lead teacher in a classroom with children under the age of two. Even after Hyde Park administrators received reports that Lowry had injured P.C. by intentionally knocking him to the ground, that she had previously knocked other children to the ground, and that she frequently singled P.C. out for rough treatment, Hyde Park left P.C. and his classmates in Lowry's care for several more days. The jury also heard evidence that Hyde Park administrators attempted to conceal Lowry's treatment of P.C.—and his resulting injury—from his parents, even after P.C. had become the subject of a CPS investigation. Given this evidence and the highly deferential standard of review applied to jury verdicts, we cannot conclude that the jury's allocation of proportionate responsibility was so against the great weight and preponderance of the evidence as to be manifestly unjust.

Slip op. at 13. Hyde Park does not argue that the court of appeals applied the wrong legal standard for factual-sufficiency review. Nor does Hyde Park dispute any of the evidence noted by the court of appeals.

And factual-sufficiency is precisely the right way for an appellate court to wade into the murky waters of apportionment. To be sure, a legal-sufficiency challenge could be mounted about whether a particular responsible party should have been listed at all. *See* TEX. CIV. PRAC. & REM. CODE §33.003(b) (requiring that there be "sufficient evidence" for each person listed). But, once listed, the statute expressly leaves the task of assigning percentages to the finder of fact. *See* TEX. CIV. PRAC. & REM. CODE §33.003(a). And "[w]eighing conflicting evidence and inferences to determine whether a verdict should be vacated as manifestly unjust is appropriately a part only of the reviewing court's factual sufficiency review, a matter committed under the Texas Constitution to the courts of appeals and not to this Court." *In re J.O.A.*, 283 S.W.3d 336, 347 (Tex. 2009); *see also* Tex. Const. art. V, § 6.

Rather, Hyde Park asks this Court to announce a new rule of law that would, irrespective of the evidence, preordain certain outcomes of apportionment for intentional torts, for criminal acts, or for active wrongdoers. The court of appeals considered Hyde Park's basic argument and rejected it as inconsistent with the Texas statute and unfounded in Texas law. Slip op. at 13. That holding was correct.

B. Hyde Park Asks the Court To Ignore the Plain Text and Operation of the Texas Proportionate Responsibility Statute.

Hyde Park proposes new, sweeping rules that would dramatically alter future apportionment cases. But it never squarely addresses the statute that undeniably governs apportionment in Texas. *See* TEX. CIV. PRAC. & REM. CODE §33.003. Hyde Park spends eighteen pages talking about apportionment without ever once quoting, or even citing a specific provision of, the statute the Legislature actually wrote.[11] *See* Pet. Br. 32-50.

The Legislature's design would be gutted by Hyde Park's "three historical tests," each of which runs contrary to at least one specific provision of the statute. Perhaps worse, blessing Hyde Park's pseudo-philosophical rules as legal trump cards that can be raised for the first time on appeal — as Hyde Park has done here — would undermine the certainty in any judgment involving multiple defendants. At the very least, the Court should wait to consider these principles in a case where a defendant has at least laid the factual predicate in the trial court, rather than just recharacterizing the record on appeal.

1. Hyde Park would rewrite the Texas statute to focus on moral fault rather than causation.

As Hyde Park frames its "three historical tests," they focus on moral fault, not on legal responsibility:

> 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. Br. 38; *see also* Pet. 14 (stating the same rules verbatim).

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[11] The only reference is on page 32 of Hyde Park's merits brief, which acknowledges that the submission here was made under Chapter 33.

Those "tests" focus on whether conduct is morally "worse" — not whose actions played the most significant role in causing the plaintiff's damages. That distinction makes a great deal of difference under the Texas statute. The trial court determines which names are listed, and then the fact-finder is asked to:

> determine the percentage of responsibility, stated in whole numbers, for [those listed] 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 about "each person's causing or contributing to cause in any way" the harm. *Id.* Hyde Park's tests do not.

There is no way to square Hyde Park's pseudo-philosophical musing about who is "simply more at fault" with the system designed by the Texas Legislature.

2. The Legislature rejected a rigid distinction between intentional torts and torts sounding in negligence.

Hyde Park contends that someone found to have engaged in intentional conduct is "[a]s a matter of law . . . more at fault" that someone who was negligent. Pet. Br. 41. There is no citation to Texas law, but instead an appeal to the hazy memory that "from the very first weeks of law school" students are taught that intentional torts "often lead[] to awards of punitive damages." Pet. Br. 41.

