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No. 05-0916

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

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**PLEASANT GLADE ASSEMBLY OF GOD,  
Petitioner/Defendant,**

**VS.**

**Laura Schubert,  
Respondent/Plaintiff.**

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**On Petition for Review From The  
Second Court of Appeals at Fort Worth, Texas  
Case No. 02-02-00264-CV**

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**RESPONSE TO PETITION FOR REVIEW**

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**ATTORNEY FOR RESPONDENT**

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## **STATEMENT OF THE CASE**

To prevent duplication in briefing Respondent incorporates by reference the *Statement of the Case* submitted in her Response to the Petition for Review filed by Reverend Lloyd McCutchen, Rod Linzay, Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson.

## ISSUES PRESENTED

### ISSUE NO. 1:

\_\_\_ The Court of Appeals did not err in allowing recovery for damages for mental anguish.

### ISSUE NO. 2:

The Court of Appeals did not err in finding that expert psychological testimony regarding Post Traumatic Stress Disorder met with the requirements for scientific reliability, as required by the Texas Rules of Evidence and this Court's holdings in Havner and Robinson cases regarding expert testimony.

### ISSUE NO. 3:

\_\_\_ The trial court did not err in refusing to allow the defense of *in loco parentis*.

### ISSUE NO. 4:

The Court of Appeals did not err in failing to find that the jury should have been charged that clear and convincing proof of malice was an evidentiary requirement as this case did not implicate First Amendment rights.

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**On Petition for Review From The  
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**RESPONSE TO PETITION FOR REVIEW**

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

Laura Schubert respectfully files this Response to Petition for Review filed by Pleasant Glade Assembly of God.

## STATEMENT OF FACTS

\_\_\_\_ To prevent duplication in briefing, Respondent Laura Schubert hereby incorporates by reference the *Statement of Facts* submitted in her Response to Petition for Review filed by Reverend Lloyd McCutchen, Rod Linzay, Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson.

## SUMMARY OF THE ARGUMENT

This case is simply an intentional tort case. Religion was redacted by order of the Court of Appeals thus special evidentiary rules implicated by First Amendment rights are inapplicable. Damages such as past and future mental anguish resulting from the torts of assault, battery and false imprisonment were by law direct or general damages and foreseeable and were properly assessed by the jury. The “gate keeping” responsibility of the trial court regarding expert testimony was complied with and there was no clear abuse of discretion. *In loco parentis* is not applicable to this case involving at best a temporary supervisory situation. Because First Amendment rights were not implicated in this case, no greater standard of proof, such as suggested by Petitioners, is warranted or required.

## ARGUMENT AND AUTHORITIES

### ISSUE NO. 1:

**The Court of Appeals did not err in allowing recovery for damages for mental anguish.**

### ISSUE NO. 2:

**The Court of Appeals did not err in finding that expert psychological testimony regarding Post Traumatic Stress Disorder met with the requirements for scientific reliability, as required by the Texas Rules of Evidence and this Court's holdings in Havner and Robinson cases regarding expert testimony.**

### ISSUE NO. 3:

**The trial court did not err in refusing to allow the defense of *in loco parentis*.**

To prevent duplication in briefing as to *Issues 1, 2 and 3* Respondent incorporates by reference the briefing of these issues submitted in her companion Response to the Petition for Review filed by Reverend Lloyd McCutchen, Rod Linzay, Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson.

### ISSUE NO. 4:

**The Court of Appeals did not err in failing to find that the jury should have been charged that clear and convincing proof of malice was an evidentiary requirement as this case did not implicate First Amendment rights.**

Petitioners argue that the trial court erred in failing to give them the benefit of certain protections under the First Amendment to the United States Constitution against Laura Shubert's claims. Specifically, Petitioners have contended that a clear and convincing proof of malice requirement similar to that which the United States Supreme Court has applied to

libel actions under the free speech clause should be applied to Laura's claims and that the judgment against them should be reversed because the evidence conclusively established no one acted with malice.

