
NO. 09-0191

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

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

VS.

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

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

AMENDED PETITION FOR REVIEW

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THE REASON FOR THE *AMENDED* PETITION FOR REVIEW

Hyde Park Baptist Church (“Hyde Park”) respectfully submits this *Amended* Petition For Review. It is virtually identical to prior filings. This *Amended* Petition is necessary in order to cure a technical deficiency. Petitioner originally filed a “Supplement” to its original Petition For Review (on or about October 12, 2009). That Supplement was filed, without any objection, to add an additional Issue regarding Expert Testimony in light of this Court’s intervening decision in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009) (facially incompetent expert evidence is “no evidence”, regardless of pre-verdict objections).

Both sides have now filed their Briefs On the Merits and have addressed all points, including the additional expert opinion Issue raised in the Supplement.¹ But, Respondents correctly pointed out in their main Brief (p. 28) that leave of this Court was never sought formally to amend the original Petition for Review. Therefore, a motion has now been filed and this Amended Petition For Review is now tendered to the Court. This Amended Petition For Review is duplicative of the original Petition (4/1/2009), and the Supplement (10/12/2009) already submitted by Petitioner Hyde Park Baptist Church.

¹ If Respondents believe additional briefing is needed on this Expert Opinion Issue, Petitioners agree to such additional briefing.

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STATEMENT OF THE CASE

This is a personal injury case. Two year old PC sustained a “bump” on his head when his preschool teacher, Belinda Sue Lowry, intentionally knocked PC down. The Child and his parents sued the Teacher for assault, and sued Hyde Park Baptist Church for negligent supervision.

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

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

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this appeal pursuant to Section 22.001(a)(2) and (6) of the Texas Government Code. As to (a)(2), the decision of the Court of Appeals directly conflicts with this Court's holdings in *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997) and *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993), which restrict awards of mental anguish to certain types of cases. The Court of Appeals, below, has now added a *new category* to the group of cases where mental anguish damages can be awarded, inconsistent with this Court's restrictions on such awards. Now, a negligence claim is sufficient for an award of mental anguish damages (*i.e.* negligent infliction of emotional distress), if *some other party* acts intentionally. Thus, because the *teacher* acted *intentionally* and outside the course and scope of her employment, the Church is somehow liable.

For years, various Texas litigants have sought clarification from this Court regarding legal restrictions on mental anguish damages in minor personal injury cases, as first identified by this Court over a decade ago in *City of Tyler v. Likes*. For example, in the prior case of *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008) the Petitioners sought application of the limits of *City of Tyler v. Likes* to vacate an award of mental anguish in another case involving only minor personal injuries (carpet burns and scratches). Other *Amici* (including an insurer) joined in that prior petition, because claims for mental anguish are out of control and inflate minor injuries. This Court granted that Petition for Review, but, decided that case on completely unrelated grounds. *Id.* 264 S.W.3d 1 (Tex. 2008). This

disposition left unanswered the question of whether mental anguish damages are permissible in cases involving only minor personal injuries: a scratch, a bump on the head, etc.

The Court of Appeals found that the standard submission of personal injury damages (as found in the *Pattern Jury Charge*) effectively submits mental anguish damages from an “occurrence.” Thus, according to the lower court, this standard jury question provides for a recovery of mental anguish damages from any “occurrence,” and failure to object allows a recovery under negligence for mental anguish.

Also, this Court has jurisdiction over this appeal under §22.001(a) (6) of the Government Code. The Court of Appeals committed errors of law, and such errors are of great importance to the jurisprudence of the state and need to be corrected. The errors of law include two important areas, both of which are common in Texas personal injury litigation. First, as mentioned above, what are the legal standards to justify an award of mental anguish damages in cases involving minor personal injuries? This Petition will demonstrate that subjective psychological diagnoses are now commonly used to produce large mental anguish awards, even in cases with relatively minor personal injuries: a bruise, a scratch, a bump.

