This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Hyde Park Baptist Church
v.
Tara Turner and Terry Curtis, individually and as next friends of P.C., a minor.
No. 09-0191.

September 14, 2010.

Appearances:

David M. Pruessner, Pruessner & Alexander, for petitioner.
Laurie Michelle Higginbotham, Archuleta, Alsaffar & Higginbotham, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09- 0191, Hyde Park Baptist Church v. Turner.

MARSHALL: May it please the Court, Mr. Pruessner will present argument for the petitioner. Petitioner will reserve five minutes for rebuttal.

ORAL ARGUMENT OF DAVID M. PRUESSNER ON BEHALF OF THE PETITIONER

ATTORNEY DAVID M. PRUESSNER: May it please the Court, my name is David Pruessner and it's my honor today to represent Hyde Park Baptist Church. Hyde Park Baptist Church, like many churches, operate preschools, daycare programs, youth activity programs that are of great benefit to our society. Unfortunately, they must employ people to run these programs and people are fallible and they have their problems. In this case, we have admitted that we probably should have terminated this teacher earlier. There were certainly warning signs. It's not as if they were completely disregarded. Indeed, at one point, Hyde Park Baptist Church actually held a form of hearing in which they said Mrs. Teacher's Assistant, you can't just repeat these accusations to us on the sly; you're going to have to come in front of the teacher and repeat them so that she can confront her accuser,

which she thought was horribly offensive.

JUSTICE DAVID M. MEDINA: That is horribly offensive. It's not a criminal case; it's a case involving her child.

ATTORNEY DAVID M. PRUESSNER: It is.

JUSTICE DAVID M. MEDINA: Why does she have to confront her accuser? Why couldn't she just confront the administrator of this organization?

ATTORNEY DAVID M. PRUESSNER: Well, perhaps that's the best way to do it, Your Honor, and I don't know that we handled it perfectly. And that's why we have admitted that in this case and we no longer contest there is evidence that we were negligent. Would we do things the same way again? No. Did we fire this teacher after this incident? Yes, within two days; within 48 hours after this incident. Before there was any lawsuit, before there was CPS showing up knocking at the door, we did fire this teacher.

JUSTICE EVA M. GUZMAN: Did you fire her before you called CPS or after?

ATTORNEY DAVID M. PRUESSNER: Actually, it was one of the people in CPS. Yeah, one of the people in the preschool that called CPS, not the administration of the school.

JUSTICE EVA M. GUZMAN: But at some point you knew about it and didn't inform the family. So did you fire her after you knew that someone inside the school had called CPS?

ATTORNEY DAVID M. PRUESSNER: Yes.

JUSTICE EVA M. GUZMAN: Oh, so CPS was involved when you--

ATTORNEY DAVID M. PRUESSNER: CPS was involved.

JUSTICE EVA M. GUZMAN: [Inaudible]

ATTORNEY DAVID M. PRUESSNER: The reason I mention this is because the Court of Appeals below criticized the church. And keep in mind, I'm not saying that what the church did was correct; I'm saying they were negligent. But they criticized them because they still kept her in charge even after receiving a report of this incident. Well, they received a report of this incident on Wednesday and they fired her by close of day Friday. That's within 48 hours.

JUSTICE DAVID M. MEDINA: But you're here to complain about the award, right?

ATTORNEY DAVID M. PRUESSNER: I'm sorry?

JUSTICE DAVID M. MEDINA: You are here to complain about the award?

ATTORNEY DAVID M. PRUESSNER: Here to complain about the damage award.

JUSTICE DAVID M. MEDINA: And specifically the mental anguish?

ATTORNEY DAVID M. PRUESSNER: The mental anguish. And the reason that we make this complaint, Your Honor, is that this Court speaking through Justice Phillips in the case of City of Tyler v. Likes expressed two great concerns about mental anguish damages.

JUSTICE DAVID M. MEDINA: Well let's talk about significant injury. How do we know if a bump on a head is a significant injury?

ATTORNEY DAVID M. PRUESSNER: Well, Your Honor, I would say that almost by definition, a bump on the head is not a significant injury, but if it is--

JUSTICE DAVID M. MEDINA: What if it appears 10 days later after the injury on radiological--

ATTORNEY DAVID M. PRUESSNER: Your Honor, the reason that we attached the radiology report to our brief, not them, is because if you go look at that report, it is a negative report. Read the report. They literally say there is no finding; there is no finding of a misalignment, there is no finding of an abnormality. Now you tape a BB to the head so that you know where the bump is so you know where to look just like if they tape a BB to the breast when you do a breast exam, and they say we see the BB, but there's literally no finding to see anything. They do make a comment because well doctors get sued for medical malpractice that maybe if you did a CT scan that's more sensitive, but it is a complete negative finding and when these plaintiff lawyers say that the radiology report still shows an injury two weeks later, that's just false. That's why we attached the radiology report to our brief.

JUSTICE EVA M. GUZMAN: In Likes, though, that the Court did say that the analysis is far from exhausted and that the opinion did not attempt the perhaps impossible task of determining a unified theory--

ATTORNEY DAVID M. PRUESSNER: And we agree with that.

JUSTICE EVA M. GUZMAN: --and so we've got a two, or at the time I guess a 1- 1/2-year-old in a daycare in a facility who, according to the COA, the Court of Appeals' opinion, this was not the first time this child was hit on the head or somewhere else by this particular person. Do you disagree with those statements?

