
NO. 05-0916

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

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

VS.

**LAURA SCHUBERT,
Respondent/Plaintiff.**

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

**BRIEF ON THE MERITS OF PETITIONER
PLEASANT GLADE ASSEMBLY OF GOD**

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STATEMENT OF THE CASE

Nature of the Case: This is a tort suit about Post Traumatic Stress Disorder (“PTSD”). Plaintiff Laura Schubert brought suit against her former Church, its Pastors, and Church Members (Petitioners) complaining that she was twice held against her will for several hours while they prayed for her. She complained that these events traumatized her and caused her to suffer Post Traumatic Stress Disorder.

First Proceedings By The Court of Appeals: The Second Court of Appeals, via mandamus, directed dismissal of the complaints that religious activities allegedly traumatized Laura Schubert. Such religious activities were constitutionally protected. See *In Re: Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex.App.–Fort Worth 1998, *orig. proceeding*). The Court of Appeals exempted from that dismissal the Plaintiff’s claims for assault and false imprisonment. Plaintiff then modified her allegations so that now the activity that allegedly traumatized Laura Schubert was the physical restraint.

Proceedings At The Trial Court: The 141st Judicial District Court, The Honorable Paul Enlow, conducted a trial about Laura being traumatized because she was restrained against her will for several hours during a “hyper-spiritual environment.” The jury found assault and false imprisonment, awarding \$300,000. Judgment was entered on the verdict.

Second Proceedings At The Court of Appeals: The Second Court of Appeals eliminated the damages awarded for lost earning capacity, because such damages were too remote and speculative, but otherwise affirmed the trial court’s judgment in favor of Plaintiff.

STATEMENT OF JURISDICTION

_____The Court has jurisdiction over 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 below directly conflicts with this Court's holding in *City of Tyler v. Likes*, 962 S.W.2d 489, 496 (Tex. 1997), which restricts awards of mental anguish.

As to 22.001(a) (6), 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 four areas: the standards for admissibility of expert opinion in social sciences (psychological testimony about PTSD); the legal standards for recovery of damages for Post Traumatic Stress Disorder; the standards for the *in loco parentis* defense, and whether the First Amendment guarantee of free exercise of religion places limitations on tort recovery.

The Argument And Authorities in this particular Brief addresses the last of these four areas: the First Amendment and tort liability. One of the few decisions to address this subject is the published opinion of the Court of Appeals, below. It finds that the First Amendment requires absolutely no narrowing of tort liability, even when a plaintiff sues the church itself on the theory that it is responsible for psychological injuries based upon conduct intimately connected to worship services. As the influence of psychology waxes stronger, and the influence of religion wanes smaller, this Court should protect freedom of religion from tort liability based upon a psychological critique of religious conduct.

ISSUES PRESENTED

ISSUE NO. 1:

Whether the Court of Appeals erred in allowing recovery of damages for Post Traumatic Stress Disorder based upon adults restraining a teenage child when there was no jury finding and no evidence that PTSD was *foreseeable*, and there was no malice nor other bad motive.

ISSUE NO 2:

Whether the Court of Appeals erred in finding that the expert psychological testimony regarding Post Traumatic Stress Disorder met the requirements for scientific reliability, as required by the Texas Rules of Evidence and this Court's holdings in *Havner* and *Robinson*.

ISSUE NO 3:

Whether the Court of Appeals erred in ruling that, as a matter of law, Defendants-Petitioners were not entitled to submit their defense of *In Loco Parentis* to the jury, because persons in the position of "baby sitters" enjoy no such defense.

ISSUE NO 4:

Whether the Court Of Appeals erred in finding that the First Amendment right to freedom of exercise of religion did not place any constraints on civil liability (i.e. requirements of malice or foreseeability) for a suit based on allegations that a "*Hyper spiritualistic* environment" in church services caused mental distress (Post Traumatic Stress Disorder), which is now triggered by "anything related to religious activities" and includes "*the loss of her faith.*"

Sub-Issue No. 4A: Whether the Court of Appeals erred in ruling that the Petitioners somehow waived their First Amendment issues.

NO. 05-0916

**IN THE
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**REVEREND LLOYD A. MCCUTCHEN,
ROD LINZAY, HOLLY LINZAY,
SANDRA SMITH, BECKY BICKEL and PAUL PATTERSON
Petitioners/Defendants,**

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**BRIEF ON THE MERITS OF PETITIONER
PLEASANT GLADE ASSEMBLY OF GOD**

TO THE HONORABLE SUPREME COURT OF TEXAS:

Pleasant Glade Assembly of God respectfully files this its Brief On The Merits. It also incorporates by reference the Petition for Review and Brief On The Merits of the individuals who are Co-Petitioners for Review, Reverend Lloyd A. McCutchen, Youth Pastor Rod Linzay, and church members Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson.

STATEMENT OF FACTS

Note to the Court: To avoid duplication in the briefing, this Brief On The Merits does not repeat the facts and analysis contained in the other Brief On The Merits filed by the individual Petitioners, Reverend Lloyd McCutchen, et al. Instead, this Brief incorporates the other Brief by reference and builds upon the other Brief. The constitutional issues addressed in this Brief need only be addressed if the Issues raised in the other Brief are resolved against the individuals and the Church. Thus, the *other* Brief On The Merits should probably be read first.

The opinion by the Court of Appeals does not accurately reflect the entire record of the evidence or proceedings with respect to the First Amendment issues. For example, reading the Court of Appeals opinion, one would get the mistaken impression that mandamus *actually issued* to order the trial court fully to preserve the First Amendment rights. And, one would mistakenly believe that Petitioner's previous admissions (that the First Amendment imposes no limitations on torts for *bodily* injury) were admissions relevant to claims for mental anguish/PTSD.

Actually, the enforcement of these First Amendment rights was quite muddled and Petitioners' First Amendment rights were eventually circumvented by the trial court. The original Court of Appeals' Opinion "conditionally granted" the mandamus, as is customary. But, to circumvent this holding, Plaintiff Laura Schubert drastically amended her Petition to intertwine her intentional tort claims for bodily injury with the claims that Plaintiff was mentally traumatized by the events at the church. Seeing that their original victory was

quickly becoming pyrrhic, Petitioners immediately returned to the Court of Appeals to request that mandamus *actually issue* to prevent the circumvention of Petitioners' First Amendment rights. However, the Court of Appeals refused to issue the mandamus.

At trial, despite many attempts by the trial court to keep religion out of the case, religion suffused the Plaintiff's case-in-chief. Her main treating psychologist, Millie Astin, testified that PTSD is inherently "avoidance behavior" where circumstances similar to the prior trauma re-trigger the anxiety. And, Laura's PTSD "avoidance behavior" is that she avoids "any thing related to religious activities." (RR 7A, p. 96-97) For example, references to "scriptures that were used that night" re-trigger her trauma. (RR 7A, p. 98). And, part of her trauma was the *loss of her faith* (RR 7A, p. 96-98). Another of her psychologists, Swen Helge, submitted his report into evidence about Laura's PTSD and reported, "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." (P's Ex. 32, p. 019; RR 4, p. 146) Pointing to her own first counseling record as a key piece of evidence, counsel for Laura complained that the "hyper spiritualistic environment" of the youth group caused her anxiety. (*See* Appendix E)

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) The jury heard about her 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 laid their hands on him. As 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, the jury heard that on Wednesday night that Senior Pastor, Lloyd McCutchen, “**prayed** for her, he knelt by her head . . .” (RR 12, p. 146)

The jury was properly kept from hearing the most intimate religious aspects of the case in terms of what Pentecostals believe about demons, etc. However, as will be seen below, when the First Amendment protections apply, appellate courts are required to examine the “entire record”, not only the limited evidence the jury heard. Thus, this Court is required to review Laura’s testimony about what she was doing on the floor of the church:

Q: When you were in this condition on the floor of the church, did you make statements about Satan trying to get you, or demons trying to get?

A: [Laura] I believe I was hallucinating.

Q: **Did you make statements along the lines of Satan’s trying to get me or he’s trying to get us all? Did you make those statements during this collapse experience?**

A: [Laura] **Yes, I believe I did.**

(RR 8, p. 180-181) (CR 9, p. 1521)

Significantly, no one testified that restraining a person can cause them to hallucinate. To the contrary, Laura’s one expert, psychiatrist Pentzien, testified that her collapse and subsequent behavior were brought on by hypoglycemia, due to her failure to eat anything substantive during the entire day.

The Court of Appeals properly took judicial notice of the prior mandamus

proceedings.¹ The prior proceedings included undisputed evidence from Pastor McCutchen about the difficulties placed on the church when a member of its congregation complains of being attacked by demons. (See Appendix D) He explains:

10. During the course of the services that Laura attended on Sunday, June 9, 1996 through Wednesday, June 12, 1996, she exhibited some rather bizarre behavior. This included falling to the ground and writhing on the ground with such force that she might have injured herself. This is not common practice within our church. However, it is common practice for us to deal with people who are suffering or agonizing by laying hands on such persons and praying for them to come under the influence and control of the holy spirit, as opposed to the influence or control of an evil spirit. ...
11. After these series of incidents, Tom Schubert became increasingly critical of the conduct of our church and the youth minister Rod Linzay, and myself. His criticisms are reflected in his correspondence and my replies, copies of which are attached hereto as Exhibit D. These are true and correct copies of the letters delivered between us on the dates shown on such letters.
12. As you can see, this dispute concerned his criticisms that he believed we conducted the services improperly. Because he was critical of the way the services were conducted within the church, he hand delivered a letter to my home, which I forwarded to Brother DuBose along with my rebuttal letter on March 18, 1997. Tom Shubert also met personally with the Assistant District Superintendent, Morris Ivey, to air his complaints about the church service. The North District Council is the authority that I must answer to within our denomination. It has the authority to discipline me, criticize me, or initiate proceedings to revoke my credentials within the denomination. After receiving all of the correspondence and hearing both sides of this question, the denomination did not in any way criticize or censor me, Rod Linzay, Holly Linzay, or the Pleasant Glade Assembly of God Church.

¹ Petitioners also move this Court to take judicial notice of the prior mandamus proceeding, In re Pleasant Glade Assembly of God, No. 2-98-222-CV, and move this Court to request the record in that proceeding.

Apparently, dissatisfied with the results, the Schuberts have now gone to court over this dispute regarding the church services.

13. ... We believe that demonic and evil influences are real dangers, especially for our youth. We believe in taking action (such as laying on of hands and anointing with oil), and not just talking about combating such evil forces.

... Many people did “lay hands” on Laura Schubert and pray for her, according to the custom of our church. This type of activity happens on a very regular basis in our church, since we believe in the physical conduct of laying hands on persons in order to pray for them.

16. Within our church, it is not unusual for a person to be “slain in the spirit”. This is a biblical experience, related in several accounts of the Bible. When this happens, a person often faints into semi-consciousness, and sometimes lies down on the floor of our church. It is our belief that this is a positive experience in which the holy spirit comes over a person and influences them. It is our belief that the holy spirit is not the only spirit that can influence a person. Evil spirits can move and can torment persons. Also, it is possible that a person (particularly a young dramatic person such as Laura Schubert) can take advantage of the attention that this activity brings. They can fake the entire experience in order to draw attention to themselves.

17. When a person comes forward in the service and begins having one of these experiences, it is sometimes difficult to discern whether: (1) the person is having a positive experience with the holy spirit, (2) whether there might be evil spirits engaged in warfare against the holy spirit, (3) whether there are emotional issues are involved, or (4) whether the person is faking the entire process in order to gain attention. Discerning between these various influences and factors is a matter on which even pastors within the church might disagree. Tom Schubert (who was not there) attributes Laura’s collapsing on the floor to emotional and physical exhaustion. Myself and others within our church attribute Laura’s actions to other factors.

SUMMARY OF THE ARGUMENT

This case involves a dispute that deeply involves religion, invoking the First Amendment's protections. No Jury Question was submitted asking if the Church did anything wrong. Instead, Jury Questions were asked about whether the Pastors and Church Members did anything wrong, and then liability was imposed on the Church because they were acting in the "course and scope" of their *religious duties* for the Church. One hundred percent of the questioned conduct occurred during worship services.

Petitioners have never claimed that the First Amendment somehow gives them immunity to commit intentional *bodily* injury. Instead, the First Amendment protections prevent religious beliefs and conduct from being put "on trial" to see if psychologists and the general public (the jury) agree with their practices. Tort liability certainly does not disappear. But, it must be limited. Specifically, tort liability must be *narrowly tailored* (actually, only slightly tailored), so that damages must be *foreseeable*, or that the defendants acted with *malice*.

This is not requiring too much. Laura Schubert originally pleaded that the Church and its members acted with a malicious intent to cause foreseeable harm, and proceeded in conscious disregard of that known danger. But, Plaintiff did not prove that the Church or its members acted with malice, or that the Plaintiff's PTSD was foreseeable.

The Court of Appeals erroneously found *waiver* of First Amendment rights on two basis. First, the court claimed that Petitioners waived their First Amendment rights by admitting that the First Amendment does not apply to claims for intentional "bodily injury."

However, “bodily injury” does not include mental anguish, and certainly does not include PTSD. Second, the Court of Appeals found because the Petitioners did not get on the stand and testify that their religion *required them* to act the way they did. But, the First Amendment does not only protect activities that are religiously *required*. A person has a First Amendment right to pray before meals, baptize their children or even circumcise them, even if their religion does not mandate this behavior. For the First Amendment to be triggered it is not essential that the protected persons prove that they had no alternative under their religion to do what they did. The First Amendment is raised when a plaintiff comes into court to complain solely about psychological injuries based upon conduct that happened in the middle of religious services in response to her collapsing on the floor of a church and crying out that demons were attacking her.

ARGUMENT AND AUTHORITIES

ISSUE NO. 1:

Whether the Court of Appeals erred in allowing recovery of damages for Post Traumatic Stress Disorder based upon adults restraining a teenage child when there was no jury finding and no evidence that PTSD was *foreseeable*, and there was no malice nor other bad motive.

ISSUE NO 2:

Whether the Court of Appeals erred in finding that the expert psychological testimony regarding Post Traumatic Stress Disorder met the requirements for scientific reliability, as required by the Texas Rules of Evidence and this Court’s holdings in *Havner* and *Robinson*.

ISSUE NO 3:

Whether the Court of Appeals erred in ruling that, as a matter of law, Defendants-Petitioners were not entitled to submit their defense of *In Loco Parentis* to the jury, because persons in the position of “baby sitters” enjoy no such defense.

To prevent duplication in briefing, as to these first three Issues, the Church hereby adopts and incorporates by reference the *Argument And Authorities* by its Pastors (Reverend Lloyd A. McCutchen and Youth Pastor Rod Linzay), and its Church Members (Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson) in their companion Brief On The Merits.