Second, what are the proper standards for appellate review for the statutory apportionment of fault between an *employee* who engages in intentional wrongdoing, as compared to an *employer* who is only guilty of negligently failing to stop the employee? This is a very common litigation scenario. Under the typical *deep-pockets* theory of litigation, the solvent employer is sued for negligence after one of his employees engages in intentional

wrongdoing, such as an assault on a plaintiff. The standard litigation tactic is to settle with the guilty employee for a small sum (because he is judgment proof), and then seek a large judgment against the *deep-pockets* employer under a theory of negligent hiring/negligent supervision. The employer's only fault was failing to stop the employee, who acted outside of the course and scope of his employment. There is virtually no Texas case law on how an appellate court should review the *intentional employee v. negligent employer* apportionment of fault. Courts in other states, particularly California, have reversed mis-allocations of fault by returning to three cornerstones of tort law. This Court should provide judicial guidance on dealing with the *deep-pockets* theory of litigation in these types of cases. Two parties have filed Amicus Briefs in Support of the Petition. The Imperial Fire & Casualty Insurance Company (May 4, 2009) and the Pacific Legal Foundation (February 5, 2010).

ISSUES PRESENTED

ISSUE NO. 1:

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

ISSUE NO. 2: (The issue added by this Amended Petition.)

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

ISSUE NO 3:

The Court Of Appeals Erred In Failing To Reverse The Jury's Verdict Was Contrary To Undisputed Evidence That The Employee-Teacher Engaged In Intentional, Active, and Criminal Misconduct, Whereas The Employer-Church Was Only Guilty Of Simple Negligence. The Jury's Allocation Of Fault Was Contrary To Undisputed Evidence.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Hyde Park Baptist Church respectfully files this Petition For Review.

STATEMENT OF FACTS

Since the Jury resolved the testimony in favor of the Plaintiffs, the facts are summarized in their favor. PC, then less than two years old, was enrolled by his parents in the Hyde Park Baptist Church preschool, CDC, (RR 6, pgs. 206-210) and was assigned to the class of Belinda Sue Lowry, a long-time teacher at the Church.

Ultimately, Ms. Lowry engaged in an “assault” by knocking PC down. He hit his head on the floor and this caused a “bump” on his head. (RR 4, pg. 49)² The term “bump” is used in his medical records, when doctors searched for an injury.

The Church was negligent in supervision, because there had been prior misconduct by the Teacher in the course of her teaching for 12 years. Many parents and teachers loved her as a firm teacher. (RR 5, pg. 186; RR 7, pgs. 220, 231; RR 8, pgs. 12, 19) But, there had been prior instances of rough treatment of children, though none of the children had been injured. (RR 4, pgs. 17-18)

There was evidence that the Church knew of *some* of the prior incidents and had previously held a hearing, somewhat like a trial. The evidence was conflicting. (RR 5, pgs. 132-133) The Teacher was allowed to continue, after being admonished not to engage in any more rough treatment. *Id.*

² Citations to the Record are: RR is for Reporter’s Record; and CR is for Clerk’s Record.

But, after PC was knocked down on January 18, 2005, the Church terminated the Teacher. (RR 3, pg. 74; RR 4, pg. 49; RR 4, pg. 147; RR 5, pg. 205) The Church was then sued by PC and his parents. They secured the jury verdict that the Teacher *intentionally* injured PC, and the Church had been negligent (but not grossly negligent) in its supervision of the Teacher. (See Appendix B)

The undisputed facts are that there were *no significant injury*, only a “bump.” But, PC had allegedly suffered “mental anguish” via a “psychological injury.”

Prior to his bump on the head, PC had behavioral problems stemming from aggression. His mother had previously stated that he had become “willful, and aggressive, and a bit defiant.” (RR 8, pg. 133) This aggression caused problems due to anti-social behaviors, everything from stealing toys from other children to biting other children. (RR 4, pg. 60; RR 8, pg. 72) These problems were the source of the friction between PC and his Teacher. (RR 4, pg. 53)

All the damages awarded stem from mental anguish. His mother took PC in for counseling for being a victim of “child abuse,” and spent thousands of dollars for counseling services. The evidence showed that the psychological assessment of PC’s Condition was very *subjective*. Plaintiffs psychologist concluded that he had an “adjustment disorder with anxiety.” (RR 7, pg. 141) An Anxiety Disorder is a recognized DSM Diagnoses, from the Diagnostic And Statistical Manual of Mental Disorders.³ An Adjustment Disorder, by

³ Appellant moves the Court to take judicial notice of the DSM IV’s description of an Anxiety Disorder, pursuant to Texas Rule of Evidence 201. This standard reference book is

definition, is a short term phenomena, and must be over *within six months*. (Otherwise, the condition would be some other disorder.) As of the trial (two years after the incident), it was simply impossible for there to be a continuing “Adjustment Disorder.”