ATTORNEY DAVID M. PRUESSNER: Well, I disagree with the statements [inaudible]. They said that this child had been subject to prior mistreatment by the teacher like a trip or prior verbal correction and that this child was centered, was sort of brought out or focused of the teacher's wrath more than other children, which I have to say if you've ever taught a class full of kids, there's going to be one kid that's going to receive the object of your wrath. But, Justice Guzman, in your question about City of Tyler v. Likes, this Court did state that it is not providing an exhaustive list and indeed this Court state, you cannot it's, mental anguish is a hard thing to get your arms around. You cannot provide an exhaustive black letter line, these cases you get them, these cases you don't. So what they said is there's, they said and Justice Phillips erected what this Court has now referred to as the framework for analysis. Two big points you look at. Why are there two? Because there's two concerns. The first concern is mental anguish is so variable. Some children consider a dog absolutely terrifying and if you have a dog, you better put them away. Other children love a dog because it's a puppy. Human reaction and mental anguish is so variable that when it comes to the legal duty to protect against mental anguish, it is extremely difficult.

JUSTICE DAVID M. MEDINA: And if it's so difficult, why should we second guess what the jury did here?

ATTORNEY DAVID M. PRUESSNER: Well, Your Honor, if this is simply a jury question well then City of Tyler v. Likes shouldn't have even been decided. You should have simply stated that in these cases when plaintiffs sue for mental anguish, we simply throw it to the jury and say do you want to award mental anguish damages? But this is the scope of the legal duty. That is, is there a legal duty? Should we impose a special relationship or some sort of special duty in certain cases? And that's a matter for this Court to decide. The second matter also goes to the jury question. The second concern that the Court had in City of Tyler v. Likes is that the quality of proof in mental anguish cases is always bad. I mean it's just, and whether it's a good mental anguish case or a bad mental anguish case, you have people taking the stand saying things like I have mental anguish or I think they have mental anguish. Well why? Well my best guess is it's because of what happened to them two

years ago or what happened to them when they were a child. And this Court stated that the quality of proof is so poor in these mental anguish cases that we generally adopt a rule that we do not allow recovery for mental anguish damages. Now let's apply these two concerns to this case. How variable is mental anguish, the mental anguish experience to children? It's extremely variable. For some children, it will be absolutely upsetting to get kicked by a horse and have their face need stitches. For me, it was one of the best days of my life because I got to tell all my friends, man I had this great accident. Mental anguish? You've got to be kidding. This is a badge of honor to go to school the next day with stitches on my face.

JUSTICE EVA M. GUZMAN: Well what about the fact that this child was under the age of two?

ATTORNEY DAVID M. PRUESSNER: I think that is significant and I think this Court has to decide are we going to take City of Tyler v. Likes in which we specified certain cases being the type that we want to award mental anguish damages in and stretch it and say within that framework are special cases for little bitty children?

JUSTICE EVA M. GUZMAN: I don't. You know you have like in any other case that where mental anguish might be an issue a psychologist here, I believe, Dr. McCarthy, testifying in a clinical sense about the effect of this trauma on this child and putting before the jury testimony that described the level of mental anguish. Why isn't that an issue?

ATTORNEY DAVID M. PRUESSNER: And that sounds so good, a psychologist coming in saying I've looked at this child. I've conducted tests. I've conducted examination. Look at what that actually means. This Court has decided to look beyond science and see if this is junk science. And I go to the question of the quality of proof because in every case of injuries to a young child, one or two, you're going to have these sorts of problems. How do you know the child has an anxiety problem?

JUSTICE EVA M. GUZMAN: Do you object to the reliability of her testimony and, if not, what does that do to this case?

ATTORNEY DAVID M. PRUESSNER: I didn't try the case. I wish the trial lawyer had objected; he did not.

JUSTICE EVA M. GUZMAN: Okay and what does that do to your complaints about that?

ATTORNEY DAVID M. PRUESSNER: It severely truncates my ability to complain to this Court. I am limited solely through protesting that there is no evidence that rules out the concurrent or alternative causations on its face. That is that they simply stated did this child go through a divorce during this timeframe? Yes, including multiple moving around and living arrangements. A flood of one home caused a move. In-law issues caused another move. An accident that was severe to send the child to the hospital including dental surgery. How do you know these factors didn't cause this? The psychologist said, I thought about that and ruled it out.

JUSTICE PHIL JOHNSON: Can I interrupt you just a second? Are you arguing in regard to the damages found against Ms. Lowry or are you arguing only in regard to the negligence finding against the church?

ATTORNEY DAVID M. PRUESSNER: I'm arguing only with respect to the damages finding awarded against the church.

JUSTICE PHIL JOHNSON: Against, alright.

ATTORNEY DAVID M. PRUESSNER: And Mrs. Lowry should be liable for every bit of mental anguish.

JUSTICE PHIL JOHNSON: Okay, so your argument is not that the mental anguish was not supported as to her?

ATTORNEY DAVID M. PRUESSNER: It's and in my, exactly right, Your Honor. And my argument is not that mental anguish damages are not recoverable; they're recoverable against the intentional tortfeasor.

JUSTICE EVA M. GUZMAN: Can you?

JUSTICE PHIL JOHNSON: Following through on that, the jury charge asked whether the church was negligent in failing to supervise and in retaining her as well as directly negligent in failing to tell the parents.

ATTORNEY DAVID M. PRUESSNER: Right.