As the Court of Appeals pointed out, malice is not an element of the intentional torts of assault and battery or false imprisonment under current Texas law. *See* Wal-Mart Stores v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002); Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388 at 399 (Tex. App. - Fort Worth 2005, pet. for rev. filed); Baribeau v. Gustafson, 107 S.W. 3d 52, 60 (Tex. App.- San Antonio 2003), *cert. denied*, 125 S.Ct. 272 (2004); Green v. Indus. Specialty Contractors, Inc., 1 S.W.3d 126, 134 (Tex. App.- Houston [1st Dist.] 1999, no pet.).

Article I, § 6 of the Texas Constitution and the First Amendment to the United States Constitution afford broad protection to the free exercise of religion, but do they do not bar all claims which may touch on religious conduct. Sanders v. Castleview Baptist Church, 134 F.3d 331 (5th Cir. 1998), *cert. denied*, 525 U.S. 868, 119 S.Ct. 161, 142 L.Ed.2d 132 (1998). "The free exercise of religion does not go so far as to be inclusive of actions which are in violation of social duties or subversive of good order. Although freedom to believe may be said to be absolute, freedom of conduct is not and conduct, even under religious guise, remains subject to regulation for protection of society." TEX. CONST. art. I § 6 inter. commentary (Vernon 1984); Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996); *See also* Lide v. Miller, 573 S.W.2d 614-615 (Tex. Civ. App.-Texarkana 1978, no writ). Laura

Schubert's case involved only intentional torts of assault, battery and false imprisonment.

Likewise, the Federal Constitution distinguishes between freedom to believe, which is absolute, and the freedom to act, which “remains subject to regulation for the protection of society.” Cantwell v. Connecticut, 310 U.S. 296, 304-306, 60 S.Ct. 903, 84 L.Ed. 1213 (1940); Tilton, 925 S.W.2d at 677; Penley v. C.L. Westbrook, Jr. 146 S.W.3d 220 at 231 (Tex. App.- Fort Worth 2004, pet. for rev. filed). “Religious groups may be held liable for tort in secular acts...[and] in appropriate cases courts will recognize tort liability even for acts that are religiously motivated.” Tilton, 925 S.W.2d at 677; Murphy v. I.S.K. Con. of New England, Inc., 409 Mass. 842, 571 N.E.2d 340, 346 (1991), *cert. denied*, 502 U.S. 865, 112 S.Ct. 191, 116 L.Ed.2d 152 (1991) (noting that freedom to act on religious beliefs does not enjoy the same protection as the freedom to believe certain principals); Meronie v. Holy Spirit Assoc. for Unification of World Christianity, 119 A.D.2d 200, 506 N.Y.S.2d 174, 176 (N.Y.App. Div. 1986) (“[a] church may be liable for intentional tortious conduct on behalf of its officers or members, even if that conduct is carried out as part of the church’s religious practices.”). As stated by Justice Scalia in Employment Division v. Smith, 494 U.S. 872, 879 (1990), “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’.” *See also* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Turner v. Church of Christ of Latter-Day Saints, 18 S.W.3d 877 (Tex. App.- Dallas 2000), *cert. denied* 533 U.S. 951, 121 S.Ct. 2594

(2001). The laws that Petitioner claims were violated deal with assault, false imprisonment and battery, all of which are neutral state laws in no way designed to regulate religious conduct.

Petitioner, in the court below, had asked that this case be tried with all references to religion removed. Pleasant Glade, 174 S.W.3d at 406. All references to religion contained in any document admitted in evidence were redacted and witnesses were instructed not to use religious terminology while testifying. (RR 2, pp. 4, 6-8, 16-233; RR 3, pp. 11-12). Instruction to the jury was given by the trial court when the need arose regarding religious matters and that such matters were to play no part in the jury's consideration of the evidence (RR 3, pp. 11-12; RR 13, pp. 202-205). The defense, however, extracted several references to religion, (a) through defense witness Sandra Smith, who was strongly admonished by the trial court (RR 13, pp. 197-198, 200, 202-205), (b) through the testimony of defense witness Amber Krause Giere, (RR 12, pp. 137-139, 146) resulting in disregarded testimony and (c) by the collateral fall out from impeachment as a result of defense counsel's inaccurate suggestion to an expert witness and the jury that the events at the church were not mentioned during Laura's first Cornerstone Counseling session with Mike Witherspoon several months after the events at the church. (RR 8, pp. 182-186, 206-207; RR 15, pp. 224-228, 233-235). A redacted version of the Cornerstone Counseling session note was initially published to the jury; however, the unredacted document containing the word "hyper-spiritualization" and appearing at Exhibit "E" to Petitioner's Petition for Review was published to the jury by

agreement after a ruling by the trial court. (RR 8, pp. 182-186, 206-207).

