

NO. 05-0916

THE SUPREME COURT OF TEXAS

**PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A.
McCUTCHEON, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH,
BECKY BICKEL AND PAUL PATTERSON**

Petitioners/Defendants/Appellants

V.

LAURA SCHUBERT,

Respondent/Plaintiff/Appellee

*Petitioned from No. 02-02-00264-CV
Second District Court of Appeals of Texas
at Fort Worth, Texas*

**MOTION TO STRIKE CHURCH MEMBER PETITIONERS' APPENDIX
EXHIBITS TO BRIEF ON THE MERITS, APPENDIX EXHIBITS TO
RESPONDENTS' RESPONSIVE BRIEF TO SCHUBERT'S BRIEF ON THE
MERITS AND REFERENCES TO EVIDENCE OUTSIDE THE RECORD**

William O. Wuester
State Bar No. 22085500
DOUGLAS, WUESTER & STENHOLM, P.C.
500 W. 7th Street, Suite 501
Fort Worth, Texas 76102
(817) 336-4881
(817) 336-4889 -- Fax

ATTORNEY FOR LAURA SCHUBERT
RESPONDENT/PLAINTIFF/APPELLEE

NO. 05-0916

THE SUPREME COURT OF TEXAS

**PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A.
McCUTCHEON, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH,
BECKY BICKEL AND PAUL PATTERSON**

Petitioners/Defendants/Appellants

V.

LAURA SCHUBERT,

Respondent/Plaintiff/Appellee

*Petitioned from No. 02-02-00264-CV
Second District Court of Appeals of Texas
at Fort Worth, Texas*

**MOTION TO STRIKE CHURCH MEMBER PETITIONERS' APPENDIX
EXHIBITS TO BRIEF ON THE MERITS, APPENDIX EXHIBITS TO
RESPONDENTS' RESPONSIVE BRIEF TO SCHUBERT'S BRIEF ON THE
MERITS AND REFERENCES TO EVIDENCE OUTSIDE THE RECORD**

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Laura Schubert, respectfully files this Motion to Strike church member Petitioners' Appendix exhibits to Brief on the Merits, Appendix exhibits to Respondents' Responsive Brief to Schubert's Brief on the Merits and references to evidence outside the record.

In this case, Pleasant Glade Assembly of God filed Petitioner's Brief on the Merits and the church members filed a separate Brief on the Merits. Laura Schubert filed a Brief on the Merits only on the issue of damages. This motion deals with Appendix exhibits attached to the church member's Brief on the Merits and the Appendix exhibits attached to the brief filed in response to Schubert's Brief on the Merits. _____

Church member Petitioners have included respectively in their Brief on the Merits as Appendix H and Appendix I, "The Bulletin of American Academy of Psychiatry and the Law (1993) and case reports accessed on a computer. Respondents (Pleasant Glade Assembly of God Church and its named church members) have attached to their Responsive Brief to Schubert's Brief on the Merits as appendices "A" and "B" respectively, an article: *Abnormal Psychology* and a treatise: *Posttraumatic Stress Disorder in Litigation*. At page 7 of their responsive brief, Respondents refer to and quote from a book, *Posttraumatic Stress Disorder: The Victim's Guide to Healing and Recovery* by Raymond B. Flannery, Jr., Ph.D. This book was never admitted as an exhibit nor were passages read from the book during the trial, nor was any expert testimony elicited regarding the content of the book. Also at page 7 of their responsive brief, Respondents reference the *Dictionary of Psychology* by Arther S. Raber, Ph.D. at p. 584 (Penguin 1985), and at page 9 of their brief they reference E. Goode (2002, March 28) "*Thousands in Manhattan Needed Therapy After Attack*" (New York Times, p. 15). At pages 10-11 of their responsive brief, Respondents reference an article, *Posttraumatic Stress Disorder in Litigation, Guidelines for Forensic Assessment*, p. 79, (American Psychiatric Publishing, Washington, D.C. 2003) by Robert I. Simon, M.D.

MOTION TO STRIKE CHURCH MEMBER PETITIONERS' APPENDIX REFERENCES TO BRIEF ON THE MERITS, AND APPENDIX REFERENCES TO RESPONDENTS' RESPONSIVE BRIEF TO SCHUBERT'S BRIEF ON THE MERITS

None of the above referenced documents was part of the Reporter's Record nor the Clerk's Record, thus, they should all be stricken from the briefs as outside the record. Further, any references to or quotes from these documents contained in the aforementioned briefs should be stricken or in the alternative, not considered by this Court. Further, the article *Abnormal Psychology* was written in July 2005, and the treatise, *Posttraumatic Stress Disorder in Litigation* was written in 2003. The trial in this case was in 2002.

In its review, the appellate court does not consider documents that are not part of the record. Green III v. Kaposta, 152 S.W.3d 839, 841 (Tex. Civ. App. - Dallas 2005, no pet.); Adams v. Reynolds Tile and Flooring, Inc., 120 S.W.3d 417, 423 (Tex. Civ. App.- Houston [14th Dist.] 2003, no pet.); Crossley v. Staley, 988 S.W.2d 791, 794 (Tex. Civ. App. - Amarillo 1999), citing Sabine Offshore Service, Inc. v. City of Port Arthur, 595 S.W.2d 840 (Tex. 1979); Henslee v. State, 375 S.W.2d 474 (Tex. Civ. App. - Dallas 1963, writ ref'd n.r.e).

