

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
ON APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSISSIPPI

KIMBERLY TODD, NATURAL MOTHER
AND NEXT FRIEND OF LILY TODD, A MINOR

APPELLANT

VS.

NO. 2007-CA-00729

FIRST BAPTIST CHURCH OF WEST POINT

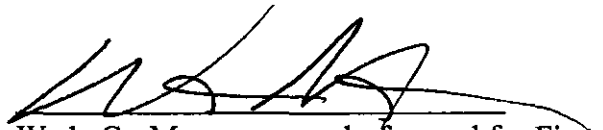
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons have interest in the out come of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lily Todd, Appellant;
2. Kimberly Todd, Mother and Next Friend of Appellant;
3. Frank Todd, Father and Next Friend of Appellant;
4. First Baptist Church of West Point, Mississippi, Appellee;
5. Honorable Lee Howard, Clay County, Mississippi Circuit Court Judge;
6. Wade G. Manor, Scott, Sullivan, Streetman & Fox, P.C. (Ridgeland, Mississippi),
Counsel for the Appellee; and
7. R. Shane McLaughlin and Nicole H. McLaughlin, McLaughlin Law Firm (Tupelo, Mississippi), Counsel for Appellant.

By:


Wade G. Manor, counsel of record for First
Baptist Church of West Point, Appellee

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APPELLANT


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APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, FIRST BAPTIST CHURCH OF WEST POINT

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Counsel for the Appellee; and
7. R. Shane McLaughlin and Nicole H. McLaughlin, McLaughlin Law Firm (Tupelo, Mississippi), Counsel for Appellant.

By: _____

Wade G. Manor, counsel of record for First
Baptist Church of West Point, Appellee

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STATEMENT OF THE ISSUES

1. Whether the Trial Court properly granted summary judgment in favor of the Appellee, First Baptist Church of West Point, where the Plaintiff has not and cannot establish essential elements of her claim for negligent supervision, namely breach of duty and proximate cause.
2. Whether the Trail Court properly granted summary judgment in favor of the Appellee, First Baptist Church of West Point, dismissing the Plaintiff's breach of contract claim where the Plaintiff has not and cannot establish an actual breach of contract.

STATEMENT OF THE CASE

On February 3, 2005, then two-year-old Lily Todd was injured while in attendance at the Early Childhood Ministry of the First Baptist Church of West Point, Mississippi (hereinafter referred to as "First Baptist Church"), a day care/preschool program for infants and children through age twelve. (R. at 8, 206) The precise circumstances of Lily Todd's injury, however, have not been confirmed, as there are no eyewitnesses to the actual incident.

The uncontradicted testimony reflects that, immediately prior to the subject incident, Carolyn Ward had five children in her care, including the Appellant, Lily Todd. (R. at 117-118) In her deposition, Ms. Ward testified that two of the children were playing on a "sit and spin" toy while Lily was playing near a shelf just moments before the subject incident. (R. at 120-121) The parents of the other two children in her care had arrived and Carolyn Ward was, advising the parents of their child's day when the accident occurred. (R. at 118-119) When Ms. Ward heard Lily cry, she ensured that the door leading outside was closed and immediately ran to Lily's attention. (R. at 117, 120) Based on her own observations, Ms. Ward testified that Lily had fallen between a baby bed and a bookshelf and was lying face down, however, the cause of her fall is unknown. (R. at 117-118, 120) Once she lifted Lily from the floor, Ms. Ward noticed that Lily was bleeding from the mouth. (R. at 128) Ms. Ward then took Lily to the nearest bathroom and called for assistance. (*Id.*) Lily's mother, Kimberly Todd, was also called and, upon her arrival, the daycare director and Ms. Todd drove Lily to the hospital. (R. at 129-130)

On October 18, 2005, the Appellant filed her *Complaint* against First Baptist Church in the Circuit Court of Clay County, Mississippi. (R. at 7) She alleged that First Baptist Church breached its duty to exercise reasonable care for her safety "by failing to provide supervision to Lily Todd and

her classmates commensurate with their age and the attendant circumstances” and by failing to properly train its employees.¹ (R. at 9-10) The Appellant also alleged that First Baptist Church “breached its contractual obligation to provide a safe environment to Lily Todd.” (R. at 10) However, as properly concluded by the Trial Court, the Appellant failed to establish genuine issues of material fact with respect to her negligence and breach of contract claims. (R. at 878-879) As such, based on the uncontradicted testimony, First Baptist Church was properly granted summary judgment as a matter of law. (*Id.*) From the Trial Court’s April 2, 2007 *Order* granting summary judgment, the Appellants filed the instant appeal. (R. at 880)

¹ The Court dismissed with prejudice the Appellant’s negligence claim based on First Baptist Church’s alleged failure to properly train its employees by *Order* dated March 15, 2007. (R. at 871) The claim and subsequent dismissal are not at issue on appeal and, therefore, are not addressed in the argument.

