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**NO. 09-0191**

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

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

**VS.**

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

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

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**PETITIONER'S REPLY BRIEF  
AND MOTION FOR LEAVE TO AMEND PETITION**

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

Petitioner Hyde Park Baptist Church respectfully files this its Reply Brief, and includes a short Motion For Leave To Amend Petition For Review. (Page \_\_\_\_.)

## SUMMARY OF THE REPLY

Respondent mentions the Family Code and the Penal Code in its brief.<sup>1</sup> However, it is important to bear in mind that there are no private causes of action created by either. The case of *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.), held that the Penal Code does not create a private right of action. It was cited with approval by the Supreme Court in *Brown v. De la Cruz*, 156 S.W.3d 560, 567, n.39 (Tex. 2004).

Similarly, there is no private cause of action under the Family Code provisions cited by Respondents. In the case of *Perry v. S.N.*, the Court went through a lengthy analysis of “whether plaintiffs may maintain a cause of action for negligence per se based on the Family Code, which requires any person having cause to believe a child is being abused to report the abuse to statute authorities and makes the knowing failure to do so a misdemeanor.”<sup>2</sup> 973 S.W.2d 301, 302 (Tex. 1998). Restated, the Court said, “the issue before us is whether it is appropriate to impose tort liability on any and every person ‘who 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.’” *Id.* at 305 citing Tex. Fam. Code § 261.109(a).<sup>3</sup>

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<sup>1</sup> Respondents also mention the Family Code section concerning termination of the parent-child relationship statute. But how this applies is difficult to discern.

<sup>2</sup> The version in effect when *Perry* was written considered violations to be Class B misdemeanors. The version in effect now considers them Class A misdemeanors with other considerations.

<sup>3</sup> In its footnote 2, the Court noted:

The version of this provision in force at the time of the events in this case read “has been *or may be* adversely affected.” *See* 944 S.W.2d at 729 (quoting former TEX. FAM. CODE § 34.01(a)) (emphasis added). The Legislature deleted the italicized language in 1997. *See* Act of Sept. 1, 1997, 75th Leg., R.S., ch. 1022, § 65, 1997 Tex. Gen. Laws 3733, 3760. However, the phrase “or may be” remains in the current version of § 261.109(a).

Among the several factors or considerations taken into account by the Court in reaching its decision not to impose civil liability on a non-reporter was that “the Legislature has expressed a judgment that abuse and non-reporting deserve very different legal consequences.”<sup>4</sup> *Id.* at 308. The Court held on this point:

This evidence of legislative intent to penalize nonreporters far less severely than abusers weighs against holding a person who fails to report suspected abuse civilly liable for the enormous damages that the abuser subsequently inflicts. The specter of disproportionate liability is particularly troubling when, as in the case of the reporting statute, it is combined with the likelihood of "broad and wide-ranging liability" by collateral wrongdoers that we condemned in *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d at 279.

*Id.* citing *Carter*, 584 S.W.2d 274, 279 (Tex. 1979).

Ultimately, the Court determined that it was “not appropriate to adopt Family Code section 261.109(a) as establishing a duty and standard of conduct in tort.” *Id.* at 309. Thus, there was no cause of action or right of recovery.

More recently, the case of *Colt v. Hamner*, held: “Finally, to the extent Colt appeals the judgment in Hamner's favor because Hamner violated sections 261.101 and 261.107 of the Texas Family Code, we note that these statutes do not create private causes of action; rather, their enforcement is the responsibility of the ‘appropriate county prosecuting attorney.’” 2005 Tex. App. LEXIS 2751, [\*4] (Tex. App.—Dallas 2005, no pet.) (released for publication 5/5/2005) citing TEX. FAM. CODE ANN. § 261.107(c) (Vernon 2002); see TEX. FAM. CODE ANN. § 261.109 (Vernon 2002).

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<sup>4</sup> The latter being a misdemeanor, punishable by a maximum fine of \$2,000 and a maximum jail sentence of six months; while the former included mostly felonies.

## **BUT FOR CAUSATION**

Plaintiffs (Respondents) argue that imposition of a large portion of liability against Hyde Park is justified, because of the existence of *but for* causation. Plaintiffs argue:

*But for* Hyde Park's failure to respond to many reports of Lowry's abusive tendencies, PC would never have been injured under Hyde Park's care.

