CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome 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. Wade G. Manor and Kenneth T. O'Cain, attorneys for Appellee; and
6. R. Shane McLaughlin and Nicole H. McLaughlin, attorneys for Appellant.

R. Shane McLaughlin
Attorney of record for Appellant

2007-CA-00729
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OTHER MATERIALS

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to discuss the evidence in this case 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.

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in granting summary judgment as to Plaintiff's negligent supervision claim where the child was admittedly left unsupervised at the time the injury occurred and a jury could have determined that Defendant breached the duty of ordinary care.

2. Whether the Trial Court erred in granting summary judgment as to Plaintiff's breach of contract claim, as there was sufficient evidence demonstrating that Defendant breached the contract by failing to supervise the minor child.

STATEMENT OF THE CASE

Plaintiff Lily Todd, through her Mother and Next Friend Kimberly Todd, filed her Complaint seeking damages for personal injuries against First Baptist Church of West Point, Mississippi on October 18, 2005. (R. p. 007). Lily alleged that she suffered trauma to her face and sustained severe injuries while she was attending a daycare program at First Baptist Church. (R. p. 008). Defendant filed an Answer and Defenses on December 5, 2005. (R. p. 046). The Parties agreed to the entry of a Scheduling Order establishing various deadlines, and setting a trial date of April 4, 2007. (R. p. 085).

Defendant filed a Motion for Summary Judgment on February 12, 2007. (R. p. 100). The Trial Court subsequently granted Defendant's Motion for Summary Judgment. (R. p. 878).

Plaintiff timely appealed from the Trial Court's ruling. (R. p. 880).

STATEMENT OF FACTS

On February 3, 2005, Plaintiff Lily Todd ("Lily") was a two-year old child attending a daycare program at First Baptist Church in West Point, Mississippi ("First Baptist"). (R. p. 155). The daycare program, called Early Childhood Ministry, provided preschool classes and child care for infants through children age twelve. (R. p. 206). Lily had attended the daycare program since she was six-weeks old. (R. p. 171). The daycare program charged sixty five dollars per week to care for Lily. (R. p. 22).

On February 3, First Baptist's daycare program was short-staffed. (R. p. 117). Carolyn Ward was a child care provider for a two-year-old age group in the daycare. (R. p. 116). Carolyn Ward testified that one of the daycare teachers was out sick on February 3, and as a result, the daycare was short on caretakers that day. (R. p. 117). Generally, in the event of an employee calling in sick, the daycare would call in a substitute to fill-in for the employee. (R. p. 148). However, according to Ms. Ward, when it was not possible to obtain a substitute and there were few enough children that one teacher could handle two classes, two groups of children were sometimes combined for supervision. (R. p. 148). In this instance, no substitute was called in. (*Id.*). Rather, Ms. Ward's class, including Lily, was combined with a class of older toddlers because of the employee shortage. (*Id.*).

Ms. Ward does not recall how many children she had charge of during the subject afternoon. (R. p. 149). She estimated that she was supervising between ten and twenty children. (*Id.*). The daycare program was governed by regulations promulgated by the Mississippi Department of Health as to the ratio of caregivers required for various age groups of children. (R. p. 200). The regulations provided that for two-year-olds the minimum ratio was one caregiver to twelve children. (R. p. 201). The regulations also proscribed a maximum group size

of fourteen children for groups of two-year-olds, with two caregivers present. (*Id.*). The regulations provided as follows as to supervision of the children:

> The staff-to-child ratio shall be maintained at all times, to include when children are arriving and departing the facility.
>
> Children shall not be left unattended at any time.

(R. p. 201). In addition to the State regulations, the daycare program's own handbook discusses the necessity of actual supervision of the children. (*See* R. p. 215-21). The daycare's handbook admonishes daycare employees that "ACCIDENTS NEARLY ALWAYS HAPPEN IN AREAS WHERE NO TEACHERS ARE PRESENT." (R. p. 221) (emphasis in original). The handbook further states that "[t]eachers are responsible ***at all times*** for the safety of all the children in their room." (R. p. 215) (emphasis added).

