

NO. 05-0916

THE SUPREME COURT OF TEXAS

LAURA SCHUBERT,

Petitioner/Plaintiff/Appellee

V.

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

Respondents/Defendants/Appellants

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

PETITIONER SCHUBERT'S REPLY BRIEF

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CERTIFICATE OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 53.2(a), Petitioner, Laura Schubert, certifies that the following is a complete list of the parties and persons interested in the outcome of this appeal and their counsel of record:

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Raymond B. Flannery, Jr., Ph.D., *Posttraumatic Stress Disorder:
The Victim’s Guide to Healing and Recovery* (_____, _____) 6
James Hansell, Ph.D. and Lisa Damour, Ph.D., *Abnormal Psychology*
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Robert I. Simon, M.D., *Posttraumatic Stress Disorder in Litigation, Guidelines for
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STATEMENT OF THE CASE

This is a suit for damages. Laura Schubert sued Respondents for injuries sustained when she was pinned to the floor of Respondents' church on two occasions in June 1996. Damages included, among other damages, an award of \$122,000.00 for lost earning capacity. Chief Justice John Cayce, Second District Court of Appeals, Tarrant County, signed the judgment appealed from. The trial court was 141st Judicial District Court, Tarrant County, which signed a judgment for \$300,000.00 in favor of Plaintiff. Pleasant Glade Assembly of God, Reverend Lloyd A. McCutcheon, Rod Linzay, Holly Linzay, Sandra Smith, Becky Bickel and Paul Patterson were Appellants in the court below; Laura Schubert was Appellee. The justices who participated in the discussion in the Court of Appeals were Chief Justice John A. Cayce, Justice Terri Livingston and Justice Sue Walker. Chief Justice Cayce authored the opinion for the Court. There was no separate opinion although Justice Livingston dissented as to issue number 3 dealing with the Appellate Court's reversal of a \$122,000 award for loss of earning capacity which is the issue upon which Schubert appeals. Respondents have also filed their own Petition on the Merits addressing other issues. The citation for the opinion is 174 S.W.3d 388 (Tex. Civ. App. - Fort Worth 2005, pet. filed). The Court reversed the trial court's award of \$122,000.00 to Laura Schubert in damages for loss of earning capacity and rendered judgment that she take nothing on that claim. The Court affirmed the remainder of the trial court's judgment.

STATEMENT OF JURISDICTION

This Court has jurisdiction as this case is a direct appeal from the lower appellate court pursuant to Rule 53.1, Texas Rules of Appellate Procedure.

ISSUE PRESENTED

Issue No. 1

Did the Court abuse its discretion in finding that there was no evidence to support a finding that Laura's loss of earning capacity damages was foreseeable and proximately caused by Respondents' conduct?

NO. 05-0916

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**PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A.
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Respondents/Defendants/Appellants

PETITIONER SCHUBERT'S REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Laura Schubert, respectfully files this her Reply Brief.

STATEMENT OF FACTS

Petitioner incorporates by reference the Statement of Facts contained in her Brief on the Merits. Petitioner takes issue with the factual accuracy and also with the spin placed on the facts by Respondents.

SETTING THE RECORD STRAIGHT

On page 2 of its Brief, Respondents assert that Laura Schubert referred to the events at the Church as if, “they were virtually a rape.” Respondents then quote but a sentence from the Petitioner’s Brief on the Merits. A more contextually complete quote is as follows:

“No one would have trouble with the concept that loss of earning capacity damage would be a foreseeable consequence of a rape, yet in this case almost precisely the same thing happened to Laura Schubert, save and except for penetration. She was pinned to the floor for two hours on two separate occasions by people she trusted, who violated her bodily integrity, causing her to lose control over her own body and causing her physical injury in the form of bruises, scrapes and carpet burns. Understanding that scenario, one might ask how Respondents could argue that loss of earning capacity is not a reasonable foreseeable consequence of their acts.

