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STATEMENT REGARDING ORAL ARGUMENT

As mentioned in Appellant's principal Brief, oral argument would be beneficial in this case. Oral argument would be helpful to discuss the evidence from which a reasonable jury could find each element of the tort of negligent supervision by Defendant, as well as a breach of contract. In this case, differing inferences may be drawn from the evidence. A reasonable jury could find, based on the facts presented, that Defendant either did or did not exercise ordinary care in supervising Lily Todd, and that the breach of duty did or did not cause Lily's injury. Oral argument would be useful to discuss the differing reasonable inferences possible from this record, and why summary judgment was therefore improper.

REPLY ARGUMENT I.

DIFFERENT REASONABLE INFERENCES COULD BE DRAWN FROM THE FACTS, SUCH THAT A JURY COULD HAVE FOUND THAT DEFENDANT WAS NEGLIGENT.

Defendant's Brief is based on the conclusory assertion that Carolyn Ward's supervision of Lily Todd was necessarily reasonable under the circumstances, and that a reasonable juror could not have concluded differently. Defendant even states that "there is no question as to the reasonableness of Carolyn Ward's actions." (Appellee's Brief at 7). Of course, this could not be further from the truth; there is much question as to the reasonableness of Ms. Ward's actions.

Defendant's Brief ignores the following facts, from which a reasonable jury could have well determined that Ms. Ward's supervision breached the duty of reasonable care under the circumstances:

1. Ms. Ward was supervising very young children. Lily Todd was only two years old. (R. p. 155).
2. Repeated admonitions in the daycare's handbook require daycare teachers to supervise the children at all times. (*See* R. p. 215).
3. Upon discharging a child for the day, Ms. Ward would walk the child to the door, and would then engage in protracted discussion with the children's parents. (R. p. 119). Ms. Ward admitted that she talked to the parents of departing children for approximately one to two minutes, and that during this entire time she had her back turned to the children, and never even glanced in their direction. (R. p. 121, 136).
4. Ms. Ward admitted she had no idea what the children were doing for approximately two minutes or where they were in the classroom. (R. p. 136).

5. Lily's accident occurred while Ms. Ward was admittedly not supervising the children. (R. p. 117).
6. Debbie Fromm, another daycare employee, initially understood that Lily was kicked in the mouth by another student while Ms. Ward was talking to the parents. (R. p. 155).
7. Lily's treating physician, Dr. Gregory Gaines, testified that Lily's injuries were caused by a "strong blow" to the front of the face, and that her injuries were not consistent with a simple trip and fall. (R. p. 341). Rather, her injuries were consistent with a fall from significant height, or a hard blow to a child's secured head. (R. p. 345-46).

Of course, in determining the reasonableness of Ms. Ward's supervision, a jury would be instructed as to the applicable Mississippi law. Mississippi law provides that a party who supervises a child has a duty of reasonable care under the circumstances. *Summers v. St. Andrew's Episcopal Sch., Inc.*, 759 So. 2d 1203, 1213 (Miss. 2000). Accordingly, the level of supervision required to meet the standard of reasonableness will vary based on the circumstances, including the child's age and maturity. *See Summers*, 759 So. 2d at 1213 citing *Sutton v. Duplessis*, 584 So. 2d 362, 365 (La. Ct. App. 1991). Clearly, the age of the children being supervised is a factor that must be considered in determining whether supervision is reasonable under all of the circumstances. *See, e.g., Payne v. N.C. Dept. of Human Resources*, 382 S.E.2d 449, 552 (N.C. Ct. App. 1989) (noting that "[t]he amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations."). Similarly, The Indiana Supreme Court has reasoned as follows:

> Of course what constitutes due care and adequate supervision depends largely upon the circumstances surrounding the incident such as the number and age of the students left in the classroom, the activity in which they were engaged, the duration of the period in which they were left without supervision, the case of providing some alternative means of supervision and the extent to which the

> school board has provided and implemented guidelines and resources to insure adequate supervision.

Miller v. Griesel, 308 N.E.2d 701, 707 (Ind. 1974). *See also Edson v. Barre Supervisory Union*, 933 A.2d 200, 205 (Va. 2007) (noting that supervisors owe a duty to "act as the reasonably prudent person would in supervising students of similar age and maturity").