Respondent's Brief, pg. 13. Thus, Hyde Park is cast as the lunch pin that allowed the Teacher's intentional misconduct to occur. Without Hyde Park's negligent entrustment of a position of authority, arguably this incident would not have occurred.

However, this does not explain apportionment at all. The existence of *but for* causation is the essential pre-requisite to the imposition of *any* liability against Hyde Park. If the accident would have happened regardless of Hyde Park's conduct, then Hyde Park would be free from *any* liability whatsoever. All causation against Hyde Park would be negated.

When a plaintiff establishes *but for* causation against an employer (who engages in negligent hiring or negligent supervision), he establishes the essential requirement for the imposition of any liability against the employer. The same is true as against the employee. The plaintiff must establish *but for* causation against the employee, the same as any defendant.

\_\_\_\_\_ . However, it is now fanciful to think that the establishment of *but for* causation thereby justifies the imposition of more liability against the employer, as compared to the employee.

## **FAMILY CODE**

Plaintiffs turn to various sections of the Family Code in order to make their argument that the law generally recognizes the danger of harms to the mental health of children. However, the Family Code's guidelines in criminal standards are simply inapplicable to civil standards for liability. \_\_\_\_\_ . It is rather telling that the Plaintiffs resort to a secondary authority, like the Family Code, for general guidance. The fact that the Family Code protects against mental injuries to children is irrelevant to the imposition of civil liability. If anything, the fact that day care operators might suffer criminal prosecution for mere failure to report an injury to a child's psyche demonstrates that additional civil liability is hardly necessary to discourage behavior. And, it is not unusual for criminal statute to impose punishment on a lesser standard than that imposed by civil standards. See for example the standard for criminally negligent homicide, which is actually lower than the civil standard for gross negligence and punitive damages. Meanwhile, the Restatement of Torts is the prime secondary authority to which courts resort in deciding whether to impose civil liability, or not, in the absence of significant physical injury.

## **EXAGGERATION AND STRAW MEN**

In one section of the Brief, the Plaintiffs seriously mis-characterize Hyde Park's position. In an alarmist tones the Plaintiffs claim:

Hyde Park has taken the untenable position that Texas law does not recognize that child abuse causes mental anguish in children ... under such a restrictive view, a child purposefully 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.

Of course, this extreme position is not Hyde Park's position. Not even close. If Hyde Park were advocating such an extreme view, its position would hardly be found in the Restatement (Second) of Torts, nor followed by most courts, which require physical injury in cases of mere negligence. It would hardly garner the support of such dignified *amici* as the Pacific Legal Foundation. Of course, it is always \_\_\_\_\_ to paint your opponent as one who advocates harming children, hurting small dogs, and burning the American flag.

This entire paragraph about Hyde Park's supposed position makes no citations to Hyde Park's Brief. Someone who purposely locks a child in a dark closet, acts with the *Likes* "high degree of culpability". The intentional misconduct is precisely what renders the wrongdoer liable for mental anguish damages. *Likes* at \_\_\_\_\_. Likewise, the person who beats a child acts with the same intent to harm that renders the defendant liable for extreme damages, even punitive damages. As Justice Hecht has often explained, if you shoot at somebody, but missed, and only break their sunglasses, you are still liable for the broad array of damages for intentional misconduct. You are even liable for punitive damages, regardless of the fact that there was no physical injury nor significant property damage. It is the wrongful intent that renders the defendant liable for the broad array of damages, completely consistent with the wide body of Texas tort law and Prosser On Torts.

However, this is not that case here. The church was only guilty of negligence. From the standpoint of a negligent employer, his conduct is accidental, not intentional.

### **PUBLIC POLICY AND PUNISHMENT**

Plaintiffs argue that the position advocated by Hyde Park would increase the dangers of child abuse, which is certainly a harmful result. Plaintiffs argue that “Hyde Park’s theory would lead to terrible incentives ...” Respondents’ Brief, pg. 1. Let us stop and consider this point. We are all against child abuse. Here, the actual abuser, Belinda Sue Lowry, was let off lightly. She settled for a minor sum, \$5,000, so that liability could be imposed against the deep pocket, Hyde Park Church. The abuser has gone largely free of all responsibility, because of the mis-apportionment of blame against the relatively innocent employer, Hyde Park. Who should the law destroy financially? The actual child abuser, or the employer who negligently failed to prevent the abuse?