All of the Plaintiff’s damages in this case are forms of mental anguish damages. For example, the future medical expenses are for future therapy. Dr. McCarthy recommended that PC “continue in individual play therapy,” because he did not have “fine motor skills.” When drawing, he “won’t grasp the pencil strongly.” (RR 7, pg. 182) She prescribed play therapy *every week* for years, costing tens of thousands of dollars. (RR 7, pgs. 182, 183)

The jury awarded damages, including:

Future medical care expenses	\$ 34,980.00
Physical pain and mental anguish (past)	\$ 25,000.00
Future mental anguish:	\$100,000.00

Judgment was entered on the verdict and the Court Of Appeals affirmed.

SUMMARY OF THE ARGUMENT

This Court has placed restrictions on mental anguish damages. First, they are simply not recoverable in cases of simple negligence. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) For mental anguish damages to be recoverable, certain *objective factors must* be met: such as a *significant* bodily injury, a shocking injury that is outrageous, a “special relationship,” or malice by the defendant. *City of Tyler v. Likes*, 962 S.W.2d 489, 495-96 (Tex. 1997). None of those situations is present here.

relied upon by many authorities, including this Court in *S.V. v. R.V.*, 933 S.W.2d 1, 19 (Tex. 1996).

Also, as this Court has recently recognized, conclusory expert testimony about causation is actually “no evidence.” Proving legal causation means ruling out other (competing) causes for a general condition, such as general anxiety or sadness. During the same time period as the alleged abuse, the child was subjected to the divorce of his parents, multiple relocations and changes in living arrangements, other traumatic injuries requiring surgery, and other childhood events. Plaintiffs did not introduce competent expert opinions that ruled out competing causes. Plaintiffs only submitted the expert’s *ipse dixit* opinion.

Finally, the Jury’s finding of Comparative Responsibility was simply contrary to undisputed evidence. While the jury is accorded wide discretion in apportioning fault between tortfeasors, the jury cannot ignore all the undisputed evidence. An intentional tortfeasor that intentionally engages in a criminal assault is simply *more at fault* than a party (such as an employer) that is passively negligent. California courts have overturned jury verdicts that involve such a mis-allocation of fault.

ARGUMENT AND AUTHORITIES

ISSUE NO. 1:

The Court Of Appeals Erred In Entering A Judgment Awarding Mental Anguish Damages Against A Negligent Employer, On The Basis That The Employee Acted Intentionally.

(This particular Issue is directed at the award of \$100,000 for future mental anguish.) This case is about the recovery of damages for mental anguish. Despite lengthy and repeated motions for new trial and for J.N.O.V. complaining that such a recovery contradicted Texas law, judgment was entered awarding mental anguish damages solely on *negligence*.

A. Traditionally Texas Law Required Significant Physical Injury

This Court has expressed serious concerns about the impact of psychological damages in personal injury cases in *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996). A minor case can be exaggerated by a psychological diagnosis to produce a large mental anguish award.

Employers in Texas, like Hyde Park, are regularly hit with sizeable psychological damage verdicts in cases involving minor bodily injury. For examples, in the case of *Olivarri v. City Public Service Board of San Antonio*, No. 2003-CI-15120, in Bexar County, Texas, the plaintiff proved that her supervisor “groped her” (patted her on the butt) and verbally harassed her (told lewd jokes). There was no significant bodily injury, but she was awarded \$4.7 million from her ex-employer because of mental anguish for her psychological injuries.⁴

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

This Court expressed concerns about subjective mental anguish awards in *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997). The Court observed that psychological injuries are very *subjective*: what bothers one person may not bother another. Fearing that mental anguish claims were a blank check for a jury, this Court decided to impose **objective tests**.