The *Argument And Authorities* in this particular Petition is devoted solely to First Amendment issues.

ISSUE NO 4:

Whether the Court Of Appeals erred in finding that the First Amendment right to freedom of exercise of religion did not place any constraints on civil liability (i.e. requirement of malice or foreseeability) for a suit based on allegations that a “*Hyper spiritualistic environment*” in church services caused mental distress (Post Traumatic Stress Disorder), which is now triggered by “anything related to religious activities” and includes “*the loss of her faith.*”

A. A Concern Regarding Prejudice

Before proceeding with its actual argument, the Church pauses to raise a delicate issue. The Church is concerned that this Court may have a negative view of the Church. Such a negative view may grow out of the prior published opinion (the mandamus proceeding) in this case, and the fact that this case concerns the emotionally charged subject of *demons*.

The Assembly of God denomination believes in the actual presence of demons, a belief shared by every world religion.² However, a mistake by West Publishing Company seriously

² *The Oxford Dictionary Of World Religions*, p. 268 (Oxford Press 1997) explains the world-wide belief in demons:

Demonic figures appear in all religions. Examples are: in Judaism, *dibbuks*, *golems*; in Christianity, *fallen angels*; in Islam, *shaitans*; in Hinduism, *asuras*, *raksasas*; in Buddhism, *asuras*, *yakkhas*, *mara*; in China, *kuei*.

distorts the Church's beliefs in demons and the religious conduct in which the Church engaged.

When this suit was originally filed, the Schuberts made wild allegations about religious conduct, claiming that Church Members and its Pastors, especially Youth Pastor Rod Linzay, engaged in truly bizarre conduct and that he made truly bizarre statements about demons. These accusations were made by Laura Schubert, a person who sometimes hallucinates and sometimes sees "little green men."³ Her accusations were truly incredible *and false*.

The Church and Pastors were put in a difficult position. On the one hand, they could go to trial and prove that they did not engage in the religious conduct alleged, although they would have to admit that they did talk about demons during church services. But, such a trial would itself violate the First Amendment. It would be a form of heresy trial, such that the Church's and Pastors' religion would be put on trial and their religious beliefs examined. Originally, the trial court intended to force such a trial. The trial court originally denied a motion to dismiss the religious claims that complained about alleged prayers about demons, possession by spirits, statements about visions of God, etc.

The Church and Pastors decided to seek mandamus to compel the dismissal of these religious complaints. However, an appellate court is not a fact finder. See *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (*orig. proceeding*) ("An appellate court may not deal with disputed matters of fact in an original mandamus proceeding.")

³ For a description of some of Laura's wild hallucinations, see Appendix G to the Brief of Church Members and Pastors at page 4.

The Church and the Pastors could not factually contest the Schubert's accusations in the mandamus proceeding, but had to accept them *as if they were true*. This was no minor assumption. In fact, the Church had to swallow hard to go forward with a mandamus proceeding that required the Court of Appeals to assume the allegations were true, but such is the nature of mandamus. After the Court of Appeals issued its first Opinion, 991 S.W.2d 85, the Church and Pastors filed a Motion For Correction. That motion reminded the Court of Appeals that it had repeated, and intended to publish, the Plaintiff's allegations as if they were judicially established facts. Publishing these allegations as if they were "facts" would be incorrect.

This Court of Appeals then granted the motion to correct⁴ to reflect that its recitation of events was only the *Plaintiff's allegations* and that they were presumed to be true for purposes of that proceeding. However, the corrected opinion was not published by West Publishing.⁵

If the Justices now hearing this appeal were to begin by reading the West Publishing Company's version of the prior Opinion on mandamus, 991 S.W.2d 885, the Justices would come away with the incorrect conclusion that the Church engaged in bizarre behavior. That is simply untrue.

The best way to deal with prejudice is simply to expose it to the light. Enlightened

⁴ December 3, 1998 Order of the Court of Appeals in Case No. 2-98-222-CV.

⁵ Versuslaw.com provides the corrected opinion.

people realize that, while *their own* religious beliefs seem perfectly natural and normal, the religious views of other denominations and religions seem downright offensive and eccentric.⁶ As the United States Supreme Court said of the strange ritual of animal sacrifice in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993):

Although the practice of animal sacrifice may seem abhorrent to some, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection ... their religion cannot be deemed bizarre or incredible.

Id. 508 U.S. at 531 (citations and internal quotation marks omitted).

It is precisely because religious practices are viewed by outsiders as “aberrant” that they require First Amendment protection. It is only when the surrounding community is abhorred by a religious practice that the First Amendment protections need to come to the aid of the minority that hold the “strange” religious belief. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

This need for First Amendment protection has grown, because psychology now dominates our modern thought and our legal system. In the trial, the actions of the Church were critiqued by three persons from the field of psychology who testified that the Church caused psychological injuries. Monetary damages were then imposed on the Church, its

⁶ Following their religious beliefs, people do bizarre things. Some groups dunk people under water in an effort to save them from eternal suffering in hell, other groups chant phrases to reach nirvana, some groups regularly reenact “eating the body” and “drinking the blood” of their savior, other groups engage in circumcision of male infants.

Pastors, and members to compensate Plaintiff for psychological injuries. Consider, for example, the actions of Reverend Lloyd McCutchen, a long-time pastor within this denomination, now nearing retirement. What was his wrongful conduct? He was not even present during the first Sunday night incident, nor during most of the Wednesday night incident. The testimony is that he was summoned over to the Youth Service where he directed that some peaceful music be played via a tape, and then he “**prayed** for her, he knelt by her head . . .” (RR 12, p. 146) He then called her parents, who came to get her.

The jury imposed 50% of fault against him, personally, the largest of any defendant. Why? If Laura was truly complaining of being restrained, then liability would be imposed on the people who restrained her. Reverend McCutchen neither restrained her nor advised others to do so.

If the jury wanted to impose liability on a Church to strike back at its religion, it would have faulted the Church. But, the Church itself was not included in any Jury Question. The jury saw the most obvious representative of the Church, Pastor McCutchen, and faulted him for Laura’s psychological injuries. He was personally hit with the largest percentage of fault, 50%. Thus, to accept the Jury’s Verdict, one must accept the notion that the person *most at fault* for Laura’s PTSD is Pastor McCutchen, because he responded to a call for help and came over and prayed for Laura. Obviously, the jury did not like him praying.

B. The Standard Of Review: The WHOLE Record

When the judicial system invades the area of conduct protected by the First Amendment, the Supreme Court imposes an obligation on courts to conduct an “independent

examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 701 (7th Cir. 2001); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000) (“we must independently consider the entire record”).

In addition, the stringent First Amendment protections, originally developed under libel law in *New York Times v. Sullivan*, have been applied to suits against churches and their members. See Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. Fed. 754, 774-77 (1989). As explained in *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) (suit for emotional harms against Jehovah Witnesses):

State laws whether statutory or common law, including tort rules, constitute state action. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court ruled that state libel laws are subject to the constraints of the first amendment. “The test,” according to the Court, “is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.” [citations omitted] For purposes of this test, we see no difference between libel and other forms of torts. Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.

And concluding:

A religious organization has a defense of constitutional privilege to claims that it has caused *intangible harms*—in most, if not all, circumstances. As the United States Supreme Court has observed, “[t]he values underlying these two provisions [of the first amendment] relating to religion have been zealously protected, sometimes even at the expense of others interests.”

See also, *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001) (applying these same

First Amendment standards to a suit involving intentional infliction of emotional distress).

C. This Case Began And Ended As A Religious Dispute

After the events at the Church, Tom Schubert, then a Pastor and Missionary for the Assembly of God denomination, wrote letters complaining to the Senior Pastor of the way this situation was handled. His complaints were entirely religious saying, “We will leave it to you to investigate if you feel it is necessary,” and adding “I am placing this situation in your hands and hope God gives you wisdom.” He too phrased the entire incident in terms of spiritual warfare:

What those kids went through during a night of spiritual battle was just as hurtful as what Laura faced in Africa. Laura knows that Demons are bigger and more dangerous than Cameroonian soldiers with machine guns. Pray for her. She went through a war and is now a casualty ...

Tom Schubert’s letter of August 2, 1996, contained at p. 085 to Appendix to Petition For Writ of Mandamus proceeding, No. 2-98-222-CV.

Not receiving satisfaction from the Senior Pastor, Tom Schubert appealed to the denomination’s District Superintendent, Derwood Dubose, demanding that disciplinary action be taken against the Church. *Id.* at pgs. 117-124. Not receiving satisfaction, he then filed this lawsuit. Thus, the Original Complaint was filled with allegations about the Church’s religious statements about demons, God, the cross, prayers, exorcism, etc. (CR 1, pgs. 4-16) In response to the original dismissal motion, Tom Schubert authored his own Affidavit complaining that the conduct at the Church was, according to him, out of line with the beliefs and practices of the Assembly of God denomination. (See pgs. 161-166 to Appendix to

Petition For Writ of Mandamus proceeding.) The Original Complaint alleged that this religious conduct traumatized Laura Schubert and emotionally injured her by causing PTSD. (CR 1, pgs. 16-17) While the Original Petition also complained of restraint, the resulting injury from this conduct was alleged to be some bruises and scratches. Only after the first mandamus proceeding required dismissal of the religious complaints did Laura Schubert then heavily amend her allegations to complain that being restrained had caused her PTSD. While this pleading was used to get the case into court, complaints about religion permeated the entire trial.

Her PTSD was directly linked to religion. For example, one witness Charles D. Wilson, told about taking Laura on his family vacation. She showed no psychological problems during the vast majority of the trip. But, after going to church on Sunday morning, her entire affect then became depressed and sullen. This testimony was offered for the sole purpose of showing that her going to a church service on Sunday morning triggered her PTSD. (RR 11, p. 22)

And, after his daughter's favorable jury verdict Tom Schubert then made his statement to the press, "This is a situation where religion went real bad." (Fort Worth Star Telegram, March 23, 2002) The Church submits that courts do not decide when religion "goes bad."

D. The "Actual Malice" Requirement

First Amendment restrictions on tort liability were developed under the law of libel. Libel and slander law originally imposed liability upon a defendant because he "intentionally" printed material about a plaintiff. If that information was false, he was found to have engaged

in the “intentional tort” of defamation, regardless of whether he thought the information was true. As the court explained in *New York Times v. Sullivan*, under some tort law, “malice is presumed.” 376 U.S. 254, 267-284, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964) However, the Supreme Court found that “the power to create presumptions is not a means of escape from constitutional restrictions.” The Supreme Court then *rejected presumed malice* and required that malice “is a matter of proof by the plaintiff.” *Id.*; *Moore v. University of Notre Dame*, 968 F.Supp. 1330 (N.D.Ind. 1997) (“Moore [plaintiff] must clear the hurdle of showing the defendants acted with the requisite malice. Actual malice may not be presumed.”). Thus, malice must be proven by a plaintiff.

Here, the Plaintiff failed to produce any evidence that any Petitioners acted with any *actual malice*, such an intent to injure or harm Laura. Instead, the evidence is that every person who approached Laura did so because they believed she needed help, *i.e. prayer*. (RR 14, p. 184) As the court stated in *Paul v. Watchtower, supra* 819 F.2d at 887 fn. 7:

... she [plaintiff] has neither alleged nor shown that members of the Church hierarchy were motivated by reasons unrelated to their interpretation of the dictates of their religion.

E. The Limitation On Damages

In addition, the First Amendment also imposes strict limitations on the scope of damages that are allowed. Damages cannot be *presumed*, they must actually be proven. See *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 756-57, 105 S.Ct. 2939, 2941, 2943-44, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 3011-12, 41 L.Ed.2d 789 (1974); *Vassallo v. Bell*, 534 A.2d 724, 740

(N.J.Super.A.D. 1987):

Here, however, the Court of Appeals held that PTSD damages were *presumed* to be *foreseeable*.⁷ The PTSD damages were treated as “direct damages” with the holding:

Direct damages, also known as “general” damages, flow naturally and necessarily from the wrong and compensate the plaintiff for the loss that the defendant is *conclusively presumed to have foreseen* as a result of his wrongful act.

(Opinion, Appendix C at 174 S.W.3d at 397, emphasis added.)

However, given the First Amendment’s importance in avoiding any “presumption” of damages, *foreseeability* should not to be presumed. PTSD damages should be proven as Special Damages, recoverable only if they are foreseeable.

Why should foreseeability be imposed as part of constitutional protections? The courts can impose liability for religious conduct only if the liability is “narrowly tailored” to serve a compelling state interest. Imposition of broad tort liability for unforeseeable damages is simply not “narrowly tailored.”

The requirement that state intrusions into First Amendment conduct must be “narrowly tailored” is a universal First Amendment principle. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-2837, 106 L.Ed.2d 93 (1989); *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *United States v. Am. Library Ass’n*, 539 U.S. 194, 218, 23 S.Ct. 2297, 2310, 156 L.Ed.2d 221 (2003) (Justice

⁷ Of course, such a presumption would directly contradict her own expert witness, who negated foreseeability of PTSD even if there had been a psychologist present at the time of the events. (RR 13, p. 272-273)

Breyer concurring “a means narrowly tailored to achieve the desired objective”); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) even efforts to protect children from pornography must be “narrowly tailored” due to First Amendment concerns); *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (statute prohibiting political campaigning in designated areas survived only because it was “narrowly tailored” to serve a compelling state interest). Most importantly, any recovery of damages for “intangible harms,” such as mental anguish damages, are barred “in most, if not all, circumstances.” *Paul v. Watchtower, supra*, at 883.

In sharp contrast, the trial court submitted a Charge (Appendix A) that broadly imposed liability for unforeseeable consequences regardless of the Petitioners’ good faith. Despite objections, this Charge was not “narrowly tailored” to include only malicious or foreseeable injuries. The imposition of broad liability runs afoul of Petitioners’ First Amendment rights.

F. Why Were The Intentional Tort Claims Not Originally Dismissed Via Mandamus?

The question may naturally arise to this Court: if the First Amendment prohibits Laura from recovering under such intentional tort theories, then why didn’t the Church and Pastors originally seek to dismiss those counts in the original mandamus proceeding?