SUMMARY OF THE ARGUMENT

The Appellant failed to demonstrate that disputed issues of material fact remain in the instant case from which a reasonable jury could find in favor of Lily Todd. With respect to the Appellant's claim of negligent supervision, the Appellant failed to demonstrate that First Baptist Church breached the duty of ordinary care owed to Lily Todd, as Carolyn Ward's supervision of the Appellant (and accordingly, the supervision of Lily Todd by First Baptist Church) was clearly reasonable under the circumstances. Also, the Appellant failed to demonstrate that the allegedly negligent supervision of Lily Todd was the legal and factual cause of her injuries, since no evidence exists that might establish that Carolyn Ward caused, could have prevented or should have otherwise anticipated Lily Todd's injury. The Court of Appeal's holding in *Slade v. New Horizon Ministries, Inc.* confirms that, absent such proof, the Trial Court's grant of summary judgment in favor of First Baptist Church was proper. 785 So.2d 1077 (Ct. App. Miss. 2001).

With respect to the Appellant's negligent breach of contract claim, no reasonable jury could determine that the daycare program breached a contract for supervision by failing to perform with ordinary care. Whether the Appellee breached a contract was entirely contingent upon a finding of negligence on behalf of First Baptist Church. Because the Appellant failed to demonstrate such negligence, her breach of contract claim was also properly dismissed by the Trial Court.

ARGUMENT

I. The Trial Court properly granted summary judgment in favor of the Appellee as to the Appellant's negligence claims.

In her *Complaint*, the Appellant alleged that First Baptist Church breached its duty to exercise reasonable care for her safety "by[, *inter alia*,] failing to provide supervision to Lily Todd and her classmates commensurate with their age and the attendant circumstances" and that said breach was the proximate cause of Lily Todd's injuries. (R. at 9-10) To survive the Appellee's *Motion for Summary Judgment*, the Appellant was required to demonstrate that disputed issues of material fact remain from which a reasonable jury could find in favor of Lily Todd. *Glover v. Jackson State University*, No. 2005-CA-02328-SCT (¶¶ 18) (Miss. 2007) (quoting *Simmons v. Thompson Machinery of Miss., Inc.*, 631 So.2d 798, 801 (Miss. 1994)). In the instant case, the trial court properly concluded that no genuine issues of material fact remained to be tried by a jury and further, that the undisputed material facts failed to establish the essential elements of the Appellant's negligence claim, namely breach of duty and proximate cause. No reasonable jury could find that Carolyn Ward's supervision (and in effect, the supervision of Lily Todd by First Baptist Church) was unreasonable under the circumstances, nor could a reasonable jury find that the inadequate supervision of Lily Todd, if inadequate at all, was the legal and factual cause of her injuries. As such, the Trial Court's grant of summary judgment in favor of First Baptist Church should not be disturbed.

A. The Appellant failed to establish a breach of duty on behalf of First Baptist Church.

Duty and breach of duty are essential to a finding of negligence and must be demonstrated before any other element. *McIntosh v. Victoria Corp.*, 877 So.2d 519, 523 (Ct. App. Miss. 2004)

(citing *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 174 (Miss. 1999)). Ordinarily, a breach is determined in reference to the ‘reasonable person’ standard of care. In other words, when a person fails to act as would a reasonable person under the same or similar circumstances, that person is said to have breached the applicable standard of care.” *Davis v. Christian Broth. Homes of Jackson, Miss., Inc.*, 957 So.2d 390, 404 (Miss. App. 2007) (citing *Baker, Donelson, Bearman & Caldwell, P.C. v. Muirhead*, 920 So.2d 440, 449 (Miss. 2006)). In cases involving the supervision of children, this Court has similarly held that one “has the duty of exercising ordinary care, of reasonable prudence, or of acting as a reasonable person would act under similar circumstances.” *Summers v. St. Andrew’s Episcopal School, Inc.*, 759 So.2d 1203, 1213 (Miss. 2000) (citing *Levandoski v. Jackson County School District*, 328 So.2d 339, 342 (Miss. 1976)). While First Baptist Church does not dispute that it owed a duty of reasonable care to Lily Todd, no reasonable jury could find that First Baptist Church breached that duty by acting unreasonably under the circumstances.