JUSTICE PHIL JOHNSON: You had three negligents submitted in that one issue. What damages would the church be liable for or negligent retention? What damages arise from those, from that?

ATTORNEY DAVID M. PRUESSNER: From this case for negligent retention?

JUSTICE PHIL JOHNSON: In any case. In any case.

ATTORNEY DAVID M. PRUESSNER: Well, this case doesn't involve a significant bodily injury. If there had been a significant bodily--

JUSTICE PHIL JOHNSON: Well, but if you're not challenging the damages found against her--

ATTORNEY DAVID M. PRUESSNER: Ms. Lowry?

JUSTICE PHIL JOHNSON: It seems like that the damages from negligent retention would be the damages that were found against her.

ATTORNEY DAVID M. PRUESSNER: I see. Your Honor, this is the, I now understand, see what you're saying. The Court of Appeals adopted this exact approach and my opponents call this the one-two punch. And it's basically joint and several liability. That is, these damages were appropriate against the intentional tortfeasor and since there's joint and several liability, they're recoverable against you.

JUSTICE EVA M. GUZMAN: Should you have objected to the way questions I think six was submitted?

ATTORNEY DAVID M. PRUESSNER: No.

JUSTICE EVA M. GUZMAN: And if you didn't, what effect does that have because there's was [inaudible]--

ATTORNEY DAVID M. PRUESSNER: No. Your Honor, no need to object because this is a no-evidence complaint. That is, there is no evidence of significant bodily injury so as to allow the recovery in a no-evidence point.

JUSTICE DAVID M. MEDINA: Well, obviously, parties disagree there. I mean you know defendants will say there's never significant bodily injury perhaps toward mental anguish.

ATTORNEY DAVID M. PRUESSNER: Exactly. Exactly, Justice Medina, and that's why you want the jury to answer the questions.

JUSTICE DAVID M. MEDINA: They did.

ATTORNEY DAVID M. PRUESSNER: You want the jury to answer all these questions, not pull some of them back so that when we Courts of Appeals work out that when we say oh you can recover that; we didn't have to

send the case back down to the Trial Court because one little question was pulled back. You want all the items of damages to be decided by the jury and then post verdict, you can challenge them by motion for JNOV or an appeal, which is what we're doing here. So I don't believe that this, that there was waiver, so to speak, that cancelled out our ability to complain of a no-evidence point because of the failure to object to submission of particular element of damages. And I would say that that would be a very bad form to do that because you want to encourage the trial courts to find all the various elements of damages when there's a disagreement as to whether they're recoverable or not. And then we can hash it out post verdict and on appeal. We don't have to remand it for one trial because we withdrew one blank.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, Likes alludes to the possibility that mental anguish damages may be available where there's a high degree of culpability. And let's assume that there is evidence here of repeated and systematic bullying by this teacher. Is it your position that we can or cannot look at the cumulative effect of that course of conduct?

ATTORNEY DAVID M. PRUESSNER: I don't think that you can look at that course of conduct.

JUSTICE DEBRA H. LEHRMANN: And can you explain that please?

ATTORNEY DAVID M. PRUESSNER: Yes, I can. When the, first of all, that's not the church; that's this teacher. So when you say persistent bullying, you're talking about an attempt to persistently go after and bother this child. That's.

JUSTICE DEBRA H. LEHRMANN: No, I'm talking about the church's knowing that that had gone on a repeated basis.

ATTORNEY DAVID M. PRUESSNER: Okay, the church's knowing of it is simply they hear third-hand reports of it or I should say secondhand reports of it and they have a duty to try to intervene and try to stop her. So that is a, it is a passive negligence. The jury did not find gross negligence by us. The jury did not find any type of intentional misconduct by us. In the past, this Court has held that negligence alone is not the high degree of culpability. Perhaps this Court's now going to decide in this case there's different flavors of negligence. That is, there's gross negligence, but that's not here. But you've got vanilla negligence, but this one is a little darker than vanilla negligence. Why would I submit that's inappropriate? Go back to Likes. It states we need some predictability for the law. Trying to figure out when mental anguish is going to occur is difficult. It's a subjective area. Negligence is very subjective. The proof about mental anguish damages is very subjective. In this case, the proof by the psychologist was things like this child does not hold a pencil strongly, so, therefore, they must have anxiety. This child lines up toys very systematically and always puts the same toys, the same toys, always in a row, and that indicates an anxiety. This child hurts the dog and that's an indication of anxiety. Therefore, the church must have caused this. That is a poor quality of proof that the Court in the City of Tyler v. Likes was talking about. I'm not saying that it's improper, but the Court in City of Tyler v. Likes said we shift that to a highly culpable party that intentionally injures somebody. We're willing to shift that gray area of damages to a highly culpable party that intentionally hurt somebody, but we will not shift it to a negligent party. And that's in why in Boyles v. Kerr, they said we can't allow negligence, that subjective standard of liability and mental anguish, that subjective standard of damages to go together down the aisle. It's just a very gray area and we need, the law needs more predictability.

JUSTICE PHIL JOHNSON: Counsel, you have about run out of time. Your second issue is. I'm having a hard time understanding. Is that a legal sufficiency issue or--

ATTORNEY DAVID M. PRUESSNER: No, it's a no-evidence, Your Honor.

JUSTICE PHIL JOHNSON: --is it factual sufficiency?

ATTORNEY DAVID M. PRUESSNER: No, it is a no-evidence legal sufficiency point, the second point. And we are saying that there is no evidence.