Considering the facts mentioned above, it is apparent that a reasonable jury could find that Ms. Ward's lack of any supervision for approximately two (2) minutes was not reasonable under the circumstances as they existed immediately prior to Lily's injury. Most obviously, a jury would be correct in determining that more than mere casual supervision was required since the children in Ms. Ward's care were so young. Of course, less supervision would have been required had Ms. Ward been supervising a group of pre-teens or teenagers. However, what might be acceptable supervision for older children could be grossly inadequate for children of very young ages. A jury could determine that no supervision for two minutes is unreasonable when one is in charge of supervising several two-year-old children.

A reasonable jury would consider that, despite the daycare's handbook provisions requiring supervision of the children, Ms. Ward nevertheless admits that she had no idea what the children were doing for approximately two minutes without supervision. Any reasonable jury could find that it is not reasonable to leave two-year-old children unattended for approximately two minutes, while several children are moving about and playing. Moreover, a jury would consider the manner of Lily's injuries. The uncontroverted medical evidence demonstrates that Lily's injuries were necessarily the product of a strong blow, not merely a trip and fall. Based on Dr. Gaines' testimony, a jury could reasonably conclude that Lily was either struck by another child, or fell from a significant height while Ms. Ward conversed with the parents.

Defendant next makes the disingenuous argument that Ms. Ward having her back turned to the children while she talked with the parents must be viewed as reasonable, since it was "an essential part of her supervisory duties." (Appellee's Brief at 7, n.2). First of all, talking to the parents of departing children for two minutes, going over "care sheets" and discussing meals and playtimes has nothing whatsoever to do with "supervisory duties" of the children. In fact, these activities, while laudable, detract from the business of actually supervising two-year-olds.

Under Defendant's argument, any action by Ms. Ward would be necessarily reasonable so long as the action was considered part of her job. Under such flawed reasoning, Ms. Ward could have reasonably been changing light bulbs in the hallway or cleaning the bathroom, instead of supervising the children, if these were her job duties. A reasonable jury could reject such logic and conclude that since the children were so young they should not have been left unsupervised for two minutes while Ms. Ward performed other job duties. A jury could determine that talking to parents for such lengths of time should not have been Ms. Ward's job, if she could not do so while keeping an eye on the children. A jury simply would not be compelled to conclude that Ms. Ward's actions were reasonable simply because she was doing something that was within her job duties. To the contrary, a jury might well find Ms. Ward's lack of any supervision for approximately two minutes was unreasonable under the circumstances.

Defendant also claims that it is undisputed that Ms. Ward's supervision complied with all State regulations and staff-to-child ratio requirements. These facts are not undisputed. During the time that Ms. Ward was talking to the parents of the departing children she admitted that she was not supervising the children. There was ***zero*** staff supervising at least three (3) children during this period of time. This violated the Mississippi Department of Health regulations

requiring a one-to-twelve ratio at all times, and violated the regulation's requirement that "[c]hildren shall not be left unattended at any time." (R. p. 201). Thus, despite Defendant's assertions, there are disputes of fact as to whether Ward's supervision complied with the State regulations. This illustrates yet another issue of fact as to the reasonableness of Ward's supervision. *See Summers*, 759 So. 2d at 1214 (noting that whether supervision violated applicable policies is a triable issue of fact).

Next, Defendant relies heavily on *Slade v. New Horizon Ministries, Inc.*, 785 So. 2d 1077 (Miss. Ct. App. 2001) for the proposition that Ward's supervision was reasonable as a matter of law. However, *Slade* does not stand for the proposition for which Defendant cites it. First of all, the injured party in *Slade* was not even a child being supervised. *Slade*, 785 So. 2d at 1078. In *Slade*, one of a group of children bumped into Ms. Slade, causing her to fall down. *Id.* Ms. Slade claimed that the entity responsible for supervising the child negligently did so, thereby causing her injuries. *Id.*

As to supervision of the child, the Court in *Slade* noted that there were "no facts offered which indicate that their supervision was inadequate." *Id.* at 1079. Importantly, the Court of Appeals in *Slade* noted that the children's supervisor was: "(1) within reasonable proximity of the incident (2) ***observing the children*** and ***(3) aware of the incident.***" *Id.* (emphasis added). Further, it should be remembered that the children in *Slade* were not two-year-olds, but rather were children between the ages of twelve to fifteen. *Id.* at 1077.