The answer to this question lies in the original state of the pleadings the Petitioners faced and the extraordinary nature of mandamus proceedings. In the Original Petition filed by the Schuberts, they pled that the Church and the Pastors acted intentionally to commit a battery and false imprisonment upon Laura, and acted with “actual malice.” (Plaintiff’s

Original Petition, p. 15; CR 1, p. 16) They pled that all of Laura's injuries were *foreseeable*. In fact, the Plaintiffs pled that the risk of these future harms was *subjectively understood* by the Pastors and Church Members, but supposedly they ignored these *known risks*. (Original Petition, p. 12-16; CR 1, p. 17)

Petitioners could not possibly have sought mandamus to dismiss those charges. They pleaded the exact limitations on tort liability that the First Amendment imposes: foreseeable damages caused by heinous conduct committed with actual malice. They could hardly seek mandamus on the grounds that the allegations were not true. They prepared for a trial that was supposedly going to prove they maliciously intended to injure Laura in foreseeable ways. But, the proof did not materialize. Given the gap between pleading and proof, one would have expected a directed verdict. But, instead, the trial court simply deleted all of the elements that plaintiff failed to prove, and also deleted any affirmative defenses, such as *in loco parentis*. No defensive instructions or limitations were submitted.

SUB-ISSUE NO. 4A:

Whether the Court of Appeals erred in ruling that the Petitioners somehow waived their First Amendment issues.

Contrary to the Court of Appeals' assertion, Petitioners have never *waived* their First Amendment rights. They asserted them in every pleading, at every phase, and in every brief. Indeed, reviewing the history of these proceedings, it would not have been possible to more vigorously assert the First Amendment protections. Even before trial the Petitioners prosecuted the original mandamus, and the follow-up plea that the writ actually issue, all on First Amendment grounds. The Petitioners sought dismissal, summary judgment, motions in

limine, objections to evidence, directed verdict, renewed their motion for directed verdict, and even requested a jury instruction to instruct the jury on the First Amendment. Post trial they continued their First Amendment protestations with a motion for judgment n.o.v. and a motion for new trial. All of these were denied. Nonetheless, the Court of Appeals found waiver on two basis.

First, the Court of Appeals found waiver because in the original mandamus proceeding, the Petitioners freely admitted that they had no First Amendment defenses to claims for intentional “bodily injury” that Plaintiff originally alleged.⁸ This type of admission in litigation is to be encouraged. Litigation is greatly facilitated when litigants will narrow the issues by making key admissions. But, as this Court has probably noticed, most counsel refuse to engage in candid admissions.

Have you ever wondered why a lawyer will not admit the most basic facts or legal principles? For example, a judge in oral arguments freely asks a lawyer to admit that his client’s *tort* claims are controlled by the two year statute of limitations. Judges are then annoyed that the lawyer refuses to make this basic admission? Why such extreme reluctance to admit the most basic thing? Narrowing the issues becomes tedious.

The lawyer’s reluctance is a recognition that the heaviest weapon in the appellate

⁸ The Petitioner’s original mandamus action to the Court of Appeals did not seek relief for Plaintiff’s “secular claims” for “bodily injury”:

Therefore, Relators [Original Parties] do not request that this Court issue mandamus to stop litigation of this ‘secular controversy for
“**bodily injury.**”

(Church’s Petition For Writ of Mandamus, CR 9, p. 1576-1577).

judge's arsenal is the hammer of *waiver*.⁹ For example, given the above admission about the statute of limitations, appellate judges will sometimes recite things in their opinion such as, "counsel admitted that the two year statute of limitations controls." The lawyer agonizes that the courts conveniently overlooked one critical word in his admission, the word *tort*. And, the lawyer wonders if he must now contact his malpractice carrier. Next time, the lawyer will make no such admissions, never. Argue anything, but admit nothing!

The vast majority of appellate decisions are based in whole or in part on waiver. Waiver covers almost every appellate decision, from contract cases to capital punishment. For example, during the year 2005, more than 900 Texas appellate decisions discussed waiver of alleged errors. By way of contrast, less than half as many cases discussed a common legal principle, breach of contract.¹⁰ There are countless ways in which Courts of Appeals find waiver. The list is simply too long to compile. A few examples must suffice. Waiver is found by appellate courts due to inadequate briefing,¹¹ failing to object to a party's participation in trial,¹² not raising discovery deficiencies prior to trial,¹³ and by statements

⁹ Lawyers tell the apocryphal story of the appellate judge who, hearing a difficult Point of Error, raises his hand in conference and waives, as if to say *Goodbye*. This waiving gesture simultaneously signifies waiver and "bye bye" to the difficult point of error.

¹⁰ Searches via Westlaw.

¹¹ *Anderson v. Leasecomm Corp.*, 2006 WL 1314128 (Tex.App.–Dallas 2006).

¹² *Texas Property and Cas. Guar. Ass'n v. National American Ins. Co.*, 2006 WL 821068, *11 (Tex.App.–Austin 2006).

¹³ *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, *242 (Tex.App.–Texarkana 2005).

during oral arguments.¹⁴ If a party responds to inadmissible evidence (properly objected to) by introducing refuting evidence, he arguably waives any complaint about the original admission.¹⁵ Not surprisingly, the body of waiver law is so complex, appellate justices sometimes disagree and dissent on whether waiver has occurred.¹⁶

Courts should encourage frank admissions from counsel by not expanding a limited admission into a larger waiver. Other courts, apparently wanting to encourage candid statements by counsel, narrowly construe alleged judicial admissions. “A judicial admission must be a clear, deliberate, and unequivocal statement,” *Regency Advantage Ltd. Partnership v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996); *Heritage Bank v. Redcom Labs, Inc.*, 250 F.3d 319, 329 (5th Cir. 2001); and *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (an ambiguous sentence cannot constitute a judicial admission).

In citing the supposed judicial admissions, the Court of Appeals, below, simply overlooked one little word in the Petitioner’s admission, *bodily*. If a church or pastor is sued for *bodily* injury, such as car wreck or a broken arm, then the First Amendment does not apply. However, “bodily injury” means just that: injury to the body, not mental anguish. Black’s Law Dictionary, 7th Ed. 1999, p. 789 (“physical damage to a person’s body.”); see

¹⁴ *Adams v. State*, 179 S.W.3d 161 (Tex.App.–Amarillo 2005).

¹⁵ *Grove v. Overby*, 2004 WL 1686326, *3 (Tex.App.–Austin 2004).

¹⁶ For example, see *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 620 (Tex.App.–Houston [1st Dist.] 2002, pet. denied) (Justice Cohen dissenting “Coastal neither specified to which of these many pages it was objecting, nor claimed all 288 pages were inadmissible.”)

also, *Eshtary v. Allstate Insurance Company*, 767 S.W.2d 291, 293 (Tex.App.–Fort Worth 1989, writ denied) and *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 820 (Tex. 1997) (“bodily injury” does not include mental anguish). Had Plaintiff recovered damages for a *bodily* injury (such as medical expenses for mending a broken arm), the First Amendment would not apply. But, the Plaintiff did not prove any damages for “bodily injuries”, and only suffered damages in the form of PTSD, a removed form of mental anguish damage to which the First Amendment *does* apply. The Court of Appeals was wrong to find waiver on the basis of a prior statement about bodily injury.

The Court of Appeals engaged in a similar misuse of an admission about the Pastors being in the course and scope of their employment. The Church complained that a judgment was entered against it, even though there was no jury verdict against it. No Jury Question asked about the Church itself. This naturally presents the question, were the Pastors in the course and scope of their employment? The Church briefed the issue, noting that employees who engage in torts like assault and false imprisonment are usually outside of the scope of their employment, as a matter of law. But, again, the candor of counsel can narrow the issues and return litigation to reality. The reality was that the Pastors were not acting *ultra vires*. Instead, they were engaged in religious activities for the Church. They were praying! To simplify this “course and scope” issue, the Church made a carefully worded admission, as follows:

The Church is willing to make the following carefully worded admission: Because (*and only because*) the Pastors were performing their religious duties during church services, the Pastors were in the course and scope of their work

for the Church during the times in question.

(Brief of Appellant Pleasant Glade Assembly of God, page 7.)

Wanting to avoid First Amendment issues raised by imposing liability based on prayer, the Court of Appeals simply stripped this “carefully worded admission” of its stipulation that the Pastors were performing “their religious duties.” The Court took the admission out of context by quoting only half of it, stating:

Further, appellants admit that McCutchen and Linzay “were in the course and scope of their work for the Church during the times in question.”

(Court of Appeals’ Opinion, Appendix C, 174 S.W.3d at 407.)

This is brazen. This Court would chide any counsel if they quoted half of a key sentence of a judicial opinion, ignoring the conditional language at the first half of the sentence. But, the Court of Appeals was straining to find waiver to avoid a difficult constitutional issue, so they resorted to a half-quotation taken out of context.

Relentlessly, pursuing waiver, the Court of Appeals also found that the First Amendment defenses were “waived” because the Petitioners did not get on the stand and testify that their “assault and imprisonment was based on their sincerely held religious beliefs.” (Appendix C, fn. 81.) This borders on the ridiculous.

First, if the Church Members took the stand and began voluntarily testifying to the jury about the dictates of their religion (prayer, laying on of hands, spiritual warfare), they would have injected religion into the trial. Of course, cross-examination would follow. (Example: the Bible does not actually require laying on of hands for prayer, correct?) Now, that would

be waiver! The Church Members would have voluntarily submitted their religious beliefs to the jury for examination.

Second, if members of a church had absolutely proved that their religion caused them to commit intentional torts, such as battery, would they then enjoy any First Amendment protection? The Court of Appeals seems to hold that their key to First Amendment protections was testimony that their religion requires “assault and imprisonment based on their sincerely held religious beliefs.”

Such a standard is not consistent with the law. Instead, constitutional protections are invoked when tort liability is imposed upon the type of *activities* that come within the First Amendment. For example, publishing news articles comes under the First Amendment freedom of the press, without any testimony needed from the publisher that he was somehow required to libel a person. The publisher engaged in a protected activity, publishing, so the First Amendment applies. *Sullivan*, 376 U.S. at 267-284. Similarly, religious reactions of Pastors to a girl crying out that she is tortured by demons during a Pentecostal service comes within First Amendment freedom of religion protections.

The Court of Appeals engaged in a flawed analysis by *first* deciding that the Petitioners engaged in an “intentional tort,” and then secondarily considering whether there is any First Amendment protection for persons who commit “intentional torts.” This is a flawed approach that is quite old and was once used with torts like “libel” or “insurrection.” Plaintiffs would sue with these allegations, then argue that the First Amendment had no place in protecting people that engage in libel or insurrection. However, the Supreme Court demands that the

courts look beyond these labels:

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

New York Times v. Sullivan, supra, 376 U.S. at 269.

Also, an individual need only prove that his religion *requires something*, if he is seeking to negate some secular law while trying to secure some secular benefit. In the vast majority of constitutional cases involving freedom of religion, the church member has left the sanctity of his church and entered the “world” to seek some secular benefit, such as unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), seeking public office, *McDaniel v. Paty*, 435 U.S. 618, 629, 98 S.Ct. 1322, 1329, 55 L.Ed.2d 593 (1978), entering military service, *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986), or reaching his hand out to grasp secular money, *Tilton v. Marshall*, 925 S.W.2d 672, 677-78 (Tex. 1996). When the church member leaves his church to seek worldly benefits, he can hardly be surprised to find that he is subject to some “neutral” regulation by the State. This is referred to as the “minimum requirement of neutrality.”¹⁷ In that context, he must show that his religion *requires him* to do something, such as not work on Sunday. *Sherbert v. Verner, supra*.

¹⁷ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533; 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

But, it is an entirely different matter when church members stay within their own church, as here, during normal hours of worship (Sunday night and Wednesday night), and are interacting with one another in the context of spiritual warfare. In this case, the State has thrown open the doors of the church and walked into the inner sanctuary to see whether it condones or prohibits certain conduct. And, the State now uses the measuring stick of psychological opinions to measure the Church's conduct.

In the cases where the State enters the church's doors, the courts must *slightly* limit tort liability in deference to freedom of religion. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531; 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (bizarre activities in the services protected, without proof that their religion "requires" animal sacrifice) and *Paul v. Watchtower Bible & Tract Society Of New York*, 819 F.2d 875 (2nd Cir. 1987) ("[r]eligious activities which concern only members [persons] of the faith are and ought to be free—as nearly absolutely free as anything can be.")

Here, the courts are literally stepping between church members during their service, a dangerous place for courts. The courts can do so, but they must follow a narrow path, limiting its judgments to liabilities for bodily injuries, or foreseeable mental injuries maliciously inflicted.

PRAYER FOR RELIEF

Petitioner prays that this Court grant their Petition For Review, reverse the Court of Appeals, and grant such other 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 the foregoing Brief On The Merits - Pleasant Glade Assembly of God has been sent via certified mail, return receipt requested, to the following counsel of record on this the 8th day of June, 2006:

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APPENDIX A

ORIGINAL

NO. 141-173273-98

LAURA SCHUBERT, TOM SCHUBERT §
AND JUDY SCHUBERT §

IN THE DISTRICT COURT

VS. §

141ST JUDICIAL DISTRICT

PLEASANT GLADE ASSEMBLY OF §
GOD, ET AL §

TARRANT COUNTY, TEXAS

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath, and such exhibits, if any, as have been introduced for your consideration under the rulings of the court. In other words, consider only what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

An important part of your function is to weigh and evaluate the evidence and testimony of each witness and document admitted into evidence by the Judge. In exercising this function, the jury may and should consider the conduct and demeanor of the witnesses, their bias, interest, prejudice, or lack of such qualities, and may and should determine the witness' credibility under the facts and circumstances of the case. You may accept part of a witness' testimony and reject part of it; you may accept all of it or reject all of it, and you may accept all of one witness' testimony and reject the testimony of another witness, although you must not do this arbitrarily.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term *PREPONDERANCE OF THE EVIDENCE* means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence, except that a finding of "None" to a question inquiring of damages may be based upon a failure of the evidence to demonstrate an answer by a preponderance of the evidence.

DEFINITIONS AND INSTRUCTIONS

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

JURY QUESTIONS

Question No. 1.

Did any of the following Defendants falsely imprison Laura Schubert?

"Falsely imprison" means to willfully detain another without legal justification, against her consent, whether such detention be effected by violence, by threat, or by any other means that restrains a person from moving from one place to another.

Answer "Yes" or "No" as to each Defendant:

Reverend Lloyd A. McCutchen:	<u>yes</u>
Rod Linzay	<u>yes</u>
Holly Linzay	<u>yes</u>
Becky Bickel	<u>yes</u>
Rigina Beberwyck-Martin	<u>NO</u>
Ileana Randolph	<u>NO</u>
Paul Patterson	<u>yes</u>
Denise Patterson	<u>no</u>
Sandra Smith	<u>yes</u>

QUESTION NO. 2.

Did any of the Defendants commit an assault against Laura Schubert?

A person commits an assault if he (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Answer "Yes" or "No" as to each of the Defendants.