And that is the thrust of Hyde Park's argument: It suggests a false equivalence between punitive damages (which cannot be apportioned under Texas law) and mental-anguish damages.

But that is belied by the statute. The Legislature expressly carved exemplary damages out of the apportionment statute — it is improper to even ask to apportion those damages between defendants. TEX. CIV. PRAC. & REM. CODE §33.002(c)(2) ("This chapter does not apply to . . . a claim for exemplary damages included in an action to which this chapter otherwise applies."). The Legislature similarly carved out workers compensation claims, *id.* §33.002(c)(1), as well as damages for certain claims involving methamphetamines, *id.* §33.002(c)(3). But the Legislature did not include among this list any special carve-out for mental-anguish damages. When the Legislature has listed some items but excluded others, the most natural reading is that the omission was deliberate. *United Services Automobile Ass'n v. Brite*, 215 S.W.3d 400, 403 (Tex. 2007) (citing *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 273-74 (Tex. 1999)).

Indeed, creating some rule that distinguished out mental-anguish damages would dramatically narrow the scope of the proportionate-responsibility statute. Mental anguish is available for many basic kinds of negligence torts. The Legislature's comprehensive apportionment system would be undermined if it could not be used in situations involving mental anguish. Indeed, it might leave tortfeasors such as Hyde Park responsible for even more of the damages than they might otherwise be. After all, a major reason why Lowry — a settling party — is included is to potentially <u>reduce</u> Hyde Park's liability. That the fact-finder considered this record and found Hyde Park the more responsible party does not mean that the Legislature's whole design should be scuttled.

The closest that Hyde Park comes to discussing the statute is a few quotes that it lifts from a 1995 treatise about the then-current version of the apportionment statute. Pet.

Br. 43. Hyde Park asserts that a few legislators might have preferred a rule that would make intentional wrongdoers always more responsible, as a matter of law. Pet. Br. 44. But nothing quoted by Hyde Park says that. But that is not what they wrote. This Court has already acknowledged that the whole thrust of the statute marked a shift from "comparative negligence" to "comparative responsibility," folding in other types of duty rules such as strict tort liability, which have nothing to do with negligence. *General Motors Corp. v. Sanchez*, 997 S.W.3d 584, 593 (Tex. 1999) (quoting the statute).

3. The statute rejects any artificial distinction between "active" and "passive" wrongdoers.

Hyde Park also asserts that, as a matter of law, "active fault is worse than passive fault." Pet. Br. 38. But the Texas statute expressly applies "to each person's causing or contributing to cause in any way the harm . . . whether by negligent act or omission." TEX. CIV. PRAC. & REM. CODE §33.003(a) (emphasis added). The Texas Legislature wanted to include both active and passive fault within the reach of the proportionate-responsibility statute. Hyde Park's artificial distinction has no place under this regime.[12]

Nor does Hyde Park suggest any authority for its thesis. Instead, Hyde Park refers to a common-law right of indemnity that might have arisen between the two kinds of tortfeasors. Pet. Br. 45-46. But, as Hyde Park acknowledges, this was superseded by the Texas proportionate-responsibility statute, Pet. Br. 45, which sets out a different way of

[12] Hyde Park observes that tort law sometimes imposes different duty rules for active or passive conduct. Pet. Br. 45. But that observation is inapposite. The statutory text and design lumps both kinds of tort duties together for apportionment.

determining whether one tortfeasor can seek contribution from another. TEX. CIV. PRAC. & REM. CODE §33.015.

4. The Legislature already adopted a very nuanced rule about how to weigh criminal misconduct, which does not apply here.

Hyde Park asks for a sweeping rule that "criminal conduct is worse than mere civil misconduct," Pet. Br. 38, saying that "this is the type of comparison that mandated reversal in [two California cases]," Pet Br. 49.

But the Texas Legislature has already spoken, adopting a much narrower and more specific rule — one which does not absolve Hyde Park of its own responsibility. Through Chapter 33, the Legislature singled out specific criminal conduct that would automatically make a defendant jointly and severally liable. TEX. CIV. PRAC. & REM. CODE §33.013(b)(2). That list only includes certain crimes — and it requires that the defendant have had specific intent, not merely some lesser level of *mens rea*. TEX. CIV. PRAC. & REM. CODE §33.013(e). Hyde Park's rule does not match up with the statute.