Of course, *Slade* is different from this case in every important aspect. Here, in contrast to the facts of *Slade*, there are several facts which indicate that supervision of Lily was inadequate. In *Slade* the supervisor was actively observing the children and was aware of the incident when it occurred. Here, Ms. Ward admits she was not observing the children, and had not done so for

one to two minutes when the accident occurred. Ms. Ward admits she had her back to the children and was talking to the parents of departing children when the accident occurred. Ms. Ward testified she did not know what the children were doing or where they were located in the classroom when the accident occurred. In further contrast to the facts of *Slade*, Ms. Ward was not aware when Lily's accident occurred, as her attention was not redirected until Lily began to scream. (*See* R. p. 117). These facts are completely different from those of *Slade*.

Slade is not nearly as on-point as is *Summers*, as discussed in Appellant's principal Brief. As mentioned, the *Summers* Court found that genuine issues of material fact precluded summary judgment where children were left unsupervised while teachers talked among themselves. *Summers*, 759 So. 2d at 1213. In *Summers*, this Court stated:

> It is undisputed that no teacher was present at the time of the alleged injury so a natural inference could be drawn that St. Andrew's failed in its duty to properly supervise. This Court has held that summary judgment is inappropriate where differing but reasonable inferences may be drawn from uncontradicted facts.

Id. at 1213-14 (internal citation omitted).

The reasoning this Court applied in *Summers* is equally applicable here. Here, just as in *Summers*, there was admittedly no supervision of the child at the time of the accident, and there had been none for approximately two minutes. Just as in *Summers*, the adult supervisor was talking with another adult, rather than supervising her charges, when the child's injury occurred. Thus, just as in *Summers*, differing reasonable inferences could be drawn from the facts as to the reasonableness of supervision. As explained by the *Summers* Court, a "natural inference could be drawn" that Ward failed to properly supervise Lily based on the lack of supervision at the time of the accident.

The only difference in this case from *Summers* is that instead of chatting with colleagues, Ms. Ward was performing one of her "job duties" in talking to parents of departing children.

However, as discussed above, merely denominating something as one of her job duties does not render her conduct reasonable as a matter of law, when it is done to the exclusion of supervising children. Defendant has cited no authority, because there is none, holding that supervision of a child is reasonable under the circumstances, as a matter of law, just because the employee is performing some other job duty rather than supervising the children. Of course, whether the action of performing another job function in lieu of supervising the children is reasonable depends on the facts and circumstances, and such a determination is a quintessential jury function.

As explained in *Summers*, a jury in this case could draw different inferences from the facts. The jury could conclude that Ward turning her back for two minutes while not supervising the children was reasonable. On the other hand, a jury could determine that this was not reasonable supervision under the circumstances. Such determinations are for a jury to make. *See* MISS. CONST. ART. 3, § 31 (providing that "[t]he right of trial by jury shall remain inviolate"). Thus, this issue should have been tried to a jury rather than decided on summary judgment.

Similarly, a jury could likewise determine that Lily's injuries were caused by the unreasonable lack of supervision. Defendant ignores the legions of authority holding that issues of causation should be reserved for a jury. *See, e.g., Rein v. Benchmark Constr.* Co., 865 So. 2d 1134, 1143; (Miss. 2004) (holding issues of causation are issues for a jury); *Donald v. AMOCO Prod. Co.*, 735 So. 2d 161, 174 (Miss. 1999) (noting that "[w]hile duty and causation both involve foreseeability, duty is an issue of law, and causation is generally a matter for the jury."); *Am. Creosote Works v. Harp*, 60 So. 2d 514, 517 (Miss. 1952) (holding "when reasonable minds

might differ on the matter, the question of what is the proximate cause of an injury is usually a question for the jury.").