Reverend Lloyd A. McCutchen:	<u>yes</u>
Rod Linzay	<u>yes</u>
Holly Linzay	<u>yes</u>
Becky Bickel	<u>yes</u>
Rigina Beberwyck-Martin	<u>no</u>
Ileana Randolph	<u>no</u>
Paul Patterson	<u>yes</u>
Denise Patterson	<u>no</u>
Sandra Smith	<u>yes</u>

If you have answered "Yes" to more than one of the Defendants in Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3.

What percentage of responsibility do you find to be attributable to each of those found by you, in your answers to Question No. 1 or Question No. 2, to have been responsible?

The percentages you find must total 100 percent, and must be stated in whole numbers.

Reverend Lloyd A. McCutchen:	<u>50%</u>
Rod Linzay	<u>05</u>
Holly Linzay	<u>3</u>
Becky Bickel	<u>15</u>
Rigina Beberwyck-Martin	<u>0</u>
Ileana Randolph	<u>0</u>
Paul Patterson	<u>4</u>
Denise Patterson	<u>0</u>
Sandra Smith	<u>3</u>
TOTAL	<u>100%</u>

If you have answered "Yes" to any part of Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 4.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Laura Schubert for her injuries, if any, resulting from the occurrences in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you may find.

Answer separately in dollars and cents for damages, if any:

- a. Physical pain and mental anguish sustained in the past.

~~\$ 150K~~ \$ 150,000.00

- b. Physical pain and mental anguish that, in reasonable probability, Laura Schubert will sustain in the future.

\$ 0.00

- c. Loss of earning capacity sustained in the past.

\$ 10,000.00

- d. Loss of earning capacity that, in reasonable probability, Laura Schubert will sustain in the future.

\$ 112,000.00

- e. Medical care in the past after Laura Schubert turned eighteen.

\$ 12,000.00

- f. Medical care that, in reasonable probability, Laura Schubert will sustain in the future.

\$ 16,000.00

If you have answered "Yes" to any part of Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 5.

What sum of money, if any, if paid ^{now PE} in cash, would fairly and reasonably compensate Tom Schubert and Judy Schubert for Laura Schubert's medical expenses incurred, if any, while she was a minor, as a result of her injuries, if any?

Answer in dollars and cents:

\$ 0.00

After you retire to the jury room, you will select your own Presiding Juror. The first thing the Presiding Juror will do is have this entire charge read aloud, and then you will deliberate upon your answers to the questions asked.

It is the duty of the Presiding Juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
4. To vote on the questions;
5. To write your answers to the questions in the space provided; and,
6. To certify to your verdict in the space provided for the Presiding Juror's signature, or to obtain the signatures of all of the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the court of this fact.

When you have answered all the questions you are required to answer under the instructions of the Judge, and the Presiding Juror has placed your answers in the spaces provided and signed the verdict as Presiding Juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will be returned into court with your verdict.

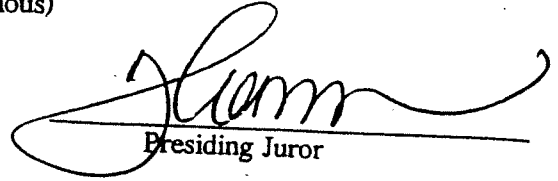


JUDGE PRESIDING

CERTIFICATE

We, the Jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the Presiding Juror if unanimous)


Presiding Juror

(To be signed by those voting for the verdict if not unanimous)

APPENDIX B

NO. 141-173273-98

LAURA SCHUBERT, ET AL.,

Plaintiffs,

VS.

PLEASANT GLADE ASSEMBLY OF GOD,
ET AL.,

Defendants.

§
§
§
§
§
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§
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§

IN THE DISTRICT COURT OF

TARRANT COUNTY, TEXAS

141ST JUDICIAL DISTRICT

JUDGMENT

On the 4th day of March, 2002, came on for trial the above-entitled and numbered cause and Laura Schubert, Plaintiff, appeared in person and by attorneys of record and announced ready for trial. Defendants Pleasant Glade Assembly of God, Reverend Lloyd A. McCutchen, Rod Linzay, Holly Linzay, Becky Bickel, Rigina Beberwyck-Martin, Ileana Randolph, Paul Patterson, Denise Patterson, and Sandra Smith appeared in person and by attorneys of record and announced ready for trial and the jury having been previously demanded, a jury consisting of twelve qualified jurors were duly empaneled and the case proceeded to trial.

On March 22, 2002, the trial of this cause was submitted to the jury. The Court's Charge to the Jury and the Verdict of the Jury is incorporated herein for all purposes by reference as if fully set forth herein.

Because it appears to the Court that the Verdict of the Jury in the trial was for the Plaintiff and against the Defendants, judgment should be rendered on the verdict in favor of the Plaintiff and against the Defendants.

IT IS THEREFORE ORDERED by the Court as follows:

1. That Plaintiff, Laura Schubert have and recover the following amounts from the below listed Defendants on her claim for false imprisonment:

a. Compensatory damages	\$300,000.00
b. Prejudgment interest on compensatory damages from August 20, 1997 to May 23, 2002 in the amount of \$142,438.30. (prejudgment interest is \$82.19 per day).	\$142,438.30
c. <u>Costs of Court</u>	\$16,152.38
Total	\$458,590.68

2. That Plaintiff, Laura Schubert have and recover the following amounts from the following Defendants on her claim for false imprisonment:


a. Pleasant Glade Assembly of God (75%) (joint and several with Reverend Lloyd A. McCutchen for 50% of the 75% and with Rod Linzay for 25% of the 75%)	\$343,943.01
b. Reverend Lloyd A. McCutchen (50%) (joint and several with Pleasant Glade Assembly of God)	\$229,295.34
c. Rod Linzay (25%) (joint and several with Pleasant Glade Assembly of God)	\$114,647.67
d. Holly Linzay (3%)	\$13,757.72
e. Becky Bickel (15%)	\$68,788.60
f. Paul Patterson (4%)	\$18,343.62
g. Sandra Smith (3%)	\$13,757.72

IT IS FURTHER ORDERED that the judgment herein rendered shall bear interest as to each Defendant at the rate of ten percent (10%) compounded as authorized by law from the date of this judgment until paid.

IT IS FURTHER ORDERED that all additional costs of court expended in this cause are adjudged against Defendants according to the percentages of responsibility set forth above, and are awarded to Plaintiff.

IT IS FURTHER ORDERED that all writs and processes for the enforcement of this judgment and the costs of court may issue as necessary.

SIGNED this 23 day of May, 2002.



JUDGE PRESIDING

APPENDIX C



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 2-02-264-CV

Pleasant Glade Assembly of God, § From the 141st District Court
Reverend Lloyd A. McCutchen,
Rod Linzay, Holly Linzay, § of Tarrant County (141-173273-98)
Sandra Smith, Becky Bickel,
and Paul Patterson § September 15, 2005

v. §

Laura Schubert § Opinion by Chief Justice Cayce

JUDGMENT

After reviewing appellants Sandra Smith, Becky Bickel and Paul Patterson's motion for rehearing, we deny the motion. We withdraw our June 9, 2005 opinion and judgment and substitute the following.

This court has considered the record on appeal in this case and holds that there was error in part of the trial court's judgment. It is ordered that the judgment awarding Laura \$122,000 in damages for loss of earning capacity is reversed and that judgment is rendered that she take nothing on this damages claim. We affirm the remainder of the trial court's judgment.

It is further ordered the parties shall bear their own costs of this appeal, for which let execution issue.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Court of Appeals of Texas,
Fort Worth.
PLEASANT GLADE ASSEMBLY OF
GOD, Reverend Lloyd A. McCutchen, Rod
Linzay, Holly
Linzay, Sandra Smith, Becky Bickel, and
Paul Patterson, Appellants,
v.
Laura SCHUBERT, Appellee.
No. 2-02-264-CV.

Sept. 15, 2005.

Background: Former church member brought action against church, pastors, and several church members, alleging assault and battery and false imprisonment, arising out of defendants' physically restraining former church member after she collapsed at church function. The 141st District Court, Tarrant County, Paul Wendell Enlow, J., entered judgment on jury verdict in favor of former church member. Defendants appealed.

Holdings: On rehearing, the Court of Appeals, John Cayce, C.J., held that:
(1) defendants were not entitled to immunity based on in loco parentis;
(2) whether defendants were entitled to protection under Good Samaritan statute was question for jury;
(3) evidence supported award of damages for mental anguish;
(4) damages for loss of earning capacity were unforeseeable and not recoverable;
(5) former member was not required to prove malice or that defendants intended to injure

her in order to recover mental anguish damages;

(6) expert opinion regarding former member's post-traumatic stress disorder (PTSD) was sufficiently reliable; and

(7) defendants were estopped from asserting protection from claims under First Amendment.

Affirmed in part, and reversed and rendered in part.

Livingston, J., dissented in part.

West Headnotes

[1] Parent and Child ↪ 15

285k15 Most Cited Cases

One who through kindness or charity or other motive has received a child into his family and treats the child as a member thereof stands "in loco parentis" so long as the child remains in his family; defining characteristics of "in loco parentis" are the actual care and custody of a child by a nonparent who assumes parental duties because the parent, generally due to his or her absence, is unable or unwilling to care for the child.

[2] Parent and Child ↪ 15

285k15 Most Cited Cases

Person who has only a temporary responsibility for supervising a child is not deemed to be "in loco parentis" as to the child.

[3] False Imprisonment ↪ 15(1)

168k15(1) Most Cited Cases

[3] Parent and Child ↪15

285k15 Most Cited Cases

Pastor and church members did not stand "in loco parentis" to 17-year-old child who attended church function while her parents were out of town, and thus pastor and church members were not immune from liability for physically restraining child after child collapsed at church function; although child's father testified that he expected pastor and church members to assume parental responsibilities as to child, supervisory situation was temporary, and child was primarily responsible for her own care while parents were gone.

[4] Action ↪5

13k5 Most Cited Cases

Fact that conduct is justified under the penal code does not abolish or impair any remedy for the conduct that is available in a civil suit. V.T.C.A., Penal Code § 9.06.

[5] Health ↪769

198Hk769 Most Cited Cases

[5] Negligence ↪284

272k284 Most Cited Cases

Good Samaritan statute, providing that a person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully and wantonly negligent, is designed to offer protection to persons who voluntarily administer emergency care. V.T.C.A., Civil Practice & Remedies Code § 74.151(a).

[6] Assault and Battery ↪42

37k42 Most Cited Cases

[6] False Imprisonment ↪39

168k39 Most Cited Cases

Whether pastor and church members were entitled to protection under Good Samaritan statute for their restraint of former church member who collapsed at church function was for jury in former church member's action alleging assault and battery and false imprisonment; although pastor and church members testified that they administered emergency care to former member in the belief that she had suffered hypoglycemic attack, there was evidence that defendants did not view episode as emergency, but viewed former member's actions as dramatic ploy for attention. V.T.C.A., Civil Practice & Remedies Code § 74.151(a).

[7] Trial ↪139.1(14)

388k139.1(14) Most Cited Cases

[7] Trial ↪139.1(17)

388k139.1(17) Most Cited Cases

Directed verdict is proper only in limited circumstances: (1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent; or (2) when the evidence is insufficient to raise a material fact issue.

[8] Assault and Battery ↪37

37k37 Most Cited Cases

[8] False Imprisonment ↪32.1

Westlaw.

174 S.W.3d 388

174 S.W.3d 388

(Cite as: 174 S.W.3d 388)

Page 3

168k32.1 Most Cited Cases

In the case of intentional torts such as assault and battery and false imprisonment, the wrongdoer is responsible for the direct and immediate damages resulting from the tort regardless of whether those damages were contemplated, foreseen, or expected.

[9] Damages ↪20

115k20 Most Cited Cases

[9] Damages ↪163(1)

115k163(1) Most Cited Cases

Unlike direct damages, consequential damages, or "special" damages, are not presumed to have been foreseen in intentional tort cases; instead, they must be premised upon a finding that the damages were proximately caused by the defendant's wrongful conduct.

[10] Negligence ↪387

272k387 Most Cited Cases

Proximate cause requires proof of foreseeability.

[11] Negligence ↪387

272k387 Most Cited Cases

Injury is foreseeable, for purposes of proximate cause analysis, if its general character might have been reasonably anticipated.

[12] Damages ↪18

115k18 Most Cited Cases

[12] Torts ↪119

379k119 Most Cited Cases

Even an intentional wrongdoer has no liability for remote consequential injuries that could not have been reasonably anticipated as a probable result of his acts.

[13] Damages ↪57.22

115k57.22 Most Cited Cases

Mental anguish damages shown to have resulted directly from some types of intentional torts, such as assault and battery, are recoverable regardless of their foreseeability.

[14] Damages ↪192

115k192 Most Cited Cases

[14] False Imprisonment ↪31

168k31 Most Cited Cases

Even if damages were not foreseeable, evidence that former church member's mental anguish arose from pastor's and church members' intentional conduct was sufficient to support award of mental anguish damages in former member's action for assault and battery and false imprisonment arising out of pastor's and church members' physically restraining former church member after she collapsed at church function; experts testified that former member suffered from post-traumatic stress disorder (PTSD) resulting from her being held down physically at church.

[15] Damages ↪18

115k18 Most Cited Cases

Foreseeability, in proximate cause context, does not require that the exact sequence of

events that produce an injury be foreseeable, but only that the general character of the damages be foreseen.

[16] Assault and Battery ↪ 38

37k38 Most Cited Cases

[16] False Imprisonment ↪ 34

168k34 Most Cited Cases

Former church member's loss of ability to go to Bible college and become a missionary because of the post-traumatic stress disorder (PTSD) she suffered as a result of pastor's and church members' intentional actions in holding her down on the floor on two occasions during church functions when she was a junior in high school was unforeseeable, and thus former member was not entitled to loss of earning capacity damages in action for assault and battery and false imprisonment arising out of pastor's and church members' physically restraining former church member after she collapsed at church function.

[17] Damages ↪ 57.22

115k57.22 Most Cited Cases

To recover mental anguish damages, plaintiff who has suffered an intentional tort is not required to prove malice, in addition to the defendant's intentional conduct, or that the defendant intended to cause the plaintiff's injury.

[18] Evidence ↪ 508

157k508 Most Cited Cases

[18] Evidence ↪ 535

157k535 Most Cited Cases

[18] Evidence ↪ 555.2

157k555.2 Most Cited Cases

Two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be based on a reliable foundation. Rules of Evid., Rule 702.

[19] Evidence ↪ 555.2

157k555.2 Most Cited Cases

To gauge reliability of expert opinion testimony, trial court must evaluate the methods, analysis, and principles relied upon in reaching the opinion, and trial court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of the discipline; in determining reliability, however, trial court does not decide whether the expert's conclusions are correct, but only whether the analysis used to reach those conclusions is reliable. Rules of Evid., Rule 702.