Which serves the public policy of protecting children: a policy that forces liability on the actual wrongdoer who hits the child, or the “deep pockets” theory that lets the wrongdoer off relatively lightly, in order to focus liability on the relatively innocent “deep pocket.” The answer is clear: the law should focus liability on the intentional wrongdoer.

If the church is forced to pay for another’s intentional wrong, the church has less money to spend on the actual welfare of its children in its care. It must pay teachers less, spend less on equipment, etc. Forcing the financial burden on the relatively innocent employer is hardly an answer. No wonder that the *amicus* Pacific Legal Foundation

emphasizes the vast sums that families spend on child care, and argues against this “deep pocket” theory of liability.

### **HORRIBLE CONSEQUENCES**

Plaintiffs argue that horrible consequences would befall children in the State of Texas, if negligence must produce a significant bodily injury to allow the recovery of mental anguish. Yet, this is clearly the Restatement view. Restatement (Second) of Torts § 436A.<sup>5</sup> Hyde Park cited and argued application of the *Restatement of Torts* in its principal Brief, page 23. In response, the Plaintiffs simply avoid any discussion of the *Restatement*. They never mention it. Instead, they continue to paint Hyde Park’s view as if is an extreme view, which could not be followed without dire consequences.

The many courts and states that follow the Restatement view do not seem to suffer these ill effects of which the Plaintiffs raise such serious alarms. See, for example, the courts following the *Restatement*, and refusing to allow a mental anguish recovery based on negligence, if there was not significant bodily injury. From Kansas to the Virgin Islands, the Restatement requirement (for physical injury in cases of negligence) was routinely followed during 2009. See *Stephenson v. Honeywell Intern., Inc.*, 2009 WL 3241595, 3 (D.Kan. 2009) (reviewing Kansas law and following the Restatement as the correct description of Kansas

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<sup>5</sup> **Restatement (Second) of Torts § 436A** *Negligence Resulting In Emotional Disturbance Alone*, states:

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

This Court cited the Restatement in its observation, “Our decision today accords with the overwhelming majority of American jurisdictions.” *City of Tyler v. Likes*, 962 S.W.2d at 499.

law); *Henry v. St. Croix Alumina, LLC* 2009 WL 2778011, 8 (D. Virgin Islands) (D. Virgin Islands 2009) (“Under Virgin Islands law, plaintiffs must establish that defendants’ negligent conduct placed them in danger and that they suffered *substantial physical harm* to their persons as a result. Restatement (Second) of Torts §§ 313, 436A.”) (emphasis added).

### **THE ONE-TWO PUNCH**

Plaintiffs argue that *all* of Hyde Park’s objections about liability for mental anguish damages (in the absence of a significant bodily injury) must fail, because of the “one-two punch” utilized by the Court of Appeals. Plaintiffs describe this “one-two punch” in their Brief:

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.

Respondents’ Brief, pg. 8.

Admittedly, this “one-two punch” is precisely the approach adopted by the Court of Appeals, below. The Court of Appeals found that Lowry had engaged in intentional wrongdoing, a category recognized as justifying mental anguish damages under *City of Tyler v. Likes*. It then concluded that this satisfied any requirement for Hyde Park’s own exposure to mental anguish damages. This was followed, regardless of a lack of any *Likes* qualification actually applying to Hyde Park. If this Court approves of this “one-two punch” trick by which mental anguish damages are more broadly imposed, then it may wish to deny this Petition. It will broadly endorse the award of mental anguish damages, even against

defendant/employers who commit only simple negligence that does not cause bodily injury.

But, realize that this new “one-two punch” is definitely a change in Texas law. For example, a doctor has a “special relationship” with a patient. Thus, the doctor can be held liable for mental anguish damages even for simple negligence. A “special relationship”, such as that between doctor and patient, is one of the few *Likes* exceptions where mental anguish damages can be awarded on the basis of simple negligence, even without a significant bodily injury. However, a suit against the employer, a clinic, for the same mental anguish damages, has historically failed. Thus, in *Johnson v. Methodist Hosp.*, 226 S.W.3d 525, 529-530 (Tex.App.–Houston [1st Dist.] 2006, *no pet.*) the clinic was not liable for mental anguish damages, because the only theory of liability was negligence (negligent hiring, negligent supervision). There was no serious bodily injury caused by the negligence in wrongly advising the plaintiff that they had HIV.