A reasonable jury could determine that Ward's negligence was the proximate and factual cause of Lily's injuries, which occurred in the absence of supervision. This is especially so in this case, considering Dr. Gaines' testimony that Lily's injuries were not consistent with a simple trip and fall. Rather, Dr. Gaines explained the injuries were likely caused by either a fall from significant height or a hard blow to Lily's secured head. A reasonable jury could conclude that either of these preventable accidents occurred during the time Lily was left unsupervised. A reasonable jury could, properly, determine that it is just such injuries that reasonable supervision would prevent. Indeed, prevention from a significant fall, or from a blow by another child, are some of the very purposes for supervision of young children in the first place. Accordingly, the evidence could amply support a jury finding that Ward's negligent supervision caused Lily's injuries.

Simply put, just as in *Summers*, there are triable issues of fact here. A jury could, or could not, conclude that Ms. Ward's supervision of Lily was reasonable under the circumstances. A jury could determine that Ms. Ward's breach of the standard of care caused Lily's injuries. As explained by *Summers*, these issues must be decided by a jury, rather than being decided by the Court as a matter of law. Accordingly, the Trial Court erred in granting summary judgment and this Court should reverse and remand for trial.

REPLY ARGUMENT II.

LILY TODD COULD RECOVER AS A THIRD-PARTY BENEFICIARY OF THE CONTRACT BETWEEN HER PARENTS AND THE DAYCARE.

Defendant apparently concedes, as it must, that there was a contract between the daycare and Lily's parents, and that Lily was an intended third-party beneficiary of the contract. (*See* Appellee's Brief at 11-12). As a third-party beneficiary, Lily can recover for her personal injuries based on a breach of the contract. *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1147 (Miss. 2004). Defendant's sole argument as to this issue is that "a reasonable jury **could not** determine that the daycare program breached the contract by failing to supervise Lily." (Appellee's Brief at 12) (emphasis in original). Defendant misses the point of this issue entirely and instead attacks a straw-man. The issue is not whether Defendant performed the contract negligently, but whether Defendant breached its obligations under the contract with Lily's parents.

The *Rein* opinion illustrates the proper analysis for this third-party beneficiary claim. In *Rein,* a company called Natural Accents contracted with a nursing home to provide ant bed control. *Rein,* 865 So. 2d at 1141-42. A nursing home resident was subsequently attacked by fire ants and died from her injuries. *Id.* at 1126-37. The resident's wrongful death beneficiaries sought to recover against Natural Accents based on an alleged breach of its contract with the nursing home to control fire ant beds, claiming that the resident was a third-party beneficiary of the contract. *Id.* at 1148. The Court reasoned as follows:

> That proposal indicates that Natural Accents did indeed contract to provide "ant bed control." That evidence shows, as a matter of law, that Natural Accents obligated itself, by its own express terms, to some duty to inspect and treat ant beds at Silver Cross. ***The scope of that duty is a proper question for the trier of fact.*** The foreseeability of Mrs. Rein's injuries and death to Natural Accents is also a jury question. Further, the same trier of fact should determine the

> significance as related to causation of the failure by Natural Accents to comply with the terms of the contract.
>
> * * *
>
> [Natural Accent's] contract with Silver Cross indicates express obligations of some duty to inspect and treat ant beds at Silver Cross. ***The scope of Natural Accents' duty, the foreseeability of this event and Mrs. Rein's death, and whether a breach of Natural Accents' duty was the cause of this tragedy are proper questions for the trier of fact.***

Id.

The analysis in this case should be the same as that employed in *Rein*. Here, as conceded by Defendant, the daycare obligated itself to supervise Lily by contracting with Lily's parents. Lily's parents paid sixty-five dollars per week for the promised supervision. Lily was, undisputedly, an intended third-party beneficiary of the contract.

Just as in *Rein*, the issue of the scope of the daycare's duty of supervision is a "proper question for the trier of fact." That is, a jury must determine whether the daycare breached the contract to supervise Lily, or whether it fully performed its obligations under the contract. Of course, as discussed above, there is much evidence from which a jury might conclude that the daycare breached its contractual duty to supervise Lily. Most obviously, the daycare's employee, Ms. Ward, admits that she was not supervising Lily at the time of the accident, that she had her back to Lily for approximately two minutes, and that she had no idea what Lily and the other children in her care were doing during this time.