The record consists of the Clerk's Record, and where appropriate, the Reporter's Record. Tex. R. App. P. 34.1. Materials outside the record, that is, materials not filed with the District Clerk as part of the record of the case, that are improperly included in or attached to a party's brief may be stricken and may not be considered by an appellate court in its review of the appeal on its merits. Merchandise Center, Inc. v. W.N.S., Inc., 85 S.W.3d 389, 393 (Tex. Civ. App. - Texarkana 2002, citing Till v. Thomas, 10 S.W.3d 730 (Tex. App. - Houston [1st Dist. 1999] no pet.); Carlisle v. Phillip Morris, 805 S.W.2d 498, 501 (Tex. App.- Austin 1991, writ denied). "The attachment of documents as exhibits or appendices to briefs is not formal inclusion in the record on appeal, and thus, the documents cannot be considered." Perry v. Kroger Stores, 741 S.W.533, 534-535 (Tex.

Civ. App.- Dallas 1987) citing Zodiac Corp. v. General Electric Credit Corp., 566 S.W.2d 341, 347 (Tex. Civ. App. - Tyler 1978, no writ); Bibby v. Preston, 555 S.W.2d 898, 902 (Tex. Civ. App. - Tyler 1977, no writ). In the trial court, statements from “learned treatises” are admissible only in conjunction with testimony by an expert witness, “even when the authority of the publication is otherwise established.” Carlisle, 805 S.W.2d at 501 citing Goode, Wellborn and Sharlot, *Guide to the Texas Rules of Evidence: Civil and Criminal*, 596 p. (1998); See TEX. R. EVID. 803(18).

Instead of relying on evidence that was before the trial court, the church and its members, by way of argument, evidence outside the record, and the above-referenced appendices are attempting to bring before this Court argument, uncross-examined evidence and expert testimony that was not before the trial court. This same problem arose in the Hernandez case where the Texas Court of Criminal Appeals stated,

“In his brief to this Court, the state prosecuting attorney presents a plethora of cites to scientific articles and learned treatises, as well as to some cases from other jurisdictions concerning this general area of scientific endeavor. This is swell stuff. The trial court should have been given this material, and appellate should have been allowed an opportunity to cross examine any witnesses who sponsored it. The trial court hearing is the main event for Daubert/Kelly gate-keeping hearings; it is not a try-out on the road to an appellate scientific seminar.” Hernandez v. State, 116 S.W.3d 26, 30 (Tex. Crim. App. - 2003).

In the Hernandez case the state failed to introduce any scientific material, testimony or published judicial opinions from which the trial court might have been able to take judicial notice of the scientific reliability of the intoxilizer. As a result, the Hernandez court went on to state of the prosecution, “It cannot now rely upon the appellate courts to become independent scientific sleuths to ferret out the appropriate scientific materials which could support the trial court’s decision to allow the ADX technician’s testimony.” *Id.* at 31.

MOTION TO STRIKE CHURCH MEMBER PETITIONERS’ APPENDIX REFERENCES TO BRIEF ON THE MERITS, AND APPENDIX REFERENCES TO RESPONDENTS’ RESPONSIVE BRIEF TO SCHUBERT’S BRIEF ON THE MERITS

In the alternative, should this Court choose not to strike the offending appendices, the references to evidence outside the record and the quotations from these documents in the bodies of the aforementioned briefs, Schubert requests that this Court not consider the appendices, the evidence outside the record, nor quotations therefrom. Carlisle v. Phillip Morris, 805 S.W.2d at 501 (Court granted Motion to Strike and did not consider the offending portion of Plaintiff's Brief).

WHEREFORE, premises considered, Schubert respectfully requests this Court strike the offending appendices, any evidence outside the record and all references to and quotations from said evidence and appendices found within church member Petitioners' Brief on the Merits and the responsive brief to Schubert's Brief on the Merits and further that the Court not consider the content of the offending appendices or the contextual references to or quotations from said documents or evidence contained within the aforementioned briefs.

Respectfully submitted,

/s/ William O. Wuester
William O. Wuester
State Bar No. 22085500
DOUGLAS, WUESTER & STENHOLM, P.C.
500 W. 7th St., Suite 501
Fort Worth, TX 76102
817/336-4881
817/336-4889 (Telecopy)

ATTORNEYS FOR LAURA SCHUBERT
PETITIONER/PLAINTIFF/APPELLEE/MOVANT

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing document was mailed to counsel of record by certified mail, return receipt requested, this _____ day of July, 2006, addressed to:

David M. Pruessner
The Law Offices of David M. Pruessner
Three Galleria Tower
13155 Noel Road, Suite 1025
Dallas, Texas 75240

/s/ William O. Wuester
William O. Wuester