[20] Evidence ↪ 555.2

157k555.2 Most Cited Cases

If foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on the data because any opinion drawn from that data is likewise unreliable; expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from the data based on flawed methodology. Rules of Evid., Rule 702.

[21] Evidence ↪555.2

157k555.2 Most Cited Cases

Expert testimony that is based on research the expert has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science, thus supporting determination that expert opinion is sufficiently reliable to be admitted. Rules of Evid., Rule 702.

[22] Appeal and Error ↪971(2)

30k971(2) Most Cited Cases

[22] Evidence ↪546

157k546 Most Cited Cases

Trial court has broad discretion to determine admissibility of expert opinion testimony, and appellate court will not reverse the trial court's ruling absent a clear abuse of that discretion.

[23] Appeal and Error ↪946

30k946 Most Cited Cases

Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

[24] Evidence ↪555.10

157k555.10 Most Cited Cases

Expert opinion that former church member suffered from post-traumatic stress disorder (PTSD) as a result of pastor's and church members' actions in holding her down on the floor on two occasions during church functions when she was a junior in high school was sufficiently reliable to be admitted

in action for assault and battery and false imprisonment; although former member and her family were source of experts' information, expert stated that this was "the way it's normally done" in the psychological community, experts conducted standard psychological testing on former member, indications that former member was embellishing symptoms was consistent with a "cry for help," and experts' methods and analyses had a rate of error generally accepted in the scientific community as reliable. Rules of Evid., Rule 702.

[25] Assault and Battery ↪3

37k3 Most Cited Cases

[25] False Imprisonment ↪4

168k4 Most Cited Cases

Malice is not an element of the intentional torts of assault and battery or false imprisonment.

[26] Evidence ↪43(1)

157k43(1) Most Cited Cases

Court may take judicial notice of its own records, and such notice is mandatory if a party requests it and supplies the necessary information. Rules of Evid., Rule 201(d).

[27] Estoppel ↪68(2)

156k68(2) Most Cited Cases

Church that successfully challenged "religious" claims against it under First Amendment in prior application for writ of mandamus would be estopped from later in action asserting First Amendment protection

from plaintiff's secular claims for assault and battery and false imprisonment; church had sworn under oath in mandamus proceeding that plaintiff's secular claims against it were entitled to no First Amendment protection and should "go forward." U.S.C.A. Const.Amend. 1.

[28] Constitutional Law ↪ **43(1)**

92k43(1) Most Cited Cases

Church members waived their right to assert affirmative defense of First Amendment protection, in action brought by former church member for assault and battery and false imprisonment arising out of incident in which members physically restrained former church member after she collapsed at church function, where church members did not establish that their assault and imprisonment of former church member was based on their sincerely held religious beliefs, but instead testified that their conduct arose from their belief that former church member's actions were a ploy for attention from other members of church youth group. U.S.C.A. Const.Amend. 1.

*392 Law Office of David M. Pruessner, David M. Pruessner, Dallas, for Appellants.

Douglas, Wuester & Stenholm, P.C., William O. Wuester, Fort Worth, for Appellee.

PANEL A: CAYCE, C.J.; LIVINGSTON and WALKER, JJ.

OPINION ON REHEARING

JOHN CAYCE, Chief Justice.

Introduction

This is an appeal from a judgment against Pleasant Glade Assembly of God church, two of its pastors, and several church members [FN1] based on a jury verdict in favor of a former church member, Laura Schubert, for assault and battery and false imprisonment. In ten issues, appellants assert they should not be held liable for Laura's damages because they were acting *in loco parentis* and as Good Samaritans. They also complain that the damages awarded by the jury were not foreseeable and that the trial court improperly admitted medical evidence concerning Laura's post-traumatic stress disorder (PTSD). Finally, appellants contend that the judgment should be reversed because there is no clear and convincing evidence, as required by the First Amendment, that they acted with malice.

FN1. Appellants are Pleasant Glade Assembly of God church, Reverend Lloyd A. McCutchen, Rod Linzay, Holly Linzay, Sandra Smith, Becky Bickel, and Paul Patterson.

We reverse and render in part and affirm in part.

Factual and Procedural Background

On Saturday, June 8, 1996, Tom and Judy Schubert went out of town for a long weekend, leaving their three teenage children home alone. The Schuberts left their oldest child, nineteen-year-old Amy, in charge.

While the Schuberts were away, their middle child, seventeen-year-old Laura, spent much of her time at the family's church, Pleasant Glade Assembly of God, participating in church-related activities. Laura collapsed following the evening service on Sunday, June 9, and several church members, including appellants, felt it necessary to physically restrain her. The evidence concerning the restraint and the events that followed is hotly contested.

The record shows that, after her collapse, Laura clenched her fists tightly, gritted her teeth, foamed at the mouth, made guttural noises, cried, yelled, kicked, sweated, and hallucinated. The parties sharply disagree, however, over whether these things were the cause, or the result, of appellants' attempts to restrain her. The parties also disagree over the amount of force used to restrain Laura and whether she was restrained for minutes or hours.

There is evidence that Laura's collapse and her reaction to being restrained could have been due to the medical condition hypoglycemia. Appellants did not know this at the time, however, and some of them believed that Laura's actions were a dramatic ploy for attention from members of the church's youth group. None of appellants sought medical attention for Laura, and there is conflicting evidence concerning whether any of them attempted to check her vital signs or determine whether she was feeling all right. Appellants testified at trial, however, that they

had acted solely out of a desire to help Laura, not hurt her, and that they had no feelings of ill will or malice towards her.

Following the Sunday episode, the next two days passed uneventfully. Laura continued *393 to participate in church-related activities, such as Vacation Bible School and preparing for youth drama productions. Tom and Judy Schubert returned home late Tuesday afternoon.

On Wednesday evening, Laura attended the church's weekly youth service. Rod Linzay, the church's youth pastor, was in charge of the service. At the close of the service, Laura began to act in a manner that Linzay and the youth group believed indicated that she was having another episode like that of the previous Sunday night. At some point, Laura began thrashing about on the floor. Once again, there is conflicting evidence about whether this was the cause or the result of appellants' attempts to restrain her, as well as about how long the restraint lasted and the amount of force used.

The church's senior pastor, Lloyd McCutchen, was summoned and told that "Laura is doing it again." [FN2] At the prompting of Gene Schacterle, a visiting pastor, McCutchen eventually telephoned Tom Schubert. Laura's parents drove to the church to get her, where they found her in a condition that Tom described as "dazed." They took Laura to a restaurant for a meal and then drove home. Both Laura and her parents testified that Laura

suffered carpet burns, a scrape on her back, and bruises on her wrists and shoulders as a result of her experiences. Laura's parents did not, however, seek medical attention for her physical injuries.

FN2. McCutchen had not been present during the Sunday evening episode, but had been told about it.

By June 21, Laura had begun to experience nightmares about her experiences at the church. In late June 1996, she first visited a counselor. In addition, although Laura had been attending public school before the summer of 1996, she became anxious and left school on the first day of her senior year in August 1996. She was authorized to complete her senior year of high school at home. Also, while at work in late October 1996, Laura cut her wrists, although not badly, with a box cutter after seeing her overwhelming work schedule. She also reported that she had become depressed and suicidal because of the June 1996 events at the church.

In November 1996, Laura was first diagnosed as suffering from post-traumatic stress disorder (PTSD). By May 1997, several other doctors had also made this diagnosis and a diagnosis of acute stress disorder. Several of Laura's doctors testified at trial and opined that Laura's PTSD was caused by her being held down physically at the church in early June 1996.

Between the fall of 1996 and the time of trial,

Laura saw many different counselors, psychologists, and psychiatrists and, on a number of occasions, was admitted to psychiatric institutions for several days. She suffered a variety of symptoms, including angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia. [FN3] She was also classified as "disabled" by the Social Security Administration and began drawing a monthly disability check.

FN3. Agoraphobia is the abnormal fear of being helpless in an embarrassing or inescapable situation that is characterized by the avoidance of being in public places. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 24 (10th ed.1994).

Laura eventually sued appellants for, among other things, assault and battery and false imprisonment. In defense to the suit, appellants claimed that they were immune from liability under the *in loco parentis* doctrine and because they acted as Good Samaritans. In addition, appellants contended that under the First Amendment to the United States Constitution *394 and article I, section 6 of the Texas Constitution Laura should be required to prove by clear and convincing evidence that appellants acted with malice. Appellants also asserted that they should not be held responsible for Laura's damages because they were not foreseeable.

The case was tried to a jury. At the close of

the evidence, appellants moved for a directed verdict on their defenses and on the ground that there was no evidence that Laura's damages arising from her PTSD were foreseeable as a result of appellants' conduct. The motion was overruled. Appellants then requested jury instructions on their defenses and on the question of foreseeability as it related to Laura's damages, all of which the trial court denied.

The jury found appellants liable for assault and battery and false imprisonment and awarded Laura damages for past physical pain and mental anguish in the sum of \$150,000, past and future loss of earning capacity in the sum of \$122,000, and past and future medical care in the sum of \$28,000, for a total recovery of \$300,000. After the trial court overruled appellants' motion for judgment notwithstanding the verdict, this appeal followed.

In Loco Parentis

In their first issue, appellants complain that the trial court improperly denied their motions for a directed verdict and for judgment notwithstanding the verdict based on *in loco parentis*. They assert that they are immune from liability for Laura's assault and battery and false imprisonment claims because they stood *in loco parentis* as to Laura during the June 1996 incidents and acted with the "reasonable belief" that their actions were necessary to restrain her. In the alternative, appellants assert that the trial court erroneously refused to submit their proposed

jury instruction on *in loco parentis*.

[1][2] "*In loco parentis*" literally means "in the place of a parent" and refers to "acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." [FN4] In Texas, *in loco parentis* status has been conferred on persons and entities who have voluntarily assumed parental responsibilities and attempted to create a home-like environment for the child. [FN5] "[O]ne who through kindness or charity or other motive has received into his family and treats a child as a member thereof, stands in loco parentis ... so long as the child remains in his family." [FN6] The defining *395 characteristics of *in loco parentis* are the actual care and custody of a child by a nonparent who assumes parental duties because the parent--generally due to his or her absence--is unable or unwilling to care for the child. [FN7] A person who has only a temporary responsibility for supervising a child, however, is not deemed to be *in loco parentis* as to the child. [FN8]

FN4. BLACK'S LAW DICTIONARY 803 (8th ed.1999).

FN5. See *McGee v. McGee*, 936 S.W.2d 360, 369-70 (Tex.App.-Waco 1996, writ denied) (op. on reh'g) (holding that stepfather stood *in loco parentis* because he had cared for child from early childhood and was the only father child had ever known); *Goetz v. Lutheran Social Serv. of Tex.*,

Inc., 579 S.W.2d 82, 83 (Tex.Civ.App.-Austin 1979, no writ) (holding that children's home had *in loco parentis* status and appointing home as child's managing conservator after parental rights were terminated); Malone v. Dixon, 410 S.W.2d 278, 285 (Tex.Civ.App.-Eastland 1966, writ ref'd n.r.e.) (concluding that orphanage stood *in loco parentis* as to child after his aunt placed him there following his parents' death); Trotter v. Pollan, 311 S.W.2d 723, 729 (Tex.Civ.App.-Dallas) (deeming couple *in loco parentis* to child who lived for years in their home with no financial assistance from child's father and whom they voluntarily cared for and treated as their own), writ ref'd n.r.e. per curiam, 158 Tex. 494, 313 S.W.2d 603 (1958); Cantu v. S. Pac. Ry. Co., 166 S.W.2d 963, 965 (Tex.Civ.App.-Amarillo 1942, writ ref'd) (holding couple stood *in loco parentis* to child whose parents had committed to couple child's care, custody, and child-rearing responsibilities from age 15 months until child's death ten years later).

FN6. Trotter, 311 S.W.2d at 729; accord McGee, 936 S.W.2d at 369.

FN7. Coons-Andersen v. Andersen, 104 S.W.3d 630, 635-36 (Tex.App.-Dallas 2003, no pet.).

FN8. See In re Martin, 147 S.W.3d 453, 456 (Tex.App.-Beaumont 2004, orig. proceeding) (holding that child's uncle, who was temporarily responsible for babysitting child, was not entitled to *in loco parentis* status).

[3] In this case, appellants assert that they stood *in loco parentis* as to Laura on the occasions in question because Tom and Judy Schubert had entrusted them with Laura's care while the Schuberts were out of town; the church's youth pastor, Rod Linzay, and his wife Holly, regularly "played a parental role with respect to the youth group"; and other church members assumed parental responsibilities for Laura, which Tom Schubert testified that he expected. These are, however, merely temporary supervisory situations; they are not the types of circumstances that give rise to the *in loco parentis* status. [FN9]

FN9. See id. & supra n. 5.

Further, the record shows that Laura was primarily responsible for her own care and was not in the custody of anyone in particular while the Schuberts were out of town. Although Laura's parents left Amy "in charge" and also expected Laura to spend much of her time at the church, Laura was responsible for her own meals and getting herself to and from her retail job and church-related activities. She also stayed at night in her own home, sometimes with a friend, unsupervised by any adults. Thus, the defining characteristics of *in*

loco parentis--actual care and custody--are not present in this case. [FN10]

FN10. See *Coons-Andersen*, 104 S.W.3d at 635-36.

[4] The authorities on which appellants rely are inapposite because they involve either the teacher-pupil relationship [FN11] or defenses to criminal prosecution--neither of which is present here. [FN12] The teacher-pupil relationship is statutorily defined and is limited to professional employees of a school district. [FN13] Moreover, the fact that conduct is justified under the penal code does not abolish or impair any remedy for the conduct that is available in a civil suit. [FN14]

FN11. See *Spacek v. Charles*, 928 S.W.2d 88, 95 (Tex.App.-Houston [14th Dist.] 1996, writ *dism'd w.o.j.*); *Hogenson v. Williams*, 542 S.W.2d 456, 459-60 (Tex.Civ.App.-Texarkana 1976, *no writ*) (both involving athletic coaches and students and citing *Restatement (Second) of Torts* §§ 147, 150-51 (1965)).

FN12. See *Tex. Penal Code Ann.* § 9.61(b) (Vernon 2003) (providing that adult can stand *in loco parentis* as to child by express or implied consent of child's parents), § 9.62(1) (providing that use of nondeadly force against a person is justified (1) if actor is entrusted with the care, supervision, or administration of the person for a

special purpose, (2) when and to the degree actor reasonably believes necessary to further special purpose or to maintain discipline in a group); *see also Snowden v. State*, 12 Tex.Ct.App. 105, 105, 1882 WL 9200, at *2 (1882) (holding that brother who provided home and financial support to his 15-year-old sister could assert *in loco parentis* defense to criminal prosecution for shoving her).