Under the approach advocated by the Plaintiffs, and the Court of Appeals below, *Johnson* was wrongly decided. Under the new “one-two punch” theory, the doctor and clinic have jointly caused a mental anguish injury. And, the doctor had the necessary special relationship to satisfy the *Likes* requirement for the award of mental anguish damages. Presto: both clinic and doctor would be liable for mental anguish damages under this new “one-two punch” approach. Liability for mental anguish damages is broadened.

What other court has ever adopted this “one-two punch” approach. None. Apparently counsel for Plaintiffs could not find any such case, nor could the Court of Appeals below.

They adopt the “one-two punch” approach without any citation to any case for the notion that if a requirement is satisfied as to *one* defendant, that the other defendant is simply swept along into liability bin.

In both *Likes* and *S.V. v. R.V.* this Court expressed concern about broadly imposing liability for mental anguish damages, because they are so subjective. Likewise, negligence is very subjective “failing to do what a reasonably prudent person would do.” When a subjective liability standard is married to a subjective damages standard, liability spreads out like spilt syrup. Everything becomes sticky.

#### **A SECOND ISSUE – NO EVIDENCE ON CAUSATION**

Plaintiffs argue that Hyde Park has “waived” its complaint of a lack of evidence to support causation, because this point was not included in Hyde Parks’ Original Petition For Review. Instead, this new point was added via a Supplemental filing, following this Court’s decision in *Pollack*.

Plaintiffs are correct that Hyde Park failed to seek leave of this Court to amend its Petition For Review. However, no such objection was filed by Plaintiffs at the time that the Supplement was filed. Plaintiffs can not demonstrate any prejudice from this minor procedural delay, since the Petition For Review in this case has not even been granted, even as of this date. Thus, more than enough opportunity for briefing has occurred. It can even occur in the future.<sup>6</sup>

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<sup>6</sup> Hyde Park freely consents to Plaintiffs filing a supplemental brief to cite evidence where Plaintiffs negated competing causes of P.C.’s mental anguish via actual evidence, rather than *ipse dixit* (because I am an expert

To cure this procedural problem, Hyde Park does hereby formally move the Court for leave to amend its Petition For Review in order to include this second issue. The second issue is fundamental, a lack of evidence of causation (*i.e.* competent evidence that excludes other, competing causes that may have caused P.C.’s mental anguish). Hyde Park can certainly demonstrate “good cause” for this minor delay. Until this Court’s decision in *Pollack*, the law was unclear on whether Hyde Park could bring a no evidence point before this Court, because no objection had been made during trial at the time the evidence was admitted. Instead, the objections were raised in post-trial motions, such as Hyde Park’s motion for new trial, and its motions for j.n.o.v.

A fundamental rule of this Court is that *waiver* does not create things, *ex nihilo*. Waiver does not create evidence. Since there is no evidence to support causation, then there is a fundamental problem with this jury verdict and the judgment. The fact that Hyde Park might have delayed a few months before including issue number two in its Petition For Review does not suddenly create evidence of causation, when there is none in the record. For these reasons, Hyde Park respectfully prays that this Court grant leave to amend its Petition For Review.

### **“OLD VIEW” AND “NEW VIEW” OF TEXAS LAW**

Petitioner’s Brief On The Merits demonstrated that, at one time in Texas law, there was clearly a requirement for a physical injury to win an award of mental anguish damages on the

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and I say so).

basis of mere negligence. After all, that is the Restatement view. Even federal courts that dislike this view, recognized that this was an “older view” that explains several Texas decisions that were supposedly decided under this “older view”.

Plaintiffs ignore the fact that the position advocated by Hyde Park was once the view held by Texas courts, and never abandoned by this Court. Thus, their dire warnings of all the horrible consequences that might occasion the adoption of Hyde Park’s view, is nothing more than an empty cry of “wolf”.

Apparently parents, children and day care centers all functioned effectively under the “older view” of law. Indeed, if litigation is any indication, there are far more cases of child abuse now, than there ever were under the “older view” of the law.

Adopting the Restatement position will not be a pronouncement of some radical new principle. It will simply be a reminder to courts in general, and the federal courts in particular, that this “older view” of Texas law is actually the law. It was never abandoned or modified by this Court. Thus, federal courts and lower courts should continue to follow this Court’s precedent, until this Court actually changes it.