That a perpetrator might not know that he was causing or could cause PTSD as a consequence of his act is of no moment. Certainly, no rapist would understand or know enough to appreciate all of the mental and physical consequences of his act, one of those being the potential for PTSD. But a rapist, or in this situation, the Respondents who pinned Laura spread eagle to the floor, certainly did know, or should have known that their acts could not help but have serious psychological and physical ramifications for their victim, not only because of the length of time involved in the assaults but also because Respondents were youth counselors, pastors, parents of youth members and a nurse RR 14, p. 135), and thus attuned to the consequences, both physical and mental, of trauma on youth.”(Schubert Brief on the Merits, pp. 20-21).”

Petitioner stands by her above-mentioned statements in her brief and would point to Dr. Swen Helge’s trial testimony regarding the adverse effects for Laura being held down “spread eagle” (Vol. 6, pp. 129, 148-149,153,161). As a result of the events at the church, Laura’s “future plans were limited to recovering from extreme trauma which interfered with her...academic ...effectiveness.

(App. "B", p. 014, P's Exh. "30", Dr. Helge's report). *See also* Dr. Pentzien's report which stated in part, "The patient denied any frank sexual contact during the time of alleged trauma at the hands of the youth ministers though was physically held down...she sustained ecchymotic (bruised) areas on the body secondary to the restraint imposed by her peers." (App. "C", p. 018, P's 34).

At page 2 of their Brief, Respondents state Reverend Lloyd McCutcheon is "nearing retirement." No such wording is in the record.

Again at page 2-3 of their Brief, Respondents essentially state that Reverend McCutcheon just happened to be present on Wednesday evening and that "nothing like a rape" occurred. In support, Respondents quote a passage from the Court of Appeals Opinion at page 3 of their Brief, i.e.,

"When McCutcheon 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." Opinion of Court of Appeals, Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 396 (Tex. Civ. App. - Fort Worth 2005, pet. filed).

A review of the cited passage to the Court of Appeals Opinion reveals that the appellate court was addressing the issue of the Good Samaritan defense and its description of Reverend McCutcheon's activities dealt only with that subject, not with the subject of his negligence. RR 9, pp. 299-301, RR 12, pp. 92-94, 110-122 reflects that Reverend McCutcheon was advised by a church employee and youth member, Rod Linzay, prior to the Wednesday night of what had happened to Laura during the previous Sunday events, that she "had" to be restrained and tightly held by the arms, that she was rolling around, flailing her arms and legs, that she would have bruises on her; and that on Wednesday evening McCutcheon never asked Laura to get up or if she could get up off the floor of the church

and he never followed up to determine if there was anything physically wrong with Laura nor did he ask Rod Linzay, his youth minister and a nurse by training to do so. Even though Gene Schachterle, a visiting minister asked McCutcheon to call Laura's parents on Wednesday night because Laura was "near comatose," McCutcheon waited 15 more minutes and finally called her parents only after Schachterle asked him for a second time to call (RR 12, pp. 121, 129, 132-134).

Respondents state at page 3 of their Brief that Laura Schubert admitted in her testimony that people at the Church had no desire to hurt her but were acting out of a motivation to try to help her, citing to RR 4, p. 74. No such testimony appears at that citation to the record.

Next, at page 3-4 of their Brief, Respondents quote from Dr. Pentzien's testimony (RR 13, pp. 272-273) that neither a psychologist nor a layman would be able to tell if Laura Schubert were going to develop Posttraumatic Stress Disorder even if they were standing there watching the alleged "non violent" events take place. (The evidence set forth in Schubert's Petition and Brief on the Merits reflects the events were violent). What Respondents fail to state is that the jury made no finding on Posttraumatic Stress Disorder nor were they asked to make any finding on whether Laura Schubert suffered from Posttraumatic Stress Disorder. The jury was asked to find whether or not Laura had suffered mental anguish as a result of the events. (Court's Charge, App. "G", p. 7, Question 4a, Petitioner Schubert's Brief on the Merits).