⁴ *Texas Lawyer*, October 17, 2005, Verdict Search, Employment, Meter reader recovers \$4.7 million on sexual harassment claim. San Antonio Court of Appeals, Case No. 04-06-00085-CV.

This Court held that mental anguish damages are recoverable only in special cases, such as those involving: (1) *serious* bodily injury, (2) a “special relationship” between the plaintiff and defendant, (3) “injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result” (such as a sexual assault), or (4) cases involving proof of “intent or malice” by the defendant. *Id.* These are the “*Likes* requirements.” None of these *Likes* requirements were present in this case.⁵ First, there was no serious bodily injury.

B. Significant Bodily Injury Should Be A Threshold Test For Negligence

Historically, the *Likes* requirement for a *serious* bodily injury has been fatal to mental anguish claims founded on negligence. Thus, a negligent (and incorrect) medical diagnosis that a person had AIDS, did not permit mental anguish damages. While the patient had needlessly suffered needle sticks, bruising, and pain from medical treatments, the patient did not have a *significant* bodily injury. No recovery was allowed. *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90 (Tex.App.–Houston [14th Dist.] 1998, pet. denied), citing the *Likes* requirements.

Historically, one could not bring a claim for negligent hiring/supervision if the only

⁵ The body of this brief addresses two *Likes* requirements: significant bodily injury and malice. The remaining two categories do not apply. There were no shocking injuries to fit the *third Likes* requirement (those injuries of such a “shocking and disturbing nature that mental anguish would be a highly foreseeable result.”) A sexual assault is such a case. *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008). But a bump on the head hardly qualifies. Finally, *Likes* allows recovery of mental anguish damages when the defendant breaches a “special relationship” with the plaintiff. Here, the Plaintiffs have not plead, argued or proven any “special relationship.” Persons only have special relationships with people, such as doctors, not with institutions, such as hospitals or churches. *Johnson v. Methodist Hosp.*, 226 S.W.3d 525, 529-530 (Tex.App.–Houston [1st Dist.] 2006, *no pet.* Thus, our case qualifies for none of the *Likes* requirements.

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

Sibley, likewise cites *Verinakis, supra*, demonstrate that ***at least at one time in Texas, there was a requirement for significant physical injury***. This traditional test was easily applied, and weeded out mental anguish cases involving a mere scratch or bruise.

**C. Lower Courts Have Strayed From The
Significant Bodily Injury Requirement**

The Court of Appeals, below, refused to impose this *Likes* requirement for a significant physical injury. The Court of Appeals is not alone. Several lower courts apparently believe that this *Likes* requirement for a significant physical injury was somehow abandoned as an “*older understanding* of the claim for negligent hiring and supervision.” (Emphasis added.) *Verhelst v. Michael D’s Restaurant San Antonio, Inc.*, 154 F.Supp.2d 959 (W.D.Tex. 2001).⁶ Other federal district courts have likewise gone down this new road. *See Nichols v. Apartment Temporaries, Inc.*, 2001 WL 182701 *6 (N.D.Tex. 2001).

Worse, this Court’s recent opinion in *Adams v. YMCA of San Antonio*, 265 S.W.3d 915,

⁶ “Finally, the defendant argues that the plaintiff’s claim must fail as a matter of law because she was not alleged any physical injury. . . . it appears that the defendant’s position is based on an older understanding of the claim of negligent hiring and supervision. [Citing *Sibley* and *Verinakis* as the cases relegated to the bin of an “older understanding.”]

917 (Tex. 2008) is now cited in the court, below, seemingly as confirmation that mental anguish damages are allowable, so long as there is “more than a scintilla” of proof that such damages were sustained. See Court of Appeals Opinion, Appendix C at pg. 6.

D. Vicarious Intent Is Inappropriate

We now turn to the last *Likes* requirements, “intent or malice.” The Court of Appeals found that this *Likes* requirements was fulfilled, because the *Teacher* acted with “intent or malice,” even though the Church did not. Because *someone* acted with such evil intent, a mental anguish recovery was allowed as against the Church.