FN13. See *Tex. Educ.Code Ann.* §§ 22.051, .0511 (Vernon Supp.2004-05).

FN14. See *Tex. Penal Code Ann.* § 9.06 (Vernon 2003); J. Hadley Edgar, Jr. & James B. Sales, 4 *Texas Torts & Remedies* § 50.04[1] (2005).

*396 Because appellants did not stand *in loco parentis* as to Laura, the trial court did not err by overruling their requests based on this doctrine. Accordingly, we overrule appellants' first issue.

Good Samaritan

[5] In their second issue, appellants contend that the trial court erred by denying their motion for a directed verdict based on the Good Samaritan statute. This statute provides that a person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully and wantonly negligent. [FN15] It is designed to offer protection to persons who voluntarily

administer emergency care. [FN16]

FN15. See Act of May 22, 1993, 73rd Leg., R.S., ch. 960, § 1, 1993 Tex. Gen. Laws 4194, 4194 (amended 1999, 2003) (current version at Tex. Civ. Prac. & Rem.Code Ann. § 74.151(a) (Vernon 2005)).

FN16. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 658 (Tex.App.-Dallas 2002, pet. denied).

[6] Appellants contend that they administered emergency care to Laura because there is evidence that her collapse following the Sunday evening service was due to a hypoglycemic attack. Appellants' position is contradicted, however, by their trial testimony that they moved Laura from the church sanctuary, where she had collapsed initially, to a Sunday School room because they believed her actions were a dramatic ploy for attention from other members of the youth group. Several of the appellants testified that they wanted to remove Laura from the "audience" that was forming in the main sanctuary. Moreover, there is no evidence that any emergency continued after appellants moved Laura from the sanctuary to the Sunday School room.

In addition, the record does not show that appellants believed the Wednesday evening episode involved an emergency. When McCutchen was summoned on Wednesday evening while Laura was being restrained, he

simply put his hand on her forehead, played a tape of music to calm things down, and eventually telephoned her father.

[7] A directed verdict is proper only in limited circumstances: (1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent; or (2) when the evidence is insufficient to raise a material fact issue. [FN17] We hold that appellants did not conclusively establish their right to a directed verdict based on the Good Samaritan statute. [FN18] Accordingly, we overrule appellants' second issue.

FN17. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex.2000); *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex.App.-Fort Worth 2003, no pet.); see also Tex.R. Civ. P. 268.

FN18. *Prudential Ins. Co. of Am.*, 29 S.W.3d at 77; *Ray*, 97 S.W.3d at 730.

Foreseeability of Damages

In their third issue, appellants contend that the trial court erred by denying their request for a directed verdict on the issue of mental anguish and loss of earning capacity damages because there is no evidence that those damages were foreseeable. [FN19] Alternatively, appellants contend that the trial court erred by refusing to instruct the jury that Laura's damages *397 were limited to those that were foreseeable.

FN19. The jury awarded Laura actual damages for past physical pain and mental anguish, past and future loss of earning capacity, and past and future medical care. The damages for past physical pain and mental anguish are not segregated.

[8] At common law, actual damages are either "direct" or "consequential." [FN20] In the case of intentional torts such as assault and battery and false imprisonment, the wrongdoer is responsible for the direct and immediate damages resulting from the tort regardless of whether those damages were contemplated, foreseen, or expected. [FN21] Direct damages, also known as "general" damages, flow naturally and necessarily from the wrong and compensate the plaintiff for the loss that the defendant is conclusively presumed to have foreseen as a result of his wrongful act. [FN22]

FN20. 5 TEXAS TORTS & REMEDIES § 80.01[2] (2005).

FN21. See *Sitton v. Am. Title Co. of Dallas*, 396 S.W.2d 899, 903-04 (Tex.Civ.App.-Dallas 1965, writ ref'd n.r.e.), cert. denied, 385 U.S. 975, 87 S.Ct. 501, 17 L.Ed.2d 437 (1966); *Thompson v. Hodges*, 237 S.W.2d 757, 759 (Tex.Civ.App.-San Antonio 1951, writ ref'd n.r.e.).

FN22. 5 TEXAS TORTS &

REMEDIES § 80.01[2][a].

[9] Consequential or "special" damages, on the other hand, result naturally but *not* necessarily from the defendant's wrongful acts. [FN23] Unlike direct damages, consequential damages are not presumed to have been foreseen; instead, they must be premised upon a finding that the damages were proximately caused by the defendant's wrongful conduct. [FN24]

FN23. *Id.* § 80.01[2][b].

FN24. See *Airborne Freight Corp., Inc. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 295 (Tex.App.-El Paso 1992, writ denied) (discussing consequential damages in context of common law fraud cause of action).

[10][11][12] Proximate cause requires proof of foreseeability. [FN25] An injury is foreseeable if its general character might have been reasonably anticipated. [FN26] "Even an intentional wrongdoer has no liability for remote consequential injuries that could not have been reasonably anticipated as a probable result of his acts." [FN27]

FN25. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995); *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex.1992); see also *Clark v. Waggoner*, 452 S.W.2d 437, 438 (Tex.1970) ("In our State the two

elements of proximate cause are cause in fact and foreseeability.").

FN26. *Boys Clubs of Greater Dallas*, 907 S.W.2d at 478; *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 551 (Tex.1985).

FN27. See *Phillips v. Latham*, 523 S.W.2d 19, 27 (Tex.Civ.App.- Dallas 1975, writ ref'd n.r.e.) (holding mental anguish damages too remote to recover on basis of intentional tort claim for civil conspiracy); *Sitton*, 396 S.W.2d at 903-04 (same).

[13] Mental anguish damages shown to have resulted directly from some types of intentional torts, such as assault and battery, are recoverable regardless of their foreseeability. [FN28] The rationale for this rule is that the traditionally recognized "problems of foreseeability and genuineness are sufficiently mitigated" because "the high level of culpability [associated with these torts] affects the determination of proximate cause ... and makes it just that the defendant should bear the risk of any overcompensation that an award of mental *398 anguish damages in a particular case might entail." [FN29]

FN28. See *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex.1967) (holding that "[p]ersonal indignity is the essence of an action for battery"); *Durban v. Guajardo*, 79

S.W.3d 198, 206 (Tex.App.- Dallas 2002, no pet.) (holding that emotional distress is "the essence" of assault claim); see also *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 372 (Tex.2004) (affirming award of actual mental anguish damages when there was legally sufficient evidence of false imprisonment).

FN29. *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex.1997); see also *Fitzpatrick v. Copeland*, 80 S.W.3d 297, 302 & n. 2 (Tex.App.-Fort Worth 2002, pet. denied).

[14] In this case, there is evidence that Laura's mental anguish resulted directly from appellants' intentional acts. Several of Laura's experts, Drs. Roger Pentzien, Arthur Swen Helge, and Millie Carol Astin, testified that Laura suffered from PTSD and major depressive disorder, which were caused by her being held down physically at the church on two occasions in June 1996 when she was exhausted and unable to contact her parents. There is also evidence that Laura's damages for past and future medical care were the natural and necessary result of appellants' wrongful conduct. [FN30] Dr. Helge tied Laura's need for such medical care directly to her PTSD caused by the June 1996 events.

FN30. See 5 TEXAS TORTS & REMEDIES § 80.01[2][a].

Because there is evidence that Laura's mental

anguish and need for medical care resulted directly from appellant's intentional conduct, appellants are liable to Laura for these damages regardless of whether they were contemplated, foreseen, or expected. [FN31] Accordingly, the trial court did not err by ruling against appellants regarding these elements of Laura's damages.

[FN31]. See Sitton, 396 S.W.2d at 903-04; Thompson, 237 S.W.2d at 759.

We now turn to appellants' complaint about Laura's loss of earning capacity damages.

[15] Unlike her mental anguish damages, Laura's loss of earning capacity damages are consequential or special damages. [FN32] Therefore, they must be premised upon a finding that they were proximately caused by, and a foreseeable result of, appellants' wrongful conduct. [FN33] To be held liable for Laura's lifetime loss of earning capacity, appellants must have reasonably contemplated that their actions might have resulted in damages of this general character. [FN34] This cannot be established by mere conjecture, guess, or speculation. [FN35]

[FN32]. See Weingartens, Inc. v. Price, 461 S.W.2d 260, 264 (Tex.Civ.App.-Houston [14th Dist.] 1970, writ ref'd n.r.e.) ("Loss of earnings and loss of earning capacity are items of 'special damages.'").

[FN33]. Boys Clubs of Greater Dallas, 907 S.W.2d at 477; City of Mesquite, 830 S.W.2d at 98; Airborne Freight Corp., 847 S.W.2d at 295.

[FN34]. County of Cameron v. Brown, 80 S.W.3d 549, 556 (Tex.2002). Foreseeability does not require that the exact sequence of events that produce an injury be foreseeable, but only that the general character of the damages be foreseen. Id.; Boys Clubs of Greater Dallas, 907 S.W.2d at 478; Nixon, 690 S.W.2d at 551.

[FN35]. Boys Clubs of Greater Dallas, 907 S.W.2d at 477; McClure v. Allied Stores of Tex., Inc., 608 S.W.2d 901, 903 (Tex.1980).

[16] The evidence supporting Laura's loss of earning capacity damages shows that she could not go to Bible college and become a missionary because of the PTSD she suffered as a result of appellants' intentional actions in holding her down on the floor on two occasions during church functions when she was a junior in high school. Based on these facts, "nothing short of prophetic ken" could have foreseen that Laura would forever lose the ability to pursue a college education and a career as a missionary as a result of appellants' conduct. [FN36] On the record before us, *399 the only way someone could conclude that appellants might have contemplated an injury of such magnitude would be by "viewing the facts in retrospect, theorizing an

extraordinary sequence of events whereby the defendants' conduct brings about the injury." [FN37] A finding of foreseeability requires more than this. [FN38]

[FN36. See *Gulf, C. & S.F. Ry. Co. v. Bennett*, 110 Tex. 262, 219 S.W. 197, 198 (1920).

[FN37. Restatement (Second) of Torts § 435(2) (1965).

[FN38. See *Boys Clubs of Greater Dallas*, 907 S.W.2d at 478.

Because there is no evidence that would support a finding that Laura's loss of earning capacity was foreseeable, there is no evidence that appellants' conduct was the proximate cause of Laura's consequential damages for loss of earning capacity. [FN39] Thus, the trial court erred by denying appellants' motion for a directed verdict and awarding Laura damages for loss of earning capacity. [FN40]

[FN39. See *id.* (holding that when there is no evidence raising a fact issue on foreseeability, there is no evidence to support a finding of proximate cause); *Phillips*, 523 S.W.2d at 26-27 (holding that because there was no competent evidence that plaintiff's illnesses could have been reasonably foreseen, there was no causal relation between defendants' intentional acts and plaintiff's injuries).

[FN40. Because there is no evidence to support a finding that Laura's loss of earning capacity damages were proximately caused by appellants' conduct, we do not reach appellants' alternative issue regarding whether the trial court erred in failing to submit a separate damages question asking whether Laura's loss of earning capacity was proximately caused by appellants' conduct.

We sustain appellants' third issue in part and overrule it in part.

Absence of Malice

[17] In their fourth issue, Appellants contend that Laura is not entitled to recover mental anguish damages or the resulting expenses for her medical care under *City of Tyler*. [FN41] because appellants did not act with malice or intend to cause Laura's injuries. Appellants' reliance on *City of Tyler* is, however, misplaced. In *City of Tyler*, the supreme court said, "[M]ental anguish damages are recoverable for some common law torts that generally involve intentional or malicious conduct such as ... battery." [FN42] The supreme court did not hold that a plaintiff who has suffered an intentional tort is required to prove malice *in addition* to the defendant's intentional conduct or that the defendant intended to cause the plaintiff's injury. [FN43] Because the jury found the requisite intent to commit the tortious conduct causing Laura's mental anguish and other damages, neither the appellants' good motives nor their erroneous

beliefs that they were acting rightfully excuse them from liability. [FN44]

FN41. 962 S.W.2d at 489.

FN42. Id. at 495 (emphasis supplied); accord Fitzpatrick, 80 S.W.3d at 302 & n. 2 (noting that mental anguish damages are recoverable for intentional tort of battery because legal concerns regarding foreseeability and legitimacy of injury are satisfied).

FN43. City of Tyler, 962 S.W.2d at 495.

FN44. See DAN B. DOBBS, THE LAW OF TORTS § 25, at 49-50 (2001).

We overrule appellants' fourth issue.

Reliability of PTSD Evidence

In their fifth and sixth issues, appellants assert that the trial court improperly admitted certain medical records and expert testimony showing that Laura suffered from PTSD as a result of the events of June 1996. Appellants assert that this evidence lacks the scientific reliability required by *400 E.I. du Pont de Nemours & Co. v. Robinson [FN45] and the Texas Rules of Evidence. [FN46] In particular, appellants argue that the expert opinions of Drs. Roger Pentzien, Arthur Swen Helge, and Millie Carol Astin are based on unreliable data because virtually all of the information was provided by Laura or her

family, whom the record shows to be prone to exaggeration and fabrication. Appellants also contend that the opinions are unreliable because the experts failed to rule out Laura's traumatic childhood experiences in Africa as a possible cause of her PTSD. [FN47]

FN45. 923 S.W.2d 549 (Tex.1995).

FN46. Appellants also complain in passing that this evidence was inadmissible because it was not based on a reasonable medical probability. We do not address this complaint because it is not briefed. See Tex.R.App. P. 38.1(h).

FN47. The record contains conflicting evidence concerning whether Laura's experiences in Africa were traumatic. Some of Laura's medical records indicate that she had seen "traumatic events" such as "beatings and burnings" while her family lived as missionaries in Africa. The record is unclear, however, whether these records are based on Laura's or Tom Schubert's recounting of events. Also, Tom authored two letters in 1992 and 1996, respectively, regarding the family's alleged experiences in Africa that indicated Laura had faced "fear and danger in Africa" that "was more than any child should ever see or face." Tom testified at trial, however, that he had exaggerated in the letters "almost to the point of lying"--once to

obtain leave from Africa from the mission board due to his children's difficulties in school and another to emphasize how the events of June 1996 had hurt Laura more deeply than her experiences in Africa. Laura denied having suffered any traumatic experiences in Africa and testified instead that Africa was "an amazing place" where she would prefer to raise her daughter.

[18] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise. [FN48] A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be based on a reliable foundation. [FN49]

FN48. Tex.R. Evid. 702.

FN49. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex.2001); *Robinson*, 923 S.W.2d at 556.