SUMMARY OF THE ARGUMENT

_____Petitioner adopts and incorporates by reference the Summary of the Argument made in her Brief of the Merits. Further, because Respondents have referenced so much evidence outside the record on appeal which is the subject also of a separately filed Motion to Strike, there is little

substance left in Respondents' Brief. The jury found mental anguish damages, not Posttraumatic Stress Disorder damages. Because the acts of Respondents were found to be intentional acts, Petitioner is entitled to recover mental anguish damages.

Respondents do not address the only issue raised by Petitioner in her Brief on the Merits. Respondents have not responded to whether Laura Schubert's lost earning capacity was foreseeable thus Petitioner stands on her Brief on the Merits.

ARGUMENT AND AUTHORITIES

ISSUE 1

Did the Court abuse its discretion in finding that there was no evidence to support a finding that Laura's loss of earning capacity damages was foreseeable and proximately caused by Respondents' conduct?

A. MENTAL ANGUISH DAMAGES PRESUMED TO BE FORESEEABLE IN INTENTIONAL TORT CASES

_____ For negligence cases, the Supreme Court has stated that foreseeability "means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for them." Nixon v. Mr. Property Management Co., 690 S.W.2d 546 at 549-550 (Tex. 1985). Foreseeability does not require that a person anticipate the precise manner in which an injury will occur once he has a created a dangerous situation through his negligence, Travis v. City of Mesquite, 830 S.W.2d 94-98 (Tex. 1992). The question of foreseeability involves practical inquiry based on common experiences applied to human conduct. City of Gladewater v. Pike, 727 S.W.2d 514, 518 (Tex. 1987).

_____ In their Brief, Respondents continue to assume that the jury found that Laura Schubert

suffered from Posttraumatic Stress Disorder. What the jury found was that Laura Schubert suffered mental anguish. (See Court's Charge to the Jury, p. 7, Question 4a, Appendix "G" to Petitioner Schubert's Brief on the Merits). If the jury found mental anguish damages then the issue for the Court of Appeals was whether such damages were recoverable in an intentional tort case such as assault.

"At common law, actual damages are either 'direct' or 'consequential.' 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. 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." Schubert, 174 S.W.3d at 397 (See also 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.); 5 TEXAS TORTS & REMEDIES §80.01(2) and §80.01(2)(a) (2005). "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. 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 termination of proximate cause...and makes it just that the defendant should bear the risk of any over compensation that an award of mental anguish damages in a particular case might entail'." Schubert, 174 S.W.3d at 397-398, 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 claims); *See also* Dillard Dept. 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); City of Tyler v. Likes, 962 S.W.2d 489, 495 (Tex. 1997); Fitzpatrick v. Copeland, 80 S.W.3d 297, 302 & n.2 (Tex. App. - Fort Worth 2002, pet. denied). As the Court of Appeals below found, “in this case, there is evidence that Laura’s mental anguish resulted directly from Appellants’ intentional acts.” Schubert, 174 S.W.3d at 397. As can be seen from the Court of Appeals Opinion, the issue for them was mental anguish, not Posttraumatic Stress Disorder which Respondents so desperately now want to inject. Because the Respondents acts were found by the jury to be intentional acts, they are liable for the general damage of mental anguish suffered by Laura Schubert.