Nor did the Legislature choose to let tortfeasors such as Hyde Park off the hook merely because another responsible party might have engaged in criminal activity. There is no provision in Chapter 33 to reduce a party's liability because another party engaged in criminal activity. Instead, the Legislature imposed joint and several liability on the criminal. TEX. CIV. PRAC. & REM. CODE §33.013(b). That joint-and-several liability lets the plaintiff recover fully, and it has implications for how the right of contribution works as between the various defendants. TEX. CIV. PRAC. & REM. CODE §33.015(b)-(c).

Being jointly and severally liable thus increases the risk of loss placed on a particular defendant. But it does not reduce the recovery available to the plaintiff.

Instead, Hyde Park ignores that the Legislature provided a second, equivalent way to be jointly and severally liable. A defendant can be jointly and severally liable if "the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent." TEX. CIV. PRAC. & REM. CODE §33.013(b)(1). The fact-finder determined that Hyde Park was 80% responsible. That result is perfectly consistent with the statute. The Legislature contemplated that more than one party might be jointly and severally liable in the same cause. Indeed, section 33.015(b) provides a mechanism for "each of the defendants who is jointly and severally liable" to seek contribution from the others for any disproportionate payment.

Putting those pieces together: If Hyde Park is right that Lowry committed a criminal act — an argument that it did not make in the trial court — then the only implication would be that Lowry would <u>also</u> be jointly and severally liable, along with Hyde Park. *Id.* §33.013(b)(2). That would, in a different case, have given Hyde Park a right of contribution against Lowry.[13] *Id.* §33.015(b).

C. <u>Hyde Park's "Three Historical Tests" Are Unworkable as Legal Rules To Trump Apportionment Findings.</u>

It is unclear how Hyde Park's tests would apply even to these facts. For example, there is no finding that Lowry's conduct is criminal, or that Hyde Park's failure to report

[13] The statute says that defendants cannot seek contribution against previously settling parties. TEX. CIV. PRAC. & REM. CODE §33.015(d) ("No defendant has a right of contribution against any settling person."). That rule provides needed certainty to settling defendants.

was not. There is no finding that Lowry was not also negligent (in addition to her intentional conduct). Nor is there any finding that Hyde Park's affirmative decision to retain Lowry or its subsequent cover up was "passive" (it was not).[14]

And the uncertainty is compounded if these factors are mixed in a real-world setting — a negligent crime being apportioned against an intentional tort, for example, or conduct that is a mix of "active" and "passive" steps. Hyde Park has no answer. Instead, it seems to concede defeat, suggesting in its brief that "If our [apportionment] made sense under any of these approaches, then our [judgment] should be affirmed." Pet. Br. 41.

D. 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 — they could keep a freshman philosophy class busy for months. Worse, they are unreliable as measures of responsibility. For example, it is easy to think of situations in which one defendant's mere negligence may have contributed 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.

For employers, too, the incentives suggested by Hyde Park would be backwards. In a negligent-hiring context, they would make employers less liable for being more

[14] The same misconduct can often be framed in "passive" or "active" terms. Hyde Park asserts that it was merely "passive," referring to certain language used in the closing argument. Pet. Br. 45. But this is wordplay. Hyde Park's conduct can be framed in active verbs: It hired this teacher. It chose to retain her despite knowledge she abused other children. It put her back into a classroom with small children. And it prevented P.C.'s parents from seeking prompt medical attention by its active concealment of this incident.

negligent. Here's why: Hyde Park hired — and in the face of previous charges of abuse, chose to retain — someone who acted intentionally to abuse a child. But by Hyde Park's logic, it should be held less liable here than if its teacher had merely been clumsy. That set of incentives would be wrongheaded. As the leading torts treatise puts it, defendants should not be less liable for being more negligent: "Obviously, the defendant cannot be relieved from liability by the fact that the risk . . . to which the defendant has subjected the plaintiff has indeed come to pass." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 303 (5th ed. 1984).

There are cases when a school should be held more liable than the errant teacher, and some when it should be less. But Hyde Park is surely wrong that there is an "as a matter of law" rule that rewards them for being more negligent in retaining and supervising a teacher that abuses a child.

PRAYER

For these reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 25, 2010, a true and correct copy of this **Respondents' Brief on the Merits** 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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