In her brief, the Appellant emphasizes the fact that “Ms. Ward was standing in the doorway, with her back to the three remaining children in her class, while she talked to the parents in discharging two [other] children.” (*Id.* at 5) The Appellant relies heavily on this Court’s holding in *Summers v. St. Andrew’s Episcopal School, Inc.* in support of her contention that whether Ms. Ward’s actions were reasonable under the circumstances is a fact question to be determined by a jury. (Appellant’s Br. 11-14). However, the Appellant’s argument that *Summers* is controlling is fatally flawed. While *Summers* does involve a claim of negligent supervision, the case is clearly distinguishable from the factual circumstances surrounding Lily Todd’s incident.

In *Summers*, a child was restrained by several children on a playground who subsequently removed her clothing, exposed her, and touched her in an inappropriate manner. *Summers*, 759 So.2d

at 1206. No teacher was present in the immediate vicinity of the incident. *Id.* at 1207. In fact, the teachers present were sitting on a bench, talking among themselves, and were unaware that the incident had even occurred. *Id.* at 1207, 1213-1214. The incident actually occurred near the back of a playground in a “‘blind spot’ that is not visible from [where the teachers were located on the playground] and other watch positions established.” *Id.* at 1213. The Court stated that “[s]itting on a bench engaging in conversation with fellow teachers when 10 or more of the 16 children in [their] care are out of sight for a significant period of time is not reasonable.” *Id.* The *Summers* Court ultimately held that “[w]hether the teachers violated the rules and procedures for supervision by allegedly sitting on a bench talking to each other with their backs to the children is . . . a triable factual issue.” *Id.* at 1214 (citing *James v. Gloversville Enlarged School District*, 155 A.D.2d 811, 548 N.Y.S.2d 87, 88-89 (1989)). In other words, the Court found that a reasonable jury could infer that the teachers were acting unreasonably under the circumstances by completely ignoring their supervisory duties.

In the instant case, however, there is no question as to the reasonableness of Carolyn Ward’s actions. Carolyn Ward simply turned her back to Lily and the two other children for a brief period of time in order to send two other children home with their parents. (R. at 117, 135). The Appellant did not, and cannot, establish that turning one’s back for a such a short moment in order to accomplish this task is unreasonable, as it is an inherent and necessary part of her duty as a day care provider.² To hold otherwise would essentially create a duty of constant, invariant visual supervision. However, this Court has clearly stated that “[a]bsent special, dangerous circumstances, a school

² In her brief, the Appellant stated that a reasonable jury could conclude that Ms. Ward’s inattention to her supervisory duties was unreasonable. However, the Appellant fails to mention that Ms. Ward’s actions were, in fact, an essential part of her supervisory duties.

district does not have the duty of providing constant supervision of all movements of pupils at all times.” *Id.* at 1213 (citing *Levandoski*, 328 So.2d at 341-342). This logic should apply equally to day care providers. Because the actions of Carolyn Ward are completely distinguishable from the actions of the teachers in the *Summers* case, as the teachers in *Summers* were simply not doing their jobs and because the children in *Summers* were completely out of sight of the teachers for a significant period of time, the holding of *Summers* is clearly inapplicable to the instant litigation. No reasonable jury could find that Carolyn Ward’s actions were unreasonable under the circumstances.

A more relevant case involving circumstances similar to those surrounding Lily Todd’s injuries is *Slade v. New Horizon Ministries, Inc.* 785 So.2d 1077 (Ct. App. Miss. 2001). In *Slade*, the plaintiff was injured while in attendance at a church sponsored youth program for children ages twelve to fifteen. *Id.* at 1078. During a recreational period at a community center gymnasium, the child was accidentally knocked to the ground by another child, breaking her hip. *Id.* At the time of the incident, the children’s supervisor was standing in the doorway of the gymnasium, monitoring about fifteen children who were both inside and outside the gym. *Id.* The Plaintiff alleged that the absence of a supervisor in the immediate area of the incident raised a disputed issue sufficient to defeat summary judgment. *Id.* at 1079. However, the Mississippi Court of Appeals held that “[t]he record clearly establishe[d] supervision of the children by [the church].” *Id.* The Court added that “[t]here [were] no facts offered which indicate that their supervision was inadequate.” *Id.* Just as in *Slade*, the Appellant in the instant case has failed to establish that Carolyn Ward or First Baptist Church’s supervision of Lily Todd was inadequate. The *Slade* Court effectively determined that standing in a doorway watching children in two completely separate areas (and necessarily turning your back

on one group to watch the other) is not unreasonable. Therefore, Carolyn Ward's actions were likewise not unreasonable.