Petitioners should not be all allowed to use religion as both a sword and a shield which is exactly what they are proposing. The trial court, taking into consideration the ruling of the Court of Appeals on mandamus, eliminated all references (at the request of the church) in keeping with the mandate that this case should go forward only on the intentional torts of false imprisonment, assault and battery. (RR 2, pp. 4, 6, 8, 16-23; RR 3, pp. 11-12). In the mandamus action, the Court of Appeals granted the relief the church and its members had requested and held that all challenged “religious” claims were barred by the First Amendment. In re Pleasant Glade Assembly of God, 991 S.W.2d 85 at 87, 90 (Tex. App.-Fort Worth 1998, orig. proceeding).

Specifically, the church and its members had requested that the Court of Appeals allow Laura’s claims for assault and battery and false imprisonment “to go forward” because, in the words of their attorney of record and pastor McCutchen, who stated under oath, these claims constitute “a ‘secular controversy’ and do not come within the First Amendment.” They had argued that “no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person,” and represented that “no religious beliefs would be implicated” if Laura’s “purely ‘bodily injury’” claims of assault and battery and false imprisonment were litigated. Pleasant Glade, 174 S.W.3d at 406. For Petitioners to now claim that the case was religious in nature involving alleged claims of “hyper-spiritualization” and “loss of faith” and, therefore, that a different standard of proof is

required, is nothing more than the Petitioners attempting to have their cake and eat it too, that is, to eliminate evidence of religious conduct and at the same time state that the case is religious in nature requiring a higher standard of proof and review of the entire record, to include pleadings, briefs, motions and depositions, none of which was before the jury.

As the Court of Appeals stated, when the church and its members had obtained through the prior mandamus proceeding the dismissal of all but Laura's assault, battery and false imprisonment claims, which they swore under oath should "go forward" because they were purely secular and entitled to no First Amendment protection, the church and its members cannot now "play fast and lose" with the judicial system by taking the opposite position in an appeal to suit their own purposes. Pleasant Glade 174 S.W.3d at 407, Andrews v. Diamond, Rash, Leslie and Smith, 959 S.W. 2d 646-649 (Tex. App.- El Paso 1997, pet. denied); *also* Long v. Knox, 155 Tex. 561, 291 S.W.2d 292, 295 (1956).

Though Petitioner argues that there was no waiver, the Court of Appeals found that whether Appellants' actions are labeled as a waiver or judicial estoppel is immaterial. *See* Jernigan v. Langley, 111 S.W.3d 153, 156-57 (Tex. 2003) (noting that waiver is defined as "intentional and unintentional relinquishment of a known right or intentional conduct inconsistent with claiming that right"); Long, 291 S.W.2d at 295 ("under the doctrine of judicial estoppel...a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made."). What is clear is that the courts, faced with burgeoning dockets, are entitled to rely

on prior sworn statements of parties and counsel such as those in this case. Pleasant Glade, 174 S.W.3d at 407; *See Ergo Sci, Inc. v. Martin*, 73 F.3d 595, 599-600 (5th Cir. 1996); *See also Cleaver v. Cleaver*, 140 S.W.3d 771, 774-75 (Tex. App.- Tyler 2004, no pet.)(stating that, under federal law, judicial estoppel does not require a prior sworn statement, but only that a party successfully maintained an affirmative position in a prior proceeding that is contrary to the position that it now seeks to invoke).