[19] To gauge reliability, the trial court must evaluate the methods, analysis, and principles relied upon in reaching the opinion. [FN50] The trial court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it

will have a reliable basis in the knowledge and experience of the discipline. [FN51] In determining reliability, however, the trial court does not decide whether the expert's conclusions are correct, but only whether the analysis used to reach those conclusions is reliable. [FN52]

FN50. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex.2002); *Gammill v. Jack Williams Chev. Inc.*, 972 S.W.2d 713, 725 (Tex.1998).

FN51. *Helena Chem. Co.*, 47 S.W.3d at 499; *Gammill*, 972 S.W.2d at 725-26.

FN52. *Exxon Pipeline Co.*, 88 S.W.3d at 629; *Gammill*, 972 S.W.2d at 728.

[20] If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on the data because any opinion drawn from that data is likewise unreliable. [FN53] Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions *401 from the data based on flawed methodology. [FN54]

FN53. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex.1997).

FN54. *Id.*

[21] The supreme court has crafted two

approaches for determining whether expert testimony is reliable: the *Robinson* factors and the *Gammill* analytical gap test. [FN55] Only the *Robinson* factors are at issue here. These factors include, but are not limited to (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the nonjudicial uses that have been made of the theory or technique. [FN56] Expert testimony that is based on research the expert has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. [FN57]

[FN55]. *Gammill*, 972 S.W.2d at 720, 726.

[FN56]. *Robinson*, 923 S.W.2d at 557.

[FN57]. *Id.* n. 2.

[22][23] The trial court has broad discretion to determine admissibility, and we will not reverse the trial court's ruling absent a clear abuse of that discretion. [FN58] A trial court abuses its discretion only if it acts arbitrarily and capriciously, without reference to any guiding rules or principles. [FN59] Merely

because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. [FN60]

[FN58]. *Exxon Pipeline Co.*, 88 S.W.3d at 629; *Helena Chem. Co.*, 47 S.W.3d at 499; *Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404, 410 (Tex.App.-Fort Worth 2003, no pet.).

[FN59]. See *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex.2002); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986).

[FN60]. *Downer*, 701 S.W.2d at 242.

The evidence concerning the reliability of Dr. Helge's, Dr. Astin's, and Dr. Pentzien's expert testimony is as follows.

[24] Dr. Helge, a clinical and forensic psychologist, had over twenty-five years' experience diagnosing mental diseases and disorders and had conducted seminars and published articles related to his profession. He had also testified at more than two hundred trials and given over a hundred depositions. [FN61] Dr. Helge opined that Laura suffered from a dependent personality disorder [FN62] and that her being touched and held down against her will on the two occasions in June

1996 when she was exhausted and not able to contact her parents were the cause of her PTSD.

FN61. Appellants do not challenge the qualifications Drs. Helge and Pentzie. Instead, appellants acknowledged that these doctors were qualified as experts and also designated them as their own experts regarding certain of their diagnoses concerning Laura.

FN62. According to Dr. Helge, a dependent personality is one that trusts another person's judgment, rather than her own, particularly when under stress.

Dr. Helge conceded that Laura or her family had been the source of all the information he had relied upon in making these diagnoses, either through their self-reporting to him or other mental health professionals, or Laura's responses to the tests that he had conducted. But Dr. Helge testified that this was "the way it's normally *402 done" in the psychological community and pointed out that he had also reviewed Laura's medical records and relied on the expertise of the other experts who had interviewed her. Moreover, Dr. Helge testified that he had conducted standard psychological testing on Laura, along with a Psychiatric Diagnostic Interview (PDI-R) and a clinical interview, which were consistent with the standard and practice for clinical psychology.

Dr. Helge also listed seven specific tests that he had performed on Laura. According to Dr. Helge, the tests had been subjected to peer review, published in professional literature, accepted as valid testing instruments within the psychological community, and used in court situations. Several of the tests had been used and revised since the 1950s; others were introduced in the 1980s. He relied on the results from four of these tests, the MMPI-II, MCRI, TAT, and TSI, [FN63] along with the PDI-R and Laura's medical records from other doctors, in making his diagnoses.

FN63. These tests are the Minnesota Multiphasic Personality Inventory-2, Millon Clinical Multiaxial Inventory-III, Thematic Apperception Test, and Traumatic Symptom Inventory, respectively.

Dr. Helge explained that, while psychological testing does not identify the specific incidents that caused a person's PTSD, the tests do identify the fact that an event traumatic to an individual occurred and its characteristics. For example, Dr. Helge testified that the TAT tests a person's feelings or attitudes about certain situations, and the TSI determines sources of situations in which the person expresses unusual symptoms of trauma at a point in time. Further, Dr. Helge explained that, although there is always a measure of subjective interpretation associated with the tests he conducted, the tests also involved objective data with objective norms.

Dr. Pentzien, a practicing neuropsychiatrist with twenty-six years' experience, also diagnosed Laura as suffering from PTSD and major depressive disorder caused by the events of June 1996. Dr. Pentzien opined that nothing that had happened in Laura's life before the June 1996 events, including the Schubert family's experiences in Africa, [FN64] would have caused these disorders. Dr. Pentzien stated that, due to Laura's conflicting recounting of her history, he would want to see more information before rendering an opinion for the jury to base its verdict on. But he further testified that the rate of error for the methodology he had used in making his diagnoses was one in ten thousand, which is generally accepted throughout the scientific community as reliable.

[FN64]. Dr. Pentzien believed Tom Schubert had embellished the family's situation in Africa because he was concerned about Laura's lack of adjustment. Dr. Pentzien also discounted Laura's Africa experiences as a source of her PTSD because she had adjusted well academically, socially, and physically and had behaved "totally independently" after the family's return to the United States in late 1992, about three-and-a-half years before the June 1996 incidents.

Dr. Astin had eight years of experience as a clinical psychologist. She specialized in trauma disorders such as PTSD, had authored articles and book chapters on PTSD, had

taught courses on the psychology of victims and the assessment of PTSD, and had made numerous conference presentations on PTSD. [FN65]

[FN65]. Although they did not object to Dr. Astin's qualifications at trial, appellants assert that her testimony is not reliable because her credentials are suspect. Appellants' attacks on Dr. Astin's credentials are not supported by the record.

In May 2001, Dr. Astin diagnosed Laura as suffering from PTSD and major depression. *403 She testified that these diagnoses had not changed after twenty-five treatment sessions and additional testing. Although she was aware of Laura's experiences in Africa and was of the opinion that "horrible experiences" in a person's childhood could affect her later in life, Dr. Astin opined that the cause of Laura's PTSD and depression was related to the June 1996 incidents.

Dr. Astin testified that, in making her diagnoses, she had administered several standardized tests to Laura that are generally accepted as valid in the field of psychology for determining whether a person is suffering from PTSD and depression, and if so, with what intensity.

Further, Dr. Astin acknowledged that much of the information she used in making her PTSD diagnosis had been provided by Laura herself. But Dr. Astin listed several methods that she

used to ensure that Laura--or any other patient--was not "pulling the wool over her eyes." First, Dr. Astin relied on her clinical skills and experience. She also asked Laura to give her detailed descriptions of each of the symptoms Laura claimed to be having related to PTSD and depression (such as flashbacks, for example), so that she could determine whether Laura was actually experiencing the symptoms.

Dr. Astin explained that she had done extensive PTSD research and knew from experience that a lot of people wanted to participate in research studies for financial gain. According to Dr. Astin, these people would "overendorse," or report very high PTSD symptom levels that were inconsistent with their behavior. Over time, Dr. Astin examined these individuals' detailed, repeated self-reporting about their alleged symptoms and behavior to see if they were consistent with PTSD. If, based on her extensive clinical training and experience, she determined that a particular patient was overendorsing symptomology consistent with PTSD, but was not actually suffering from it, she would reject the patient from her research studies. She followed the same process with Laura during twenty-five visits and, as a result, "had no sense" that Laura was trying to lie.

Finally, in addition to a regular clinical interview, Dr. Astin conducted a standardized clinical interview, known as CAPS, [FN66] that, in a "very structured way" required her patients, including Laura, to provide specific,

detailed information regarding each of the seventeen possible criteria for PTSD listed in the DSM-IV. [FN67] She explained that the standardization meant that every clinician who administered CAPS to a patient conducted it according to the same format, thereby enabling clinicians to better determine the validity of the responses received and lending greater credence to their resulting diagnoses. Dr. Astin stated that CAPS had been developed in the 1980s as a result of research on potential PTSD sufferers by nationally and internationally known experts and peer-reviewed by experts in PTSD and trauma, some of whom had also written the DSM-IV. Dr. Astin stated that trauma experts considered CAPS to be "state-of-the art" and the "gold standard" for diagnosing PTSD or eliminating it as a diagnosis.

FN66. CAPS stands for Clinician Administered PTSD Scale.

FN67. The DSM-IV is the Diagnostic Statistical Manual, 4th Revision.

Appellants assert that Dr. Astin's methodology was not reliable because it was "unusual" and "quite strange." To support their position, appellants assert that Dr. Astin employed "an unusual form of clinical practice" that most mental health professionals do not recognize: Eye Movement***404** Desensitization and Reprocessing (EMDR). Appellants also assert that Dr. Astin admitted she had treated so many traumatized women that she had been "vicariously traumatized"

herself and experienced PTSD symptoms. Based on our review of the record, we cannot agree with appellants' characterization of Dr. Astin's methodology.

First, there is no evidence that Dr. Astin employed EMDR in *diagnosing* Laura's condition; instead, Dr. Astin testified that she had used this and other techniques in *treating* Laura. Dr. Astin testified that EMDR is a therapy technique that involves asking a person to bring up some aspect of a traumatic memory, along with the negative thoughts that have developed as a result of it, while watching the therapist's fingers move back and forth in front of the patient's eyes. Dr. Astin's personal opinion, however, was that the eye movements were just a way to distract the person while thinking about the trauma, therefore making it less aversive to do so.

Dr. Astin further testified that EMDR was generally accepted in the scientific community, but remained controversial because the inventor of the technique was a controversial person. She explained that there had been little good research on EMDR at first, but that seven recent, "very well controlled studies" had shown EMDR to be highly effective. As a result, this technique had been endorsed, although not promoted, by the Society for Traumatic Stress Studies [FN68] --a well-respected organization of mental health providers, including psychologists and psychiatrists, and "virtually all" of the members of the national centers for PTSD established by the federal government.

Dr. Astin testified that large numbers of clinicians were now using it, and she provided the trial court with two articles about EMDR that explained why it was valid. Regarding vicarious traumatization, Dr. Astin acknowledged that, early in her career, she had experienced symptoms of this phenomenon, which is well recognized in the field of psychology. Dr. Astin testified that, several years before Laura became her patient, she had written an article about her experiences. She also testified that she had recognized how to prevent these feelings and symptoms, no longer had them, and had never been treated for them. Finally, Dr. Astin testified that vicarious traumatization had not affected her diagnosis of Laura in any way.

FN68. Dr. Astin explained that "endorsing" meant STSS had concluded there was good evidence EMDR was effective, while "promoting" would have including prompting from STSS to use the treatment.

Despite all of this evidence of reliability, appellants assert that these experts' testimony concerning Laura's PTSD diagnosis is unreliable because the experts made the diagnosis without conducting any rate-of-incidence studies or objective medical tests, such as imaging technology or blood work, or reviewing results of similar cases of restraint. Appellants further assert that Laura's MMPI-II score showed she was "faking bad," that is, exaggerating her symptoms.

Appellants do not direct us to any expert testimony that these tests should have been conducted or would have assisted in a determination of the cause of Laura's PTSD. [FN69] Further, regarding rate-of-incidence studies, Dr. Helge testified that he did not know of any case studies examining *405 the incidence of PTSD arising from Laura's type of situation.

FN69. See Tex.R.App. P. 38.1(h); Hall v. Stephenson, 919 S.W.2d 454, 466 (Tex.App.-Fort Worth 1996, writ denied) (both providing that appellant has duty to provide appellate court appropriate citations to record).

Regarding medical tests, Dr. Pentzien testified that a blood test and neuroimaging technique were available to serve as additional tools in diagnosing mental disorders. He further testified, however, that the tests had not been conducted because they were not specific enough to distinguish between particular types of disorders. In addition, Dr. Pentzien testified that the neuroimaging technique was not sufficiently standardized to be generally accepted as reliable in the field of neuropsychiatry. Likewise, Dr. Astin testified that she knew of no literature in the field of psychotherapy that suggested a blood test or brain scan could be specific enough to reveal PTSD.

Drs. Astin and Helge conceded that Laura's MMPI-II score showed she was "faking bad." But they interpreted Laura's particular score as

consistent with a "cry for help," meaning that she was embellishing her symptoms somewhat in order to be heard, not that she was claiming to have symptoms that did not exist. Dr. Pentzien testified that, while he considered the MMPI-II helpful in making a diagnosis, he was not trained in the field of psychometrics [FN70] and therefore was not qualified to interpret the MMPI-II test results.

FN70. Psychometrics is the testing and interpretation of psychological tests.

Having conducted a careful review, we conclude that, although the record shows that the methods and analyses that Drs. Helge, Astin, and Pentzien relied upon in formulating their diagnoses involved some subjective interpretation, the record also shows that these methods and analyses had a rate of error generally accepted in the scientific community as reliable, had been accepted as valid in the scientific community for decades, had been subject to extensive peer review and publication, and had been widely used for nonjudicial purposes. [FN71] Accordingly, we hold that the trial court did not abuse its discretion by concluding that these experts' opinion testimony was reliable and therefore admissible. [FN72]

FN71. See Robinson, 923 S.W.2d at 557.

FN72. See Carpenter, 98 S.W.3d at 687; Exxon Pipeline Co., 88 S.W.3d at 629; Helena Chem. Co., 47 S.W.3d

at 499; Downer, 701 S.W.2d at 241-42. In light of this holding, we need not consider appellants' complaint that the trial court summarily overruled their objection to the admission of Laura's medical records from nontestifying experts regarding their PTSD diagnoses. Such evidence, even if improperly admitted, would have been cumulative and would not have caused the rendition of an improper judgment. See Tex.R.App. P. 44.1(a).

We overrule appellants' fifth and sixth issues.

First Amendment

[25] In their seventh and eighth issues, appellants complain that the trial court erred by failing to give them the benefit of certain protections against Laura's claims under the First Amendment of the United States Constitution. [FN73] Specifically, appellants contend 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 *406 claims [FN74] and that the judgment against them should be reversed because the evidence conclusively establishes that they did not act with malice. In the alternative, appellants assert that the case should be remanded for a new trial because the trial court erred in refusing to submit jury instructions on the issue of malice and the clear and convincing evidentiary standard.