B. EVIDENCE OUTSIDE THE RECORD

At page 7 of its Response Brief, Respondents cite, reference and then quote an alleged passage from a book (*Posttraumatic Stress Disorder: The Victim’s Guide to Healing and Recovery* by Raymond B. Flannery, Jr., Ph.D.) which Tom Schubert bought for his daughter, Laura Schubert (RR 8, pp. 70-71). First, the book was never admitted into evidence, thus Respondents are quoting from evidence that is outside the record. Second, the cited passage from the book was never admitted into evidence nor read to any witness. Third, while Respondents would wish and do suggest that Tom Schubert provided this book on PTSD to his daughter prior to her having been diagnosed with Posttraumatic Stress Disorder, exactly the opposite was true. It was as a result of receiving a billing statement from Dr. Rebal with a particular diagnosis code for Posttraumatic Stress Disorder that Tom

Schubert went to the library and thereafter purchased a copy of the book. Respondents are playing fast and loose with the record in attempting to show that Laura made up her symptoms after reading the book when the record citation referenced by Respondents shows the opposite (RR 8, pp. 70-71). Laura Schubert had already been diagnosed with Posttraumatic Stress Disorder. (RR 8, pp. 70-71). It is Petitioner's assertion that this part of Respondents' Brief should be struck as it is not only factually inaccurate but its references to and quotations from the book are to a document outside the record on appeal, or in the alternative, the Court should not consider any reference to the book. *See also* Schubert Motion to Strike which has been recently filed among the papers of this Court.

Again at pages 7 and 8 of their Brief, Respondents quote from and reference to the *Dictionary of Psychology* by Dr. Arther S. Reber, Ph.D., at p. 584 (Penguin 1995) and *Abnormal Psychology*, p. 121 (John Wiley & Sons, Inc. 2005) by James Hansell, Ph.D. and Lisa Damour, Ph.D. Neither the article nor the treatise was part of the Clerk's Record nor the Reporter's Record and, pursuant to Schubert's Motion to Strike, earlier filed with this Court, these references should be stricken from Respondents' Brief as outside the record on appeal or in the alternative not considered by this Court.

At page 9 of their Brief, Respondents again cite to the *Abnormal Psychology* article citing E. Goode (2002, March 28th), "*Thousands in Manhattan Needed Therapy After Attack*" (New York Times, p.15). At pages 10-11, Respondents again quote from and reference an article which was not before the District Court and was not part of either the Clerk's Record or the Reporter's Record in this case and, therefore, should be stricken or in the alternative not considered. This article was *Posttraumatic Stress Disorder in Litigation, Guidelines for Forensic Assessment*, p. 79 (American Psychiatric Publishing, Washington D.C. 2003) by Robert I. Simon, M.D. It should be pointed out

that the article and treatise attached respectively as Appendix “A” and “B” to Respondents’ Brief were written in 2003 and 2005, respectively. The trial in this case took place in 2002. All of the above referenced appendices, articles, books and treatises should be either stricken or not considered for the reasons set forth above and also contained in Schubert’s Motion to Strike. Green III v. Kaposta, 15 S.W.3d 839, 841 (Tex. Civ. App. - Dallas 2005, no pet.); Crosby v. Staley, 988 S.W.2d 791, 794 (Tex. Civ. App. - Amarillo 1999) citing Sabine Offshore Services, Inc. v. City of Port Arthur, 595 S.W.2d 840 (Tex. 1979).

None of the information contained in the Appendices “A” and “B” or in the above-referenced articles or books was subject to cross-examination or subject to any gatekeeper ruling under Robinson¹/Daubert². While the Church and its members have complained long and loudly about the alleged unreliability of the psychological and psychiatric testimony relied upon at trial by Laura Schubert, they attempt here to place before this Court for the first time on appeal psychological and psychiatric testimony and evidence which has not been subject to the District Court’s gatekeeper review responsibilities which would ensure reliability. Even though the Church and its members had every opportunity to hire their own psychologists and psychiatrists as expert witnesses, or to perform an independent medical examination or psychological examination of Laura Schubert, they chose not to, instead relying on the expert testimony of Schubert’s named experts and even designating two of Schubert’s experts as their own expert witnesses (CR 4, p. 505).

¹ E.I. duPont de Nemours and Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

² Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589-590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993).

PRAYER

Petitioner requests that this Court reverse that portion of the appellate court's judgment reversing and rendering the award of \$ 122,000.00 in lost earning capacity and reinstate said award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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