The Court of Appeals also pointed out that on rehearing, Smith, Bickel and Patterson (collectively, the church members) argued that they were entitled to First Amendment protection because they did not participate in the prior mandamus proceeding. The Court stated that the church members had, however, waived their right to assert this affirmative defense because they did not establish in the trial court that their assault and imprisonment of Laura was based on their sincerely held religious beliefs. Pleasant Glade, 174 S.W.3d at 407; *See Tilton*, 925 S.W.2d 672, 677-78 (Tex. 1996) (orig. proceeding). (“Before a court can determine whether a law...substantially burdens one’s free exercise rights [and entitles the person to First Amendment protection], the individual must establish by a preponderance of the evidence that the beliefs avowed are not only religious in nature, but sincerely held.”). To the contrary, the church members each testified that their conduct arose from their belief that Laura’s actions were a ploy for attention from other members of the youth group. The church members’ reliance on McCutchen’s pretrial affidavit concerning some of their denomination’s religious belief the court found to be misplaced. The affidavit did not

establish by a preponderance of the evidence that the church members themselves sincerely held those beliefs or that their conduct in this case was based on those beliefs. Pleasant Glade, Id.

The acts complained of by Petitioners were by statute either criminal or tortious acts (assault, battery and false imprisonment). Ascribing liability would in no way burden any religious practice which Pleasant Glade engaged in. Petitioners have already conceded that assault and battery are secular and as such are not part of the religious beliefs practiced at the church so a court would not be imposing a burden on any religious practice by finding liability for assault because Petitioners do not make a claim of privilege for assault and battery. (CR 9, pp. 1576-1577, Appellants' Petition for Writ of Mandamus, 1998). Assault constitutes a sufficient enough threat to the peace, safety or morality of the community so as to warrant state intervention.

This entire case was tried as a "secular dispute." In that connection, Respondent would quote a passage well known to Petitioners:

"Appellee, Laura Schubert, a teenager does bring a secular complaint against the church and its pastors. It begins when, according to her own pleading, she 'collapsed' while standing at the altar of the church during a church service. She alleges she was physically grasped, taken and held on the floor of the church against her will. This was allegedly done as part of an 'exorcism' in an alleged attempt to exorcize a demon from her. However, this religious context is actually irrelevant. Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery and false imprisonment. This is a 'bodily injury' claim. She alleges she sustained 'cuts', 'scratches', 'bruises', and 'carpet burns.'"

"Relators, the church and pastor can see that this is 'secular controversy' and does not come within the protection of the First Amendment, that is, no church or pastor can use

the First Amendment as an excuse to cause bodily injury to any person. They know that they are not ‘above the law.’”

“Of course, the church and the pastors have their defenses to this claim. At trial, with ample evidence, they will be able to demonstrate that this simply did not happen. Instead, the Appellees admit that she ‘collapsed’ to the floor. She did this (at the altar) in a dramatic play to gain attention. Then when her parents were called, she needed an explanation for writhing on the church floor.”

“If this were the sum total of this dispute, relators would not be here before this Court. Instead, the parties would be before the trial court having a very simple trial. Laura Schubert, the only Appellee present during the church service, would claim that she was forcibly taken against her will and held down on the floor of the church. The church and the pastors could deny it and provide ‘their side of the story.’ No religious beliefs would be implicated. The First Amendment and free exercise of religion would simply not be an issue. Therefore, Relators do not request this Court issue mandamus to stop litigation of this ‘secular controversy’ for bodily injury.” (emphasis added)

Author: David Pruessner, Counsel for Appellants and Petitioners; Appellants Petition for Writ of Mandamus, 1998 (CR 9, pp. 1576-1577).

In *In re Pleasant Glade*, 991 S.W.2d at 88, the Court of Appeals stated, “In this mandamus, Pleasant Glade asserts only that the Schuberts’ ‘religious’ complaints are barred by its First Amendment defense. Thus, Pleasant Glade does not argue that the false imprisonment, assault and battery claim should be protected from objection or discovery or dismissed based on the defense.”

Whether religious issues were at one time part of the case is of no consequence now since all religious activity was redacted from all aspects of the evidence presented at trial.