Also undisputed is the fact that, at the time of the subject incident, Carolyn Ward had no more than five children in her care,³ well under the maximum number of children per care-giver allowable by state regulations. (R. at 118, 201) While the Appellant is correct in stating that such compliance is not dispositive of whether the Appellee breached the duty of ordinary care, a reasonable jury certainly could not infer from such undisputed compliance that First Baptist Church, in fact, acted *unreasonably*. (Appellant's Br. 15) In addition, the Appellant further argues that a triable fact issue remains regarding whether the Appellee did, in fact, meet the State requirements for supervision. (*Id.*) However, whether First Baptist Church complied with State Regulations at any time other than the time of the subject incident is beyond the scope of this litigation, as compliance with such regulations at the time of the alleged negligence is uncontested. Furthermore, the Appellant has provided no evidence which might establish that First Baptist Church did, in fact, violate State supervisory regulations. As such, whether First Baptist Church did or did not comply with State regulations at a time other than the moment of their alleged negligence is not an issue of *material* fact, and accordingly, will not defeat summary judgment. See *Glover*, No. 2005-CA-02328-SCT (¶ 18) (quoting *Simmons*, 631 So.2d at 801).

It is clear from the undisputed material facts that First Baptist Church did not breach a duty owed to the Appellant. It is undisputed that Lily Todd was injured while in the care of First Baptist Church. However, First Baptist Church is not the insurer of Lily Todd's safety. *Levandoski*, 3287

³ The amount of children actually in her care at the time of the incident is subject to differing interpretations, as two of the children were being discharged at the time of the subject incident, leaving only three children under her direct supervision.

So.2d at 342 (quoting 38 A.L.R.2d 830, 834 (1971)). The uncontradicted testimony of Carolyn Ward fully demonstrates that she, acting on behalf of the Church as their employee in performing her duties as a day care provider, acted reasonably and with ordinary care under the then-existing circumstances. Her actions before, during, and after the accident were reasonable and the Appellant produced no facts to contradict this obvious conclusion. The Appellant wholly failed to establish an essential part of her negligence claim. Accordingly, the Trial Court properly granted summary judgment in favor of the Appellee.

B. The Appellant failed to establish that any breach of duty on behalf of First Baptist Church proximately caused her injuries.

The Appellant was also required to demonstrate that the alleged negligence of First Baptist Church was the proximate cause of Lily Todd's injuries. *Glover*, No. 2005-CA-02328-SCT (¶31).

This Court has recently stated:

In order for an act of negligence to proximately cause the damage, the fact finder must find that the negligence was both the cause in fact and legal cause of the damage. A defendant's negligence is the cause in fact of a plaintiff's damage where the fact finder concludes that, but for the defendant's negligence, the injury would not have occurred. . . . A defendant's negligence which is found to be the cause in fact of a plaintiff's damage will also be the legal cause of that damage provided the damage is the type, or within the classification, of damage the negligent actor should reasonably expect (or foresee) to result from the negligent act.

Id. at ¶¶31-33 (citing Dobbs, *The Law of Torts*, § 180 at 443 (2000)). In the instant case, the Appellant produced absolutely no evidence from which a fact finder could infer that the alleged negligence of First Baptist Church was the factual or legal cause of Lily Todd's injuries. There is no evidence in support of the Appellant's contention that, but for Carolyn Ward's actions, Lily Todd would not have been injured. The Appellant has failed to demonstrate a causal connection between

Carolyn Ward's actions and Lily Todd's injury. As such, summary judgment in favor of First Baptist Church was clearly proper.