### **CALIFORNIA PRECEDENT**

Plaintiffs argue that Hyde Park’s reliance on California precedent is misplaced. Indeed, they argue that we would be wrongly transplanting an unusual body of foreign law into Texas jurisprudence.

Actually, California courts have often lead the way, for good or bad, in dealing with

personal injury and mental anguish claims. California was one of the first courts to recognize the tort of negligent infliction of emotional distress. Unfortunately, this experiment was disastrous, and was later repudiated. Texas courts have followed an identical history.

The approach used by California courts is to look a jury's apportionment of fault and require that it actually be based on real evidence, not simply a deep pocket theory of liability. That is hardly dramatic. Texas courts have been requiring that juries base their verdict on apportionment of fault on actual evidence. As demonstrated in Hyde Park's original Brief On The Merits, Texas courts have long been able to reverse jury verdicts that wrongly apportioned too much fault on a plaintiff, barring their recovery. If a novel notion that a jury's verdict concerning apportionment of fault between defendants also be based on evidence, not mere jury argument or upon the deep-pockets theory of liability that the employer should always pay the most, simply because he has more money. This is not a radical new approach. It is simply common sense.

We are not litigating what could have been.

Plaintiffs argue that this case might have had deadly consequences because, "a blow to a child's head can result in permanent neurological impairment, intra cranial bleeding, and even death." Thus, Plaintiffs argue that the Court should not be reluctant to impose liability under the circumstances.

This is certainly true. And, a day care that negligently employs teachers that are physically abusive would have no level of comfort or protection from any decision this case,

because a blow from a teacher might cause serious injury or death. But, we must turn to the actual case before us, where no physical injury was actually in existence.

A tire negligently affixed to an 18-wheeler can come loose, fly through the air, and decapitate a person. That person's survivors clearly have a wrongful death suit against the negligent tortfeasor. However, the passenger that is mere inches away in the same seat does not even have a claim at all. Negligence as a basis for mental anguish damages is simply negligent infliction of emotional distress, traveling under a this disguise. Accordingly, the Fort Worth Court of Appeals in *Fitzpatrick v. Simmons* rejected any liability by the person who was almost killed, but not injured, because mental anguish damages can not be awarded in Texas simply based upon negligence. Hence, the court in *Fitzpatrick* cited *Boyles v. Kerr* and *City of Tyler v. Likes* in imposing this requirement.

### **FAILURE TO PROVE CAUSATION**

It is startling that Plaintiffs simply fail to address the merits of issue number two, lack of proof of causation.

This is a no evidence point. There was a rather large flaw in a plaintiff's case to fail to prove legal causation and the lack of evidence on causation is completely fatal to a plaintiff's case. Furthermore, mere "waiver" does not suddenly produce evidence in the record that establishes causation.

Here, the fundamental problem was that the Plaintiffs' experts could not show any methodology or any real evidence (beyond mere speculation) about how they excluded other

competing causes for P.C.'s mental anguish. It is undisputed that P.C. went through a traumatic period in his life where his parents were divorced, he was subjected to numerous moves and changes in location, and even suffered some serious physical injuries that sent him to the hospital, a fall incident at a playground. Some of these actually required extensive dental surgery.

In its Petition, Hyde Park complained that there was no evidence to negate these other potential causes as the sources of the mental anguish damages. Notice that the Respondents' Brief On The Merits simply does not touch the merits of this argument. They do not address the divorce, indeed, the divorce of P.C.'s parents is nowhere mentioned in the Brief. One would think that a little child's divorce of his parents is a rather significant factor in causing mental anguish for the child, particularly when it is accompanied by numerous changes in the child's habitation and child care arrangements. Nonetheless, there is no evidence that competently rules out these other potential causes of mental anguish, and the Respondents' Brief On The Merits does not even make the pretense of claiming that there is such evidence. Instead, it engages in "arguments about waiver" and the comments of fallacy of post-oak ergo prokter hoke.

A simple example of the Plaintiffs' false logic on causation is demonstrated in Respondents' Brief:

P.C. used to be very affectionately 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 RR 47

So, the facts are that a little boy was once cuddly and allowed his mom and grandmother to hold him affectionately in their lap. He got older and suddenly he no longer allows this. No doubt, every parent has gone through heart break of having their young child squirm out of their lap and resist their tender caresses. But, what is the cause: is this merely because the child is growing up, engaging in natural differentiation, or because he is going through a traumatic time period of his parents being divorced, significant physical injury from a playground incident causing hospitalization? These are legitimate questions. The way the Plaintiffs deal with this is by stating that the child became this way after the incidents in Ms. Lowry's classroom. Of course, the same is true of the divorce, the traumatic injury at the playground, the hospitalization, the movement between houses, and even the simple event of growing older for six months. The Plaintiffs' experts simply have no evidence that this sort of conduct was not attributable to other competing causes.