[FN73] The Free Exercise Clause to the First Amendment provides, "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. amend. I. Appellants also assert a claim under the Free Worship Clause, article I, section 6 of the Texas Constitution, but they do not argue that the Texas Constitution affords them different or greater protection than the First Amendment.

[FN74] See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763, 105 S.Ct. 2939, 2947, 86 L.Ed.2d 593 (1985) (indicating that damages in defamation cases involving matters of public concern are not presumed absent showing of actual malice); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80, 285-86, 84 S.Ct. 710, 726, 729, 11 L.Ed.2d 686 (1964) (applying actual malice and heightened evidentiary standard to free speech cases involving governmental officials); see also Turner v. KTRK Television, Inc., 38 S.W.3d 103, 120 (Tex.2000) (applying same to public figures). 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); Baribeau v. Gustafson, 107 S.W.3d 52, 60 (Tex.App.-San

Antonio 2003), *cert. denied*, 543 U.S. 871, 125 S.Ct. 272, 160 L.Ed.2d 118 (2004); Green v. Indus. Specialty Contractors, Inc., 1 S.W.3d 126, 134 (Tex.App.-Houston [1st Dist.] 1999, *no pet.*).

see Brown v. Brown, 145 S.W.3d 745, 750 (Tex.App.-Dallas 2004, *pet. denied*), and such notice is mandatory if a party requests it and supplies the necessary information. *See Tex.R. Evid. 201(d).*

[26] In a prior original proceeding, appellants sought, based on the First Amendment, a writ of mandamus ordering the trial court to dismiss all of the "religious" claims that had been brought by Laura and her parents. [FN75] In the same proceeding, appellants requested that we allow Laura's claims for assault and battery and false imprisonment "to go forward" because, in the words of appellants' attorney of record and Reverend McCutchen stated under oath, these claims constitute "a 'secular controversy' and do[] not come within the protection of the First Amendment." Appellants averred 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 "pure 'bodily injury' " claims of assault and battery and false imprisonment were litigated. [FN76]

We granted the relief appellants requested and held that all of the challenged "religious" claims were barred by the First Amendment. [FN77] Thereafter, trial proceeded on Laura's assault and battery and false imprisonment claims with all of the appellants' acquiescence. [FN78]

FN77. Pleasant Glade Assembly of God, 991 S.W.2d at 87, 90.

FN75. See In re Pleasant Glade Assembly of God, 991 S.W.2d 85, 87-88 (Tex.App.-Fort Worth 1998, *orig. proceeding*).

FN78. For example, before trial began, appellants' counsel responded "Okay" to the trial court's ruling that neither side would be allowed to put on evidence about appellants' religious practices as a reason for Laura's restraint. The trial court also instructed the jury at the beginning of trial that, because the suit involved a church, the First Amendment would bar the parties from explaining why certain things were said and done during the June 1996 incidents. Appellants did not object to this instruction. Likewise, when the trial court instructed various witnesses not to mention religious matters, such as prayer, or instructed the jury to disregard testimony concerning

FN76. Appellants have asked us to take judicial notice of our records in the original proceeding. A court may take judicial notice of its own records,

religious matters, appellants did not object to these rulings. In addition, at appellants' request, the trial court instructed one of Laura's expert witnesses to refrain from referring to all issues of faith or religious activity that may have been connected with the June 1996 incidents.

*407 [27][28] Having obtained, in the prior mandamus proceeding, the dismissal of all but Laura's assault and false imprisonment claims, which they swore under oath should "go forward" because they were purely secular and entitled to no First Amendment protections, appellants cannot now "play fast and loose" with the judicial system by taking the opposite position in this appeal to suit their own purposes. [FN79] We therefore hold that the church and pastors are estopped [FN80] from asserting in this appeal that they are entitled to First Amendment protections with regard to Laura's assault and false imprisonment claims. Accordingly, we overrule appellants' seventh and eighth issues. [FN81]

FN79. *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 649 (Tex.App.-El Paso 1997, pet. denied); see also *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 295 (1956).

FN80. Whether appellants' actions are labeled as 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 "an intentional 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 courts, faced with burgeoning dockets, are entitled to rely on prior sworn statements of parties and counsel such as those in this case. 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 party successfully maintained an affirmative position in a prior proceeding that is contrary to the position it now seeks to invoke).

FN81. On rehearing, Smith, Bickel, and Patterson (collectively, the church members) argue that they are entitled to First Amendment protection because they did not participate in the prior mandamus proceeding. The church members have, 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. *See Tilton v. Marshall*, 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 beliefs is misplaced. The affidavit does 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. *See id.*

Course and Scope of Employment

In their ninth and tenth issues, appellants contend that the trial court erred in concluding, as a matter of law, that McCutchen and Rod Linzay were acting in the scope and course of their employment during the June 1996 incidents. Appellants assert that rendition of judgment against the church absent a jury finding on this issue was improper.

Appellants have not briefed these issues. [FN82] Further, appellants admit that McCutchen and Linzay "were in the course and scope of their work for the Church during the times in question." Therefore, we overrule appellants' ninth and tenth issues.

FN82. See Fredonia State Bank v. Gen. Am. Life Ins. Co., 881 S.W.2d 279, 284 (Tex.1994) (noting long-standing rule that point may be waived due to inadequate briefing).

***408 Conclusion**

Having disposed of all of appellants' issues, we reverse the trial court's judgment awarding Laura \$122,000 in damages for loss of earning capacity and render judgment that she take nothing on this damages claim. We affirm the remainder of the trial court's judgment.

LIVINGSTON, J., dissents in part without opinion as to issue three.

APPENDIX D

Assemblies of God Theological Seminary (now, then it was Assemblies of God Graduate School), located in Springfield, Missouri.

3. I am a Defendant in this lawsuit brought by Laura, Tom, and Judy Schubert in the 141st District Court of Tarrant County, Texas.

4. In this lawsuit, I wish to assert my constitutional rights to freedom of speech, the free exercise of religion, and freedom of association. I make this Affidavit in connection with the assertion of those rights, not as a waiver of those rights.

5. I have read the Plaintiffs' Original Petition served upon me in this case. Many of the allegations are gross distortions or exaggerations or mischaracterizations of what happened in the worship services where Laura Schubert was present.

6. All of the activities about which Laura Schubert is complaining occurred within organized church activities and worship services within the Pleasant Glade Assembly of God Church buildings. A true and correct copy of the photo of the church is attached to this Affidavit as Exhibit A. The main sanctuary is in the center of the photo, the youth building is behind and to the right. The second photo, Exhibit B, is a true and correct copy of the inside of the sanctuary. The door that is visible leads to the youth hall.

7. Laura Schubert, Tom Schubert, and Judy Schubert are long time members of the Assembly of God Denomination. In fact, Tom Schubert and Judy Schubert served as missionaries to Cameroon, Africa on behalf of the Assemblies of God Denomination. After returning from that assignment, they began attending the Pleasant Glade Assembly of God Church. Obviously they were never coerced to attend and did so of their own free choice. Tom Schubert has occasionally preached from our pulpit.

8. Attached to my Affidavit as Exhibit C is a true and correct copy of a portion of a "Position Paper" of the Assemblies of God Denomination. As it states, this document is the Official Position of our denomination on various issues. The first chapter is devoted to our belief in the inerrancy of the Bible. In other words, that the Bible is literally true. This includes the miracles of the Bible and Jesus teachings and accounts of Jesus dealings with persons engaged in spiritual warfare with demons. Thus, anyone who regularly attends the Assembly of God Church (and certainly any missionary family within the church) is well acquainted with these teachings and practices of our church.

9. During the church activities and church services about which Laura Schubert complains, the parents (Tom Schubert and Judy Schubert) were not present. In fact, I later learned from the attached correspondence from Tom Schubert, that they were out-of-town during much of this time. Thus, Laura Schubert, was attending the church voluntarily without her parents being present. She was not coerced to come to the services, told to come to the services, or in any way forced to come to the activities and services.

10. During the course of the services that Laura attended on Sunday, June 9, 1996 through Wednesday, June 12, 1996, she exhibited some rather bizarre behavior. This included falling to the ground and writhing on the ground with such force that she might have injured herself. This is not common practice within our church. However, it is common practice for us to deal with people who are suffering or agonizing by laying hands on such persons and praying for them to come under the influence and control of the holy spirit, as opposed to the influence or control of an evil spirit. That was done in the case of Laura Schubert. Ultimately we called Laura's parents at their home to come up to the service and take control of the situation. Of

course, Tom and Judy Schubert could freely have attended the services and been present during any of this time, but they apparently chose not to do so.

11. After these series of incidents, Tom Schubert became increasingly critical of the conduct of our church and the youth minister Rod Linzay, and myself. His criticisms are reflected in his correspondence and my replies, copies of which are attached hereto as Exhibit D. These are true and correct copies of the letters delivered between us on the dates shown on such letters.

12. As you can see, this dispute concerned his criticisms that he believed we conducted the services improperly. Because he was critical of the way the services were conducted within the church, he hand delivered a letter to my home, which I forwarded to Brother DuBose along with my rebuttal letter on March 18, 1997. Tom Shubert also met personally with the Assistant District Superintendent, Morris Ivey, to air his complaints about the church service. The North District Council is the authority that I must answer to within our denomination. It has the authority to discipline me, criticize me, or initiate proceedings to revoke my credentials within the denomination. After receiving all of the correspondence and hearing both sides of this question, the denomination did not in any way criticize or censor me, Rod Linzay, Holly Linzay, or the Pleasant Glade Assembly of God Church. Apparently, dissatisfied with the results, the Schuberts have now gone to court over this dispute regarding the church services.

13. It is impossible for me to defend myself with respect to the complaints made against me in the Petition, without explaining and defending my beliefs, and the beliefs of those who are within our church. We believe that demonic and evil influences are real dangers, especially for our youth. We believe in taking action (such as laying on of hands and anointing with oil), and not just talking about combating such evil forces.

14. I have seen in the Petition and in the correspondence from Tom Schubert, the Schuberts attribute Laura's problems (including suicidal tendencies and tendencies towards self-mutilation and poor self-image) to psychological factors. They, in turn, blame the activities within our worship service for causing these psychological problems within Laura. I, on the other hand, have a different view. While I do not discount psychological factors, there is a very important spiritual element to what is happening to Laura Schubert. However, for me to elaborate, explain and defend my view point, would require me to have to explain and defend my faith in this Court of law. As a minister of the gospel, I respectfully decline any attempt to justify my beliefs and the religious practices in our worship services to a civil authority.

15. I would like to respond to one specific allegation made in the Petition, since it is blatantly false. I certainly did not hold Laura Schubert down on the floor of the church, or ever hold her against her will. I did not instruct or direct any one else to do so. I did not see or hear any one else direct people to hold Laura Schubert against her will. Many people did "lay hands" on Laura Schubert and pray for her, according to the custom of our church. This type of activity happens on a very regular basis in our church, since we believe in the physical conduct of laying hands on persons in order to pray for them.

16. Within our church, it is not unusual for a person to be "slain in the spirit". This is a biblical experience, related in several accounts of the Bible. When this happens, a person often faints into semi-consciousness, and sometimes lies down on the floor of our church. It is our belief that this is a positive experience in which the holy spirit comes over a person and influences them. It is our belief that the holy spirit is not the only spirit that can influence a person. Evil spirits can move and can torment persons. Also, it is possible that a person

(particularly a young dramatic person such as Laura Schubert) can take advantage of the attention that this activity brings. They can fake the entire experience in order to draw attention to themselves.

17. When a person comes forward in the service and begins having one of these experiences, it is sometimes difficult to discern whether: (1) the person is having a positive experience with the holy spirit, (2) whether there might be evil spirits engaged in warfare against the holy spirit, (3) whether there are emotional issues involved, or (4) whether the person is faking the entire process in order to gain attention. Discerning between these various influences and factors is a matter on which even pastors within the church might disagree. Tom Schubert (who was not there) attributes Laura's collapsing on the floor to emotional and physical exhaustion. Myself and others within our church attribute Laura's actions to other factors.

18. I have read the discovery requests which have been served upon me, including the First Set of Interrogatories sent to me and the First Request for Production sent to me. Responding to the vast majority of these questions (interrogatories) and producing the various documents and things would directly violate the free exercise of my religion. The specifics of those objections are made in the Responses to the Interrogatories and Responses to the Request for Production of Documents. I hereby state that my factual assertions in each of those Responses are true and correct. Copies of those Responses are attached to this Affidavit as Exhibits E and F.

19. In general, these interrogatories and requests amount to an "inquisition" of our church, all of its by-laws, membership, communications within the church, explanations of who we consider to be experts with respect to the religious activities and spiritual warfare, the various

religious documents ("treatises") that these persons rely upon in defending our faith and our religious practices. Responding to all of these requests would force me to go to the Deacons, our youth minister, our church secretary, and the head of various committees within the church in order to provide this information. This would constitute the discovery and interruption of our church activities in an attempt to explain and defend our church's practices, policies, procedures, and activities, including the relationship between various people in the church, the relationship between various members, whether various members were or not present during various activities, the names, addresses and telephone numbers of various members, etc. As you can see, I have provided full answers to the responses that we consider to be purely "secular" in nature (such as a copy of a W-2 Forms, copies of insurance policies, and church by-laws). I have also answered the simple questions that are not overly intrusive.

20. However, conducting discovery in an attempt to force individual members of the church to commit to one explanation or another for Laura's collapse at the front of the church, would cause strife and enmity within the church. This experience has been painful enough for our church congregation, without discovery forcing various members to commit to their interpretation of these events. Such a discovery process would be destructive not only to the leadership of the church, but also to the youth of the church. Therefore, I respectfully request that the Court not force our church into some type of inquisition whereby we are individually examined with respect to our various interpretations on why Laura Schubert did what she did, what influenced her, and what did not.

Further Affiant sayeth not.

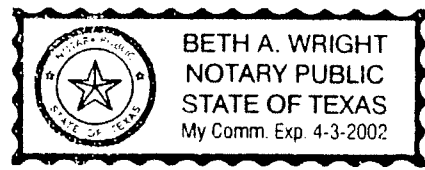
Lloyd A. McCutchen
LLOYD A. McCUTCHEN, PASTOR

SUBSCRIBED AND SWORN TO BEFORE ME on this 5th day of June, 1998 ~~July, 1995~~.

Beth A. Wright
Notary Public In And For
The State Of Texas

My Commission Expires:
4-3-2002

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APPENDIX E

2/27/96

Laura Schubert

Teen visit to africa saw traumatic events
did well in HS after moving to public school
Dad was administrator in her school.

- saw Beatings & burnings in africa
stressed by school situation

extensive testing, no medical reason for symptoms

Hyper spiritualistic environment in youth
group caused confusion - anxiety.