JUSTICE PHIL JOHNSON: You only have two issues here now, correct?

ATTORNEY DAVID M. PRUESSNER: We have a total of three issues before this Court.

JUSTICE PHIL JOHNSON: Alright, well I'm not sure about that, but let's talk about your last issue.

ATTORNEY DAVID M. PRUESSNER: Okay, my last issue, the comparative responsibility.

JUSTICE PHIL JOHNSON: Yes, is that--

ATTORNEY DAVID M. PRUESSNER: I'm sorry, Your Honor, I stand corrected. That is a factual sufficiency point and you don't normally discuss factual sufficiency points here. What we say is that this Court needs to set the standards for the Court of Appeals to conduct a factual sufficiency review. Right now, there are no standards in Texas. This legislation was passed in 1995 as part of tort reform.

JUSTICE PHIL JOHNSON: You want us to set standards for this particular type case and then what about the next type case? Would we have different standards for that or are you asking us to set standards for any case?

ATTORNEY DAVID M. PRUESSNER: We have three standards.

JUSTICE PHIL JOHNSON: For any case?

ATTORNEY DAVID M. PRUESSNER: For any case. And that is if you want to conduct comparative fault, look and see which one was actively at fault, which one was passively at fault. Look and see which one was criminal as opposed to merely civil. Look and see which one was intentional as opposed to merely negligent. Those types of standards; are those the only standards you can come up with? No. But I submit that those are three of the historic tests and one of them is even found in the statute. 33013 very much draws a line between criminal misconduct and civil misconduct.

JUSTICE PHIL JOHNSON: Thank you.

JUSTICE DEBRA H. LEHRMANN: If the jury had answered to question number one no, and found her negligent instead, would you still be arguing that the Court of Appeals erred in filing to reverse the portion at finding? And does it make sense to say that employer fails to protect others from negligence is more culpable than employer fails to protect the employee from intentional conduct?

ATTORNEY DAVID M. PRUESSNER: If the jury finding had been that the teacher was merely negligent.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY DAVID M. PRUESSNER: Your Honor, that's such a tremendous land shift. I'm not sure I can fully answer your question on the fly. You would then have two people sue for negligent infliction of emotional distress and neither one would be liable for mental anguish damages. I mean you would just stop, I think.

JUSTICE DEBRA H. LEHRMANN: Mmm hmm.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY DAVID M. PRUESSNER: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Ms. Higginbotham will present argument for the Respondent.

ORAL ARGUMENT OF LAURIE MICHELLE HIGGINBOTHAM ON BEHALF OF THE RESPONDENT

ATTORNEY Laurie Michelle Higginbotham: Mr. Chief Justice may it please the Court. The two questions raised by Hyde Park on this appeal have been answered by the Texas legislature and this Court in support of the judgment. The Trial Court and Court of Appeals got it right. The judgment should be affirmed for three reasons. First, the Texas Comparative Responsibility Statute rejects Hyde Park's position on apportionment. Second, under joint and several liability, Hyde Park is responsible for all damages. And third, uncontested child abuse supports an award for mental anguish damages. Petitioner glossed over two key facts about this case that are failed to explain. This child was abused under the care of Hyde Park for six months. Not one day, not one incident; for six months.

JUSTICE NATHAN L. HECHT: Ms. Higginbotham, we actually do get quite a few cases of abuse up here in parental termination situations and others. And sometimes it's pretty awful. How do you think this relates to those kinds of situations where there's drugs and there's broken bones and physical violence over a course of time?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, this Court does deal with child abuse on a regular basis and childcare centers are going to be watching this decision to find out the answer to the question when we know a teacher is abusive, when we know that a teacher is unfit and harming children, do we have an obligation to stop that from happening or are we off the hook because the more abusive the teacher is under Hyde Park's rule, the less liable the daycare center is?

JUSTICE NATHAN L. HECHT: But I'm just wondering relatively speaking. I don't disagree with you, but relatively speaking, I guess if this is $100,000 worth, some of these cases would be in the trillions.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor, the evidence at this trial is very clear. There were numerous teachers; there were at least four teachers that testified that this teacher was abusing this child for six months. According to the record in Volume Six, pages 66 to 68, Shelly Miller, a lead teacher, reported witnessing this teacher push this child to the ground more than once prior to the incident that was the final injury in this case.

JUSTICE DAVID M. MEDINA: That would seem to warrant an award for malice or something of that type of conduct. And it seems here that the award was assigned to mental anguish because of that bad conduct.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Your Honor, the jury unanimously concluded that this teacher did act with malice, that she intentionally injured this child and there was ample evidence of 12 years of reports that the directors at the center were aware that this was an abusive teacher. Now, this Court has consistently applied the Restatement of Tort Section 448 in Nixon v. Mr. Property Management, in Delaney v. University of Houston where Justice Hecht wrote the opinion, in Travis v. City of Mesquite, in Phan v. Pena and in Golden Spread Council, which was another child abuse case and that restatement says when there's an intentional tortfeasor or a criminal actor, that is the superseding cause of injury, unless the negligent party knew or should have known that that criminal conduct was likely to occur. In this situation, the record is replete with evidence that Hyde Park knew for 12 years that this teacher was abusive.