On pages 2-4 of the Petition for Review, the church complains of and directs this Court’s attention to examples of how “religion suffused the Plaintiff’s case in chief.” This

simply is not the truth. The church points to psychologist Swen Helge's report which was read into evidence and contained the statement "She will require extensive time to recover trust in authorities, spiritual leaders, and her life long religious faith...Laura will require gradual reintroduction into her religious faith." (citing P's Exhibit "32", p.19; RR 4, pp. 146). The truth of the matter is that counsel for both parties were responsible for the pre-trial redaction of any reference to "religion" or "religious activity" from exhibits and counsel for Petitioners missed the above referenced statement which when read to the jury was not objected to. Petitioners then point to Laura complaining at trial that the "hyper-spiritualistic environment" of the youth group caused her anxiety. Again, the truth of the matter is that Laura never made such a complaint in front of the jury and counsel for Petitioners opened the door for impeachment. The previously redacted statement concerning hyper-spiritualistic environment was allowed before the jury only because of Petitioners' counsel's repeated attempts to suggest to the jury that Laura Schubert had never complained to her counselor in August 1996 of any activity which she had witnessed at the church in June of 1996 when, in truth and fact, the document (Petitioner's Appendix "E") reflects the opposite. (RR 8, pp. 176-183).

Counsel for Petitioners goes on to complain that with respect to the Sunday morning service, the jury heard about Laura giving a testimonial about being called to be a missionary. (RR 5, p. 73, 75-76). However, it was counsel for the Petitioners who was bringing out this evidence before the jury. Further, Petitioners complain that the jury heard

about Laura's brother, Joey Schubert, being on the floor of the church at the end of the morning service, and that "the youth group prayed for him" (RR 12, p. 137) and layed their hands on him. Again, it was counsel for the Petitioners who brought this evidence before the jury. Additionally, Petitioners complain that for the evening service, the jury heard about Laura collapsing into hallucinations and then "beginning to tell of a vision she had seen." (RR 13, p. 197) and that the jury heard on Wednesday night that senior pastor, Lloyd McCutchen, "prayed for her, he knelt by her head...." (RR 12, p. 146); However, in both of these instances it was counsel for the Petitioners who was eliciting the information about which Petitioners now complain.

Petitioners go on to complain about Laura Schubert's testimony regarding what she was doing on the floor of the church and Petitioners quote several questions and answers therefrom. (RR 8, p. 179-81). (CR 9, p. 1521). The truth of the matter is that this testimony was from a deposition and never made its way before the jury.

Lastly, Petitioners sets forth in detail an affidavit submitted by pastor McCutchen. None of this testimony was ever presented to the jury. This was simply a case involving assault, batter and false imprisonment.

Petitioners went to the Court of Appeals on two occasions for mandamus relief from the introduction of "religious activity" into the trial of the case. Petitioners agreed to try the secular complaints of Laura Schubert and Petitioners now take the position that because the case involved religious activity, that some standard other than that applied to a secular

controversy involving bodily injury and mental anguish stemming from assault, battery and false imprisonment should be applied to the facts of this case. Petitioners have attempted to use religion as both a sword and a shield. Petitioners agreed to try the secular controversy and lost. Any requirement for a heightened standard of proof or for “actual malice” is completely inapplicable to the facts of this case as pointed out by the Court of Appeals in its opinion. Pleasant Glade, 174 S.W.3d at 399.

**PRAYER FOR RELIEF**

\_\_\_\_ Respondent prays that this Court in all things deny the Petition for Review, affirm the ruling of the Court of Appeals on the issue contained herein, and for such relief to which Respondent may show herself justly entitled.

Respectfully submitted,

/s/ William O. Wuester \_\_\_\_\_  
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ATTORNEY FOR RESPONDENT

**CERTIFICATE OF SERVICE**

\_\_\_\_ THIS WILL CERTIFY that a true and correct copy of the Response to the Petition for Review has been sent via certified mail, return receipt requested, to Petitioners' counsel, David M. Pruessner, Law Offices of David M. Pruessner, Three Galleria Tower, 13155 Noel Road, Suite 1025, Dallas, Texas 75240 on this the 20th day of February, 2006.

/s/ William O. Wuester  
William O. Wuester