In *Likes*:

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

Likes, 962 S.W.2d at 495 (emphasis added). But, the scales of justice are wrongly tilted if the negligence of the defendant-employer is not weighed. Instead, now the intentional misconduct of the errant employee is weighed, but the *employer* suffers the result.

This is simply the imposition of *vicarious liability*, so that the bad acts and intentions of the employee are attributed up stream to the employer. However, in our case, it was always undisputed that the Teacher was acting *outside* of the course and scope of her employment. This is typical of most of these types of cases. An employee is *automatically* outside of course and scope when they engage in an assault. *Wrenn v. G.A.T.X. Logistics, Inc.*, 73

S.W.3d 489, 494 (Tex.App.–Fort Worth 2002, *no pet.*)⁷

ISSUE NO. 2:

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

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

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

Turning to the present case, Dr. McCarthy’s opinions that the child’s disorder was not caused by divorce or other major disruptions were all conclusory under the *Pollock* standard. The “basis” for her opinion was insufficient on its face to support her conclusions.

⁷ Only unusual employees, such as security guards or “bouncers,” can commit an assault to further their employer’s business, and thereby remain in the “course and scope” of their employment. See *Kelly v. Stone*, 898 S.W.2d 924, 927 (Tex.App.–Eastland 1995, writ denied), and *Texas & Pacific Railway Co. v. Hagenloh*, 247 S.W.2d 236, 241 (Tex. 1952).

Dr. McCarthy admitted at trial that she was never told that the child had moved three times (due to family discord) before the age of two, had undergone surgery, and had sustained other injuries. (RR 7, pgs. 204-05) These events were material to the issue of causation, as any or all could have contributed to the two-year old's adjustment disorder with anxiety. Moreover, evaluating these events as potential factors was necessary to Dr. McCarthy's ultimate opinion on causation since it was reached by a conclusory approach utilizing the process of elimination. (RR 7, pgs. 144-46)

When confronted with these facts about disruptive events, Dr. McCarthy summarily dismissed them as "understandable" events. Therefore, they supposedly "didn't contribute toward this situation." (RR 7, pg. 204) Dr. McCarthy provided no basis for this conclusion except for her belief that the events were "understandable." She offered no facts, studies, or statistics to support the proposition that events which are "understandable" cannot contribute to a child's anxiety. In essence, Dr. McCarthy asked the jury to simply take her word for it. They apparently did.

Dr. McCarthy's opinion that the divorce of the child's parents was not a significant source of the child's anxiety is likewise unsupported on its face. Dr. McCarthy based her opinion on reports of "how [the divorce] was handled." (RR 7, pg. 169). She found that the divorce was "well-handled." But Dr. McCarthy provided **no basis whatsoever** for her conclusion that a well-handled divorce cannot contribute to the anxiety of a two-year old. Without this conclusion, her opinion falls apart. Nevertheless, Dr. McCarthy presented her opinion – based on this entirely unsupported conclusion – to the jury as a scientific fact: the

divorce was not a significant source of the present anxiety, so it must have been the bump on the head. (RR 7, pg. 169). This is precisely the type of conclusory testimony condemned by *Pollock*.

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

The Court of Appeals erred by mis-citing *Pollock*’s predecessor decision, *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227 (Tex. 2004), for its holding that Dr. McCarthy’s testimony could not be challenged on appeal. This decision should be reversed.

ISSUE NO. 3:

The Court Of Appeals Erred In Failing To Reverse The Jury’s Verdict Was Contrary To Undisputed Evidence That The Employee-Teacher Engaged In Intentional, Active, and Criminal Misconduct, Whereas The Employer-Church Was Only Guilty Of Simple Negligence. The Jury’s Allocation Of Fault Was Contrary To Undisputed Evidence.

The Jury apportioned fault as follows: 80% to the Church that was merely *negligent*, and 20% to the Teacher who engaged in *intentional* misconduct (but who settled prior to trial). (See Appendix B, pg. 6) No evidence supports this apportionment. Instead, it was made in response to a specific request from Plaintiff’s counsel for this exact finding, who improperly argued that anything else would constitute *approval* of the Church’s conduct. (RR 9, pgs. 70-71) The Church preserved this error via its original and its Second Motion For New Trial, Motion For Judgment N.O.V. and Motion To Correct The Judgment.