JUSTICE PAUL W. GREEN: Well let me, I understand what you're saying and it's not to minimize anything that occurred, but it looks like from what I see in the record that while there was a bump on the head, argue

about whether it was significant or not. But you know the notion, what if you got a teacher who maybe rather than throws a hip into a 1-1/2-year-old and knocks them down intentionally or otherwise, just berates children.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor.

JUSTICE PAUL W. GREEN: So you know for you have a young, 1-1/2-year-old and a teacher is mean, imagine that. I've had a few mean teachers. And does that justify you know a pattern of meanness to a child? Would that justify $100,000 in mental anguish damages?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Your Honor, that would be a question for the fact-finder and there would have to be evidence to support an award for mental anguish damages.

JUSTICE PAUL W. GREEN: In your case, it would be simply because of the acts of the hip into the child or tossing the child or something like that where no injuries occur.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor, there were injuries to this child. This child had a head injury that was denied medical treatment that was visible on radio.

JUSTICE PAUL W. GREEN: Of course that, we would have to look at the medical record on that and we can draw our own conclusions about whether that was an injury or not, can we not?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, the jury concluded that it was an injury and awarded past medical expenses and past damages for physical pain and mental anguish. That was one of the questions put to the jury and the bump on the head incident was heard when the child's head hit the floor by another teacher across the room. The child was crying in pain and was offered no medical treatment. There's no question this child suffered a head injury.

JUSTICE PAUL W. GREEN: What if you had a, what if you had an abusive child that the school knew about? You had a bully child that contemporary age to the others and knocked the child down, bumped a head, and then the school was aware of this child like that. I mean is the same liability factors occur there?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor, it would be a somewhat different case because a bully child, a peer or the child is not supervising the classroom and is not an agent of the--

JUSTICE PAUL W. GREEN: You can say it's a negligent, a negligent retention of an abusive child?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, certainly the school has an obligation to create a safe environment as they contractually promised to do to this family and the school has a special relationship to all of the children in its care. This Court has traditionally found a special relationship exists when you have contracting parties, when one of them is more vulnerable than the other and the other party knows it. In this case, you have a school that's taking care of young children. If the school is aware that a situation is dangerous, they have a legal obligation to act. Now whether that's a child or a teacher, they have a responsibility and a duty to respond. But it's worse in a case like this when it's the teacher who's in charge of that classroom, who's supervising the children.

JUSTICE DON R. WILLETT: Do you believe there are several Likes' factors that apply here, several categories of Likes or just one or some hybrid of more than one or--

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor, there are several Likes' categories that apply here. As the Court of Appeals below found, the malice of the teacher based on the intentional tort finding could apply and that would end the inquiry there.

JUSTICE EVA M. GUZMAN: It seems like though for Hyde Park, they only found negligence, so how are we imputing the malice from the teacher to the Hyde Park to support the discussion?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, the Court is not imputing malice to Hyde Park in this situation. Rather Hyde Park is responsible for its own conduct, which is being aware of the criminal conduct of the teacher and doing absolutely nothing to stop it.

JUSTICE EVA M. GUZMAN: Nonethelesss, the jury just said negligence.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: Not gross negligence or something--

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM:Negligence in retaining a teacher that it knew to be a criminal, knew to be abusive.

JUSTICE DAVID M. MEDINA: That's not in the jury charge, is it? I mean I've got the jury charge here; maybe I'm missing something.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: The question three on negligence for Hyde Park was whether Hyde Park was negligent in supervising and retaining Ms. Lowry. And in order for Hyde Park to be negligent, we have to prove that Hyde Park both gave the opportunity for the abuse by keeping the teacher in the room and that Hyde Park foresaw the abuse. Foreseeability is where all these cases turn. If it's not foreseeable that this third party is going to commit a crime--

JUSTICE DAVID M. MEDINA: But you don't have to prove malice to prove negligence and your argument here is that the award of $100,000 is because they negligently and maliciously retained this teacher.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, our Honor. In this case the award is because there were damages inflicted by child abuse of which there are two causes, two causes that work together in conjunction. It is standard tort doctrine that there can be more than one cause.

JUSTICE DAVID M. MEDINA: I understand that. Perhaps you should just leave the word malice out of your argument so we can focus on the award being supported by the evidence of the bump on his head that lasted 10 days after the injury and the medical that was submitted.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Certainly that's a basis to find support for the mental anguish damage awards. There is injury to the child, but it's not necessary. If this Court declined to find serious bodily injury, it could find the teacher's abusive act supports the mental anguish damage award.

JUSTICE DON R. WILLETT: What special relationship is--

JUSTICE DALE WAINWRIGHT: Let's talk about the serious injury just a little bit more before you go to the other points. Likes says that minor physical symptoms are not serious bodily injuries that can form the basis for recovering mental anguish damages. Anytime there is any kind of injury, even slight to a child, you worry. How do you apply first, do you think that holding in Likes applies here and, second, what's your argument that there's a serious physical injury here?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, as you noted, Likes held and stated that mental anguish damages are recovered in virtually all personal injury cases.

JUSTICE DALE WAINWRIGHT: And you cite that in your brief. The very next statement in Likes says, "Where serious bodily injury is suffered, we know that some degree of physical and mental suffering is the necessary result." At the end of that paragraph, the holding says there must be serious bodily injury to form the basis for recovering mental anguish damages. So Likes does say what you say, but it also adds other explanatory sentences following it.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Likes has not created a requirement that there be serious bodily injury to recover mental anguish damages. It gives an example of categories of damages, one of which is serious bodily injury where mental anguish damages are traditionally.