Similarly, the Plaintiffs complain that the Petition For Review focuses on one expert, and does not discuss testimony of other experts. Plaintiffs seem to forget that this is a no evidence review. The Plaintiffs can not produce evidence merely by "waiver" or stating that the Respondents failed to discuss everything. The Plaintiffs actually have to come forward with competent evidence that ruled out these other potential causes of P.C.'s mental anguish, thereby proving legal causation. This the Plaintiffs can not do, and did not do in their response.

Plaintiffs also complain that Hyde Parks' approach to challenging the expert testimony

amounts to “appeal by ambush,” because Hyde Park cites to the DSM-IV. The DSM-IV is a recognized treatise regarding statistical and psychological disorders. Is this an appeal by ambush? No, this is a no evidence review. It is hardly “an ambush” to require the Plaintiffs to actually come forward with proof of legal causation, which includes the exclusion of other causes. The DSM-IV recognizes a constant stressor, such as divorce, as being one possible cause of the exact disorder that P.C suffers. This is cited, not to some evidence to try to justify some jury finding after the fact. To the contrary, it is cited simply to demonstrate that even a cursory review of the most prominent psychological literature would demonstrate the need to rule out other potential causes of causation. Indeed, that is the exact same requirement as the law. It is hardly “an ambush” to require that the Plaintiffs comply with this Court’s rulings in *Havner* and \_\_\_\_\_ by demonstrating that evidence logically rules out other competing causes of a plaintiff’s condition.

I notice that the Plaintiffs Response does not actually lodge any meaningful objection to this Court taking judicial notice of the DSM-IV. As the original Brief of Petitioners pointed out, this Court took such judicial notice and cited and quoted from the DSM-IV in a landmark mental anguish holding, *S.V. v. R.V.* Numerous other courts have turned to the DSM-IV in analyzing claims of mental anguish and particular psychological disorders.

Respondents’ Brief does not claim that the DSM-IV is unreliable or obscure. Instead, the Plaintiffs merely complain that this is “not how learned treatises are usually handled” citing Texas Rule of Evidence 803(18). Far from claiming that the DSM-IV is unreliable,

Plaintiffs themselves cite and quote from the DSM-IV, including its “cautionary statement”.

Lacking evidence, Plaintiffs attempt to cast the burden back upon Hyde Park. “Hyde Park was free to suggest, offered evidence, or argued to the fact-finder that some of the child’s problems might have been due to other life stresses. Indeed, Hyde Park did so dash through the testimony of its own expert.” Respondents’ Brief, pg. 32, and ftn. 10.

Nice try. Failing to prove legal causation, Plaintiffs argue that the Defendants were free to try to rebut causation. But, what the Defendants attempted to rebut causation on or not is simply irrelevant to the Plaintiffs’ complete failure to produce competent evidence that rules out other potential sources of causation, thereby satisfying the Plaintiffs’ burden of proof or legal causation. Again, the Plaintiffs attempt to distract this Court away from looking at the basic question of whether the Plaintiffs fulfilled its requirement of establishing legal causation by providing competent expert testimony that ruled out other potential causes.

Actually, the citation to DSM-IV is no longer necessary in this appeal. Hyde Park cites the DSM-IV for the obvious proposition that other life stressors, such as a divorce, can produce an anxiety disorder in a child. That is probably common sense that there can be other causes for a child’s mental anguish, and anxiety, such that makes him nervous, unable to concentrate, unwilling to sit in his mother’s lap, etc. However, in its response, Plaintiffs do not dispute the fact that these other life stressors can cause this mental anguish. They simply attempt to cast the burden on Hyde Park – such that the burden is on Hyde Park to introduce evidence for the jury to consider whether other life stressors cause this event.