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

In *Scott v. County of Los Angeles*, 27 Cal. App. 4th 125 (Cal. App. 4th 1994, rev. denied) the appellate court reviewed a case of child abuse. As in our case, one party intentionally injured the child. But, the County of Los Angeles, was sued for negligently failing to prevent the injury. Similar to our case, the jury found Los Angeles County 75% at fault for its negligence in failing to prevent the injury. The California Court of Appeals found that this mis-allocation of fault was a “miscarriage of justice,” “unsupported and unsupportable.” It reversed. *Id.* 27 Cal. App. 4th at 125.

The court in *Scott* relied upon a similar California case where another disproportionate allocation of fault was overturned. *Pamela B. v. Hayden*, 30 Cal. App. 4th 1063 (Cal. App. 4th 1994) also contained a mis-allocation of fault as between an intentional attacker, as compared to a landlord that was merely negligent. Pamela B. was raped in the garage of her apartment building. The jury found that the landlord was more at fault than the rapist!

The appellate court found that, at most, the landlord was guilty of passive negligence, failing to respond to prior complaints about security, and failing to do more to prevent attacks. But the rapist was an intentional/criminal wrongdoer. The California Court of Appeals reversed, and pronounced the jury’s apportionment of fault “blatantly unfair, inequitable and

unsupported...” (25 Cal. App. 4th at p. 805)⁸

There are no similar cases in Texas addressing such a gross mis-allocation of fault. Although the *deep-pockets* theory of liability controls the vast majority of tort litigation on a daily basis, it has never been directly addressed by this Court.⁹ But, this type of appeal regarding apportionment of fault is now so standard in California that the California courts no longer publish their decisions that reverse jury findings on apportionment of fault. These are unremarkable appeals, and, therefore, not published. See, for examples, *Silvestro v. Kaiser Gypsum Co, Inc.*, Not Reported, 2009 WL 976820 (Cal.App. 2nd Dist. April 13, 2009); see also *Christian v. Enterprise Rent-A-Car Co. of Los Angeles*, 2004 WL 1234136 (Cal.App. 4th Dist. 2004) (“We are hard-pressed to find sufficient evidence in the record to support the jury’s apportionment of liability. Accordingly, the judgment must be reversed and remanded for a new trial on the apportionment...”)

⁸ Courts in other states deal with this comparison between intentional tortfeasors and negligent tortfeasors in various ways. They generally agree that “any rational juror will apportion the lion’s share of the fault to the intentional tortfeasor when instructed to compare that fault of a negligent tortfeasor and intentional tortfeasor...” *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So.2d 712, 719 (La. 1994), quoted in *Rodenburg v. Fargo-Moorhead Young Men’s Christian Ass’n*, 632 N.W.2d 407, 418 (N.D. 2001). But, they deal with this problem in various ways. In some states, a negligent defendant is given a right to be indemnified from his fellow co-tortfeasor who acted intentionally. This shifts the entire loss to the intentional wrongdoer. *Fleming v. Thresherman’s Mutual Ins. Co.*, 131 Wis.2d 123, 130 (Wis. 1986).

⁹ The closest was Justice Gonzalez’ rejection of the *deep-pockets* approach in his concurrence in the mental anguish case, *Boyles v. Kerr*, 855 S.W.2d 593, 604 (Tex. 1993), where he explained, “Thus, this case has a lot to do with a search for a ‘deep pocket’ who can pay. If the purpose of awarding damages is to punish the wrongdoer and deter such conduct in the future, then the individuals responsible for these reprehensible actions are the one who should suffer . . .”

This Court should grant the Petition For Review, and admonish Courts of Appeals to weigh the evidence under traditional standards for culpability. Such an examination would end the “deep pockets” theory of liability in these types of cases.

PRAYER FOR RELIEF

Petitioner prays that this Court grant its Petition For Review, reverse the Court of Appeals, and grant such other relief to which it shows itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of the Amended Petition For Review has been sent via certified mail, return receipt requested, to the following counsel of record, on this the 1st day of March, 2010:

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