JUSTICE DALE WAINWRIGHT: That's the one I'm talking about.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor. Now in this case we certainly could argue and the jury did find this child suffered physical pain and suffering. There was testimony from multiple teachers that this child was physically abused by this teacher on a regular basis for six months.

JUSTICE DALE WAINWRIGHT: Where do you draw the line between injury and serious physical injury?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Your Honor, that's a question that needs to be left to fact-finders because this Court has never attempted to define what is serious bodily injury because there is a number of ways people could be seriously injured. The Court wouldn't want to give an exhaustive list of how many ways one's personal body could be injured. But this Court doesn't have to find that there was serious bodily injury in this case. In fact, this Court's decision in Adams v. YMCA in 2008 involved no physical injury to a child, but it was a child abuse case. This Court has never reviewed a child abuse case and found that mental anguish damages are not supported by the evidence.

JUSTICE DON R. WILLETT: Putting aside serious bodily injury, you believe there is special relationship under Likes?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor, there is. When there's a contractual relationship between two parties, when one of those parties is more vulnerable than the other and the other party knows it, which is exactly the situation here, Courts have found special relationships to exist. Courts have found special relationships with institutions where the State of Texas has been found to have a special relationship with a child in a foster care agency-type relationship. There are times when an agency or an individual is standing in the shoes of a parent like a childcare center, and parent-child relationship is consistently recognized to be a special relationship. This daycare center has taken on the mantle of providing safe care for children, young children under the age of two, who can't speak and they have an obligation to make sure they're outfitting their center with teachers who are fit and appropriate to be around children. The evidence shows that this childcare center knew that this teacher was abusive for over 12 years, almost terminated her several times, had teachers being asked to be removed from her classroom refusing to teach with her anymore. There's no question that this crime and this intentional tort was foreseeable by Hyde Park. Counsel told you Hyde Park even had a mini-trial about her conduct in which the very type of abuse that was perpetrated against this child was discussed. The management was extremely aware of what this teacher was capable of, but made a decision to do absolutely nothing. They kept her in the classroom. They didn't increase supervision. They didn't change anything about her classroom environment and it was foreseeable that she would go on to abuse another child.

JUSTICE PAUL W. GREEN: It's all conceded though, isn't it?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: It is conceded, Your Honor, and that is why the apportionment award is supported under Chapter 33. The apportionment argument that Hyde Park raises is that as a matter of law, a negligent tortfeasor can never be more responsible than an intentional tortfeasor. And that is not the law as contemplated by the legislature or by this Court. And if this Court upholds the apportionment

finding, then Hyde Park is responsible for all damages that flow from those injuries under joint and several liability. Now the Court can look to both the text of the statute, which is Section 33.003, which states that both negligent and intentional tortfeasors are considered together; there's no exception to that apportionment. Hyde Park is asking this Court to create a new rule that would be difficult to implement in practice. They want to weigh active versus passive conduct, criminal versus noncriminal conduct. That's unworkable in the framework of a statute.

JUSTICE DALE WAINWRIGHT: Counsel, I agree with you to an extent. Chapter 33 Section 003A, in particular, says the jury is, the trier of fact is to allocate percentage of responsibility according to it's contributing to the harm. Okay, so I'm not sure it necessarily depends on whether it was intentional or negligent because someone could negligently cause more harm than an intentional act may have caused and the statute refers to apportioning responsibility based on the harm that's caused not the mens rea, at least not in the wording of the statute.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Right.

JUSTICE DALE WAINWRIGHT: However, that still leaves the question, it seems difficult to argue or to support a harm caused by a direct physical act that the jury found to be intentional being less responsible for the harm caused than someone who was supervising the party who did the intentional physical act. Doesn't that seem backwards to you that the negligent actor in this context was found four times more responsible than the intentional actor?
ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor, it does not.

JUSTICE DALE WAINWRIGHT: Why not?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: And the reason is this Court has addressed this very issue in a number of cases by following the Restatement Section 448, which says, normally a criminal act is the superseding cause of an injury to someone unless the negligent party knew or should have known and has a duty to prevent that act from happening. In Nixon v. Mr. Property Management, an apartment complex owner left vacant and was not following Dallas City ordinance to keep doorknobs and locks on doors and it was in an area that was a high-crime area and many violent crimes had occurred there. And the Court concluded that because the landlord was aware of the crimes, because the landlord was aware they were violating an ordinance that the fact that a subsequent rape occurred there was foreseeable and that that landlord was negligent in that case.

JUSTICE NATHAN L. HECHT: If the answer had been flipped, if it'd had been 80/20 the other way, would there be evidence to support that?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Your Honor, that question could have been answered that way by the jury and Hyde Park argued that.

JUSTICE NATHAN L. HECHT: Yeah, I mean, in fact, is there any answer the jury could have given with that question other than zero that would be supported by the evidence?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, we argue the great weight of the evidence certainly supports the judgment has answered.

JUSTICE NATHAN L. HECHT: But there would be some evidence.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: But there was some evidence of two causes.

JUSTICE NATHAN L. HECHT: To support any answer they gave?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Correct, Your Honor. That's correct, as long as the

answer wasn't zero because there was--

JUSTICE NATHAN L. HECHT: As long as it wasn't zero.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor.