Further, a jury could consider the daycare's own policies to determine the scope of its contractual duty. The daycare's handbook states a policy that "[t]eachers are responsible at all times for the safety of all the children in their room." (R. p. 215). The handbook warns daycare employees that "ACCIDENTS NEARLY ALWAYS HAPPEN IN AREAS WHERE NO TEACHERS ARE PRESENT." (R. p. 221). Even the State regulations warn that the staff-to-

child ratio must be maintained at all times, and that "[c]hildren shall not be left unattended at any time." (R. p. 201)

As explained in *Rein*, the scope of the daycare's contractual duty to supervise Lily is for a jury to determine. Based on the facts presented in the Record, a jury could determine that the daycare breached its duty under the contract by failing to supervise Lily, and that her injuries resulted from the breach. Accordingly, a jury could find for Lily on her breach of contract claim as a third-party beneficiary of the agreement. Thus, the Trial Court erred in granting summary judgment as to this claim.

CONCLUSION

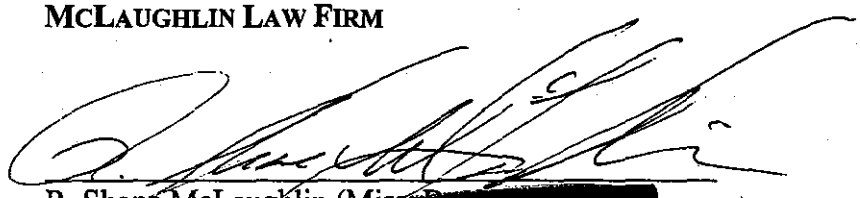
This Court should reverse the Trial Court's grant of summary judgment because there are genuine issues of material fact as to whether Carolyn Ward's supervision of Lily Todd was reasonable under the circumstances, and whether her negligent supervision caused the child's severe injuries. There is ample evidence in the record from which a jury could conclude in Lily's favor, not the least of which was Ward's admission that she failed to supervise the children at all for approximately two minutes.

There are also genuine issues of material fact as to Lily's breach of contract claim. Whether Defendant breached its contractual duty to supervise Lily is likewise an issue of fact to be determined by a jury.

Accordingly, Lily was entitled to a jury trial on her claims. The Trial Court erred in granting Defendant's Motion for Summary Judgment. This Court should reverse the Trial Court's decision and remand this case for a trial.

RESPECTFULLY SUBMITTED, this the 22nd day of February, 2008.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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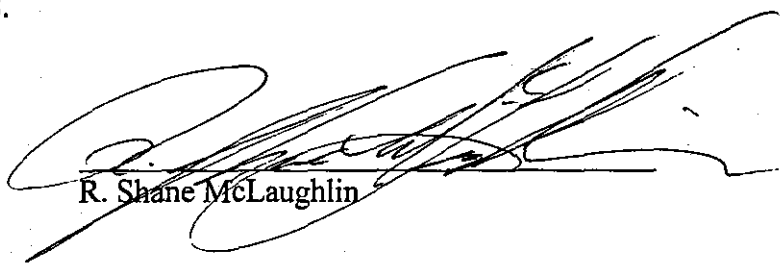
Hon. Lee J. Howard, IV
Circuit Judge
P.O. Box 1344
Starkville, MS 39760-1344

This the 22d day of February, 2008.



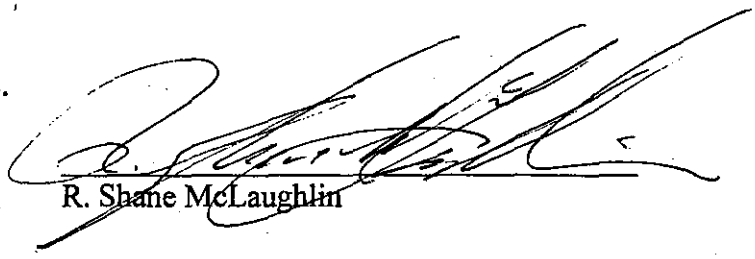
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 22d day of February, 2008.



R. Shane McLaughlin