In *Slade*, the facts of which are discussed *supra*, the Court stated that "[t]here [was] no indication that had the counselor been standing right beside [the child], rather than in the doorway of the gym, that the accident could have been prevented." *Slade*, 785 So.2d at 1079. The Court added that "[t]here [was] also no suggestion that [the child] or any other [youth program] participant, had engaged in any conduct that would have put [the church] on notice that the incident could have been reasonably foreseen." *Id.* The Court concluded that not only was there "no issue for the jury to resolve on the question of the adequacy of supervision," there was also no "evidence that the injury to [the child] was a foreseeable injury proximately related to inadequacy of supervision." *Id.* The Court of Appeals accordingly determined that summary judgment was proper. *Id.* Likewise, in the instant case, absent some proof that Carolyn Ward could have prevented or otherwise should have anticipated Lily Todd's injury, summary judgment in favor of First Baptist Church was proper.

The Appellant failed to demonstrate two essential elements of her negligence claim - breach of duty and proximate cause. The undisputed facts surrounding the subject incident left no issues for the jury to decide, as no reasonable jury could find First Baptist Church was, in fact, negligent, absent some proof that Carolyn Ward and First Baptist Church acted unreasonably under the circumstances and that said unreasonable actions were the factual and legal cause of Lily Todd's injury. Accordingly, the Trial Court's *Order* granting summary judgment in favor of First Baptist Church was proper and should not be disturbed.

II. The Appellant failed to establish the essential elements of her breach of contract claim.

The Appellant is absolutely correct in stating that "[a] reasonable jury could manifestly

determine that a valid contract existed between Kimberly Todd and the daycare . . . and that Lily Todd was a third-party beneficiary of the contract such that she can maintain an action based on its breach.” (Appellant’s Br. 19-20) However, a reasonable jury **could not** determine that the daycare program breached the contract by failing to supervise Lily.

In the Appellant’s response to First Baptist Church’s *Motion for Summary Judgment*, the Appellant quoted this Court as stating that “every contract is a common law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.” *George B. Gilmore Co. v. Garrett*, 582 So.2d 387, 391 (Miss. 1991) (quoting *Pinnix v. Toomey*, 87 S.E.2d 893, 897-898 (1955)). In other words, the Appellant was required to first demonstrate negligence in order to recover for a breach of contract. Whether the Appellee breached the contract was, therefore, entirely contingent on a finding of negligence on behalf of First Baptist Church. Because the Appellant completely failed to establish that First Baptist Church was negligent, as specifically discussed *supra*, her breach of contract claim also failed. As such, the Trial Court properly dismissed both of the Appellant’s theories of recovery.

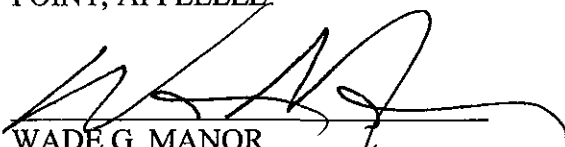
CONCLUSION

The material facts of the instant case are undisputed. Because no reasonable jury could infer from those facts that Carolyn Ward's actions were unreasonable under the circumstances and because no reasonable jury could infer that any alleged negligence on behalf of First Baptist Church caused or contributed to Lily Todd's injuries, *Slade v. New Horizon Ministries, Inc.* mandated the grant of summary judgment with respect to the Appellant's negligent supervision claim. 785 So.2d 1077. In light of the Appellant's complete absence of proof of negligence, the Trial Court was then subsequently compelled to also dismiss her claim for negligent breach of contract. Accordingly, the Trial Court's grant of summary judgment in favor of First Baptist Church as to both claims was clearly proper. Based on the foregoing, First Baptist Church respectfully requests that this Court **affirm** the Trial Court's grant of summary judgment in its favor.

RESPECTFULLY submitted this the 8th day of January, 2008.

FIRST BAPTIST CHURCH OF WEST
POINT, APPELLEE

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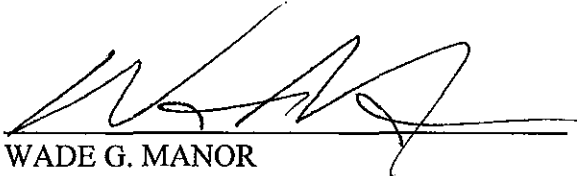
CERTIFICATE OF SERVICE

I, Wade G Manor, one of the counsel of record for Appellee, FIRST BAPTIST CHURCH OF WEST POINT, do hereby certify that I have this date caused to be delivered, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

R. Shane McLaughlin, Esquire
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Honorable Lee J. Howard, IV
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THIS the 8TH day of January, 2007.


WADE G. MANOR