JUSTICE PHIL JOHNSON: So would you address opposing Counsel's position that we ought to set some kind of standards for the Courts of Appeals to use in evaluating the weight of the evidence in these cases?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor, the standards are--

JUSTICE PHIL JOHNSON: They're asking for us, they want it remanded for the Court of Appeals to reweigh and for there to be some standards other than just looking at the totality of the evidence and deciding whether it's enough or not.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Right. And, Your Honor, the answer is the standards already exist. The Court of Appeals did weigh the factual sufficiency of the evidence. And--

JUSTICE PHIL JOHNSON: What standard did it use?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: In that case, Your Honor, the Court of Appeals would look to the great weight of the evidence and determine--

JUSTICE DALE WAINWRIGHT: What standard would we give the Trial Court and the juries to solve? We have an appellate you know factual and legal sufficiency, but what guidance do we give the jury and the Trial Court to follow?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, the Trial Court and the Court of Appeals can do both a legal sufficiency and a factual sufficiency review.

JUSTICE DALE WAINWRIGHT: So we tell the Trial Court just do something that won't get you reversed. We need to give them a little more guidance than that, don't you think?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor, the guidance is already there and.

JUSTICE DALE WAINWRIGHT: I was a trial judge and I always tried to do things that wouldn't get me re versed, but it always was quite helpful if I had a little more guidance than that and in many areas, this Court had provided that area. What guidance needs,would be helpful here?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well the guidance, Your Honor, is already there in both the factual sufficiency standard of review and the legal sufficiency standard of review. And both of those are greatly deferential to the jury. The legal sufficiency standard of review is as long as there's some evidence, any scintilla of evidence to support the verdict, then it should be undisturbed and the factual sufficiency standard is also very hard to meet. The Hyde Park conceded in it's briefing in the Court below that it was a very tough standard. As long as there's some evidence, the Court defers to the jury's finding. In this case, Hyde Park has not preserved for this Court to review whether the evidence was sufficient or not. It waived objections to the expert at trial; there were no objections to the expert testimony at trial and in this petition for review, Hyde Park did not preserve--

JUSTICE DALE WAINWRIGHT: Would you concede that your argument that legal and factual sufficiency standards are not sufficient if you're looking at punitive damages, for example? Ability, we have net worth; we have lots of guidance for the jury. It didn't work there.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, that--

JUSTICE DALE WAINWRIGHT: Need anything more here?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, that issue is not before this Court today. The jury wasn't asked about--

JUSTICE DALE WAINWRIGHT: I agree, I agree. But by analogy, we've got a lot more guidance there, don't we? In punitive damages?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: And instructions to the jury?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: We also had more guidance from the legislature that has made specific requirements for findings and very specific--

JUSTICE DALE WAINWRIGHT: Regardless of the source, we have more guidance. I bet you we don't need any more guidance here.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, we do not, Your Honor, because the legislature has spoken on this issue in Chapter 33. The legislature has carved out exceptions. For example--

JUSTICE DALE WAINWRIGHT: And I understand, but in just taking off from your answer to Justice Hecht's question about any number other than zero would have some support, so if the jury said 99% on Lowry, 1% on the church, you would say that's justifiable, that's supported?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Your Honor, that certainly wasn't our position, but it could be argued.

JUSTICE DALE WAINWRIGHT: So if the jury said 99% on the church and 1% on Lowry, you would say that's supporting?

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: And the public at large and the world would go what is going on here, if a court of law can say diametrically opposed results are both right, without providing more guidance.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Well, Your Honor, I certainly do not think that on this evidence it would be right to put 1% on the center and 99% on the child, on the teacher.

JUSTICE DALE WAINWRIGHT: This legally sufficient. If the evidence supporting it is legal sufficient, it would be affirmed on appeal.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Let me make my position clear.

JUSTICE DALE WAINWRIGHT: That's your position.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: No, Your Honor. Let me make my position very clear. The evidence supports this apportionment. The great weight of the evidence was the church knew for 12 years this teacher was abusing children. Every decision by this Court that has looked to whether an intentional

tortfeasor can be less responsible than a negligent tortfeasor has looked to foreseeability. That's the key to answering the question. If the negligent party has a duty and the negligent party can foresee that the intentional conduct is likely to occur and has the ability to control that situation, then the apportionment can be shifted so the negligent party is more responsible. The key to that is these two people are not strangers. Ms. Lowrys is Hyde Park's employee. They have the right to control her work. They know what she's doing; they set the standards. They were aware that she was abusing children for 12 years. And I see that I'm out of time. May I finish my answer and briefly conclude?

JUSTICE WALLACE B. JEFFERSON: If you can briefly sum up, Counsel.

ATTORNEY LAURIE MICHELLE HIGGINBOTHAM: Okay, because Hyde Park knew for 12 years that this teacher was abusing children and Hyde Park does not dispute that it negligently failed to supervise and retained this teacher. Hyde Park under joint and several liability can be responsible for the damages. Hyde Park is confusing vicarious liability and joint and several liability. Under joint and several liability, Hyde Park is responsible for the damages that occurred that flow from its negligence in retaining a known abusive teacher. For all these reasons, we respectfully request that this Court affirm the Courts below.

JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF DAVID M. PRUESSNER ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Do you agree or disagree that under Likes, the special relationship category would apply in a daycare situation?