## KASSI INSERT

Appellee cites *In re J.O.A.* for the proposition that weighing conflicting evidence and inferences to determine whether a verdict should be vacated as manifestly unjust is part of the court of appeals' factual sufficiency review and is not appropriate for the Supreme Court. That is true, but it is not the full story. The Supreme Court of Texas has a "responsibility to assure that the intermediate courts properly follow applicable legal standards" even if the Court itself lacks the jurisdiction to do so where factual sufficiency of the evidence supporting a jury verdict is the issue. *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993). The Court requires that courts of appeals:

when reversing on insufficiency grounds, should, in their opinions, detail the evidence *relevant* to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.

*Id.* at 28 citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). (Emphasis added by *Jaffe* Court.)

Relying on its prior opinion in *Cropper v. Caterpillar Tractor Co.*, the *Jaffe* Court reiterated that "this requirement applies as fully to a court of appeals, which is reviewing the evidence in support of a jury's answer of 'no' to a finding as it does when the answer is 'yes.'" *Jaffee*, 867 S.W.2d at 28 referencing *Cropper*, 754 S.W.2d 646, 649-53 (Tex. 1988). The Court in *Jaffe* continued that a factual sufficiency review in the court of appeals "is not

a one way street” and “must be as fair to a defendant challenging an appellate reversal of a negative jury finding as it is to a plaintiff who challenges appellate reversal of an affirmative jury finding.” *Id.* at 29. The Court found that the court of appeals there had not satisfied the standard and remanded the case to the court of appeals “for further consideration in accordance with this opinion.” *Id.* at 29.

More recently in *Golden Eagle Archery, Inc. v. Jackson*, the Court reaffirmed the standard that while it could not conduct a factual sufficiency review itself, “we do have jurisdiction to determine whether a court of appeals has applied the correct standard in conducting a factual sufficiency review.” 116 S.W.3d 757, 761 (Tex. 2003) citing *Pool*, 715 S.W.2d 629, 634-35 (Tex. 1986) (other citations omitted). The Court then restated that the courts of appeals are expected to detail the evidence in their opinions and noted that in *In re. King’s Estate*, they held that a court of appeals must:

Consider and weigh all of the evidence in the case and to set aside the verdict and remand the cause for a new trial, if it thus concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust-this, regardless of whether the record contains some “evidence of probative force” in support of the verdict. . . . The evidence supporting the verdict is to be weighed along with the other evidence in the case, including that which is contrary to the verdict.

*Jackson*, 116 S.W.3d at 761-62 citing *King’s Estate*, 244 S.W.2d 660, 661 (Tex. 1951).

The *Jackson* Court reversed and remanded the case to the court of appeals for further proceedings. *Id.* at 776.

The proper factual sufficiency review standard was not followed by the court of

appeals in this case, an omission which prevents this Court from conducting a meaningful review. The case should be reversed and remanded to the court of appeals for a factual sufficiency review according to the proper standard. The evidence that works against the jury's findings was not mentioned in the Court of Appeals' opinion at all.

For instance, there was evidence at trial of other potential factors that would affect a child's psyche, such as his parents' divorce (though they continued to live in the same home), a flood to their home which necessitated moving in with PC's grandmother, which caused "in-law issues" that required a second move with his divorced parents then deciding to live separately. (Appellant's Brief on the Merits at pp. 5-6; RR 6, p. 198; RR 8, p. 136-137). In addition, PC had two major accidents, one of which required dental surgery. (Appellant's Brief on the Merits at p. 6; RR 8, p. 137.) There was also evidence that PC exhibited aggression prior to his bump on the head. (Appellant's Brief on the Merits at p. 6; RR 8, p. 133; RR 4, p. 60; RR 8, p. 72; RR 4, p. 53.)

This evidence that goes to PC's mental anguish claim was not addressed by the Court of Appeal's opinion and this is error. Again, "[t]he evidence supporting the verdict is to be weighed along with the other evidence in the case, including that which is contrary to the verdict." *Jackson*, 116 S.W.3d at 761-62 citing *King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951).

This Court should reverse and remand this case to the Court of Appeals with instructions to conduct the factual sufficiency review according to the guidelines set forth in

the cases above and their progeny as it has done in other similar situations.

**PRAYER FOR RELIEF**

Petitioner prays that this Court grant its Petition For Review, reverse the Court of Appeals, and render judgment in their favor, or, alternatively, for a new trial, and such other and further relief to which they show themselves justly entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

THIS WILL CERTIFY that a true and correct copy of Petitioner Reply Brief has been sent via certified mail, return receipt requested, to the following counsel on this the 18th day of February, 2010:

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