ATTORNEY DAVID M. PRUESSNER: Oh no, Your Honor. I don't think it would apply at all. In Texas, the special relationship has only been applied to one relationship between doctor and patient, and it's so confined that when the patient has tried to say I have a special relationship with the hospital, the Courts of Appeals for example in Verinakis said no. You can have a special relationship with a person that you have an intimate relationship where they need to make sure you don't suffer mental anguish, but an institution? We're not going to impose that special relationship. It is very confined. Now, what would happen if this Court did recognize a "special relationship"? It would stand about 300 years of jurisprudence on its head. And what I mean by that is as my opposing Counsel said, these teachers were somewhat in the place of the parents and for many, many years, preschools were viewed as in loco parentis; they're in the place of the parents. And so it was, Courts were handoff on how people parent their children or if they place somebody else in their place, it's hands-off. If they decide they're going to hold milk up to a child's face and make him drink his milk, believe it or not, that didn't used to be evidence of abuse. If this Court says instead of following 300 of jurisprudence, 300 years of jurisprudence where we don't get into the details of how you discipline kids, which is sloppy. It's not like this Court where everything is ordered. You've got spills here and you've got one kid shoving another kid over here. If you pay attention to this, you leave the spill there. It's sloppy. If this Court decides it's going to go the opposite direction of in loco parentis, and instead say there is a special legal relationship where this Court will intervene between child and the preschool and we will actually have evidence that when you force the child to drink milk that that's abuse. When she says they knew abuse was going on for 12 years, that's what she was referring to. There were these incidents. Now keep in mind, what happens during 12 years? You don't just record incidents of abuse. You have everybody's happy with the construction project. One of the evidence is this teacher was particularly good at caring for a child that had spina bifida and needed special training by the teacher to care for this child. Over 12 years if you nit and pick and pull out a complaint just like you could with a member of this Court, if you go over 12 years, you can find a mistake here and a mistake there and you push it together and say they knew about it for 12 years.

JUSTICE DAVID M. MEDINA: Not this Court.

ATTORNEY DAVID M. PRUESSNER: I'm sorry; I meant the Court across the hall. What they knew about is things like tripping a child. Well, I submit, for example, that if Justices on this Court were to serve as, for example, Little League coaches and supervise Little League coaches, well I bet you could find some years where they grabbed a kid or threw him up against the fence because they ran the bases or threw a bat; threw a bat again and again and again and you can't throw a kid? Now is the Court going to intervene in all of these little details to where every little incident? Yes, they will if there's a significant bodily injury. If a kid actually gets hit by a bat, if a kid actually gets hit when they're pushed up against a fence.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the intervention would be if we accept the jury's verdict here, it would come when a teacher intentionally shoves a kid off a stool and hits you know to cause that kid's head to slam against concrete. That seems to be an appropriate point of intervention.

ATTORNEY DAVID M. PRUESSNER: It is, Your Honor. And keep in mind that these arguments that they and the position they've argued today would be perfectly fine before 1995, before tort reform came in. But when tort reform came in, they did not like joint and several liability. That was the main target that they had is the deep-pocket employer gets hit mainly because they have deep pockets. Look at the statute, not just 33003, but look at 33013. The Texas legislature actually said when does a person become responsible for another person engaging in intentional injury to a child? It's when they act in concert with them. So 33013 actually says a person will be jointly and severally liable with a person that injures a child or injures an elderly person. There's all sorts of crimes. They will be jointly and severally liable to them if they act in concert with them.

JUSTICE DAVID M. MEDINA: Well maybe you know, you talk about deep pockets; maybe it's because the employer's in a better position to put a stop to that abusive situation and maybe when they fail to act, they are acting in concert.

ATTORNEY DAVID M. PRUESSNER: Well, Your Honor, they don't have a jury find that they acted in concert. I hear what you're saying about maybe the school's in the best position to stop it and all I can say, Your Honor, is if I tell you that I may push this pen off this table, I may do it, I'm telling you I may do it and I finally push this pen off, can I hold you responsible? You're a member of this Court. You can command the bailiff to come in here and stop me and you didn't stop me and.

JUSTICE DAVID M. MEDINA: Right back there.

ATTORNEY DAVID M. PRUESSNER: Are you more responsible than me? You may have some degree of responsibility, but are you any more responsible than me?

JUSTICE DAVID M. MEDINA: Well I think your whole analogy is incorrect, but you know--

JUSTICE PHIL JOHNSON: So what is, would it be your position that the maximum the employer in this case could be liable for would be 50% and no more than half for the actor and, in fact, to that amount for reporting.

ATTORNEY DAVID M. PRUESSNER: I think that is being extremely generous. I can't imagine that an intentional wrongdoer and a negligent wrongdoer could be equally at fault.

JUSTICE PHIL JOHNSON: So how much should we? What is the cutoff in your view?

ATTORNEY DAVID M. PRUESSNER: I think, Your Honor, and this is, you're asking for my view. I don't know that it will be visible.

JUSTICE PHIL JOHNSON: You're here arguing your client's case and you're telling us you're wanting us, you're wanting us to write an opinion, but what do you want us to say?

ATTORNEY DAVID M. PRUESSNER: I am. I am. And I'm saying in the average negligent supervision case, I'm not talking about where an employer consistently hires incompetent people.

JUSTICE PHIL JOHNSON: In your case, in your case what is it you want us to say?

ATTORNEY DAVID M. PRUESSNER: In my case, the most they can impose is 50%.

JUSTICE PHIL JOHNSON: 50/50.

ATTORNEY DAVID M. PRUESSNER: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

MARSHALL: All rise.

2010 WL 3713692 (Tex.)

END OF DOCUMENT