Parents picked up children from Ms. Ward's group throughout the afternoon of February 3, and Ms. Ward had five children remaining in her care immediately before Lily's accident. (R. p. 117). At the time of Lily's injury, Ms. Ward was in the process of discharging two of the children to their parents. (R. 118). Ms. Ward's process of discharging children included walking the children to the door of the room and going over the children's "care sheets" with their parents. (R. p. 119). The care sheets explained the activities of each child's day, their meals and playtimes. (*Id.*). Ms. Ward would converse with the parents for a while and tell them generally about their child's day. (*Id.*).

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 of the children. (*See* R. p. 117-18). According to Ms. Ward's testimony, she had talked to the parents for "[a]bout a minute or two." (R. p. 135). One of the parents left with their child, while the other remained was talking with Ms. Ward. (R. p. 121). It was during this "minute or two" of no supervision that Lily's horrific

accident occurred. (*See id.*). Ms. Ward testified that the last time she observed the children in her care, prior to dealing with the parents of the departing children, Lily was standing near a toy shelf and the two older boys were playing on a merry-go-round type toy. (R. p. 135-36, 138). Ms. Ward candidly admitted that she did not know what any of the children were doing, or where they were, during the approximately two minutes while she talked with the parents of the departing children. (R. p. 136).

Ms. Ward's attention was not redirected to the children until she heard Lily cry out. (R. p. 117). When she heard Lily, she turned around from the doorway, and saw Lily face down on the floor between a baby bed and a bookshelf. (R. p. 120). Ms. Ward did not see what had happened to Lily. (R. p. 117). Ms. Ward observed that Lily was bleeding profusely from the mouth and there was a significant amount of blood on the floor. (R. p. 129).

The precise manner of Lily's injury was unknown, as it was not observed by any adults. (R. p. 117, 138). Ms. Ward speculated that Lily may have tripped as she went across the room. (R. p. 117). However, there were no apparent tripping obstructions. (Id.). Ms. Ward's statement, prepared following the incident, recorded that Lily was "[p]laying near merry-go-round with 2 other children. Tripped / bumped and fell, hit mouth on floor." (R. p. 156). After the accident, Ms. Ward called another daycare teacher, Debbie Fromm, to her room. (R. 155). Debbie Fromm initially understood that Lily may have been kicked in the mouth by another child attempting to get on the merry-go-round. (R. p. 155).

Lily had sustained severe injuries while Ms. Ward was talking with the parents. (*See id.*). Lily's mother was called and she and Debbie Fromm immediately rushed Lily to the local emergency room in West Point. (R. p. 172). Lily's face was ripped completely through from about a quarter inch from her bottom lip down the side of her face. (R. p. 174). Lily's injury

was such that the emergency room in West Point was not equipped to handle the trauma. (*Id.*). Lily was referred to the North Mississippi Medical Center in Tupelo, Mississippi for treatment. (R. p. 178, 180).

At the North Mississippi Medical Center emergency room Lily was treated by Dr. Gregory Gaines. (R. p. 312). Dr. Gaines observed that Lily had sustained a severe laceration around her mouth. (R. p. 324). The laceration was a "through and through laceration that divided the muscle." (R. p. 326). Dr. Gaines immediately conducted a reconstructive surgery, under general anesthesia, to repair Lily's laceration. (R. p. 329). Dr. Gaines noticed several white paint chips around the area of Lily's injuries during the surgery. (R. p. 332). Dr. Gaines testified that as a result of the injury, and the surgery, Lily will have permanent scarring on her face. (R. p. 338-39).

In addition to the severe laceration, Lily had also sustained an alveolar ridge fracture.[1] (R. p. 324). Lily's alveolar ridge fracture caused some of her teeth to be loosened from the sockets. (R. p. 325-26). As a result, two of Lily's teeth were later removed by a maxillo facial surgeon. (R. p. 331, 337). Lily subsequently had replacement teeth implanted and was fitted for a partial after her wound healed. (R. p. 181, 183).

Dr. Gaines testified that an alveolar ridge fracture such as Lily's is caused by a "strong blow" to the front of the face. (R. p. 324-25). Dr. Gaines testified that Lily's alveolar ridge fracture was not consistent with a simple trip-and-fall while she was either running or walking across a floor. (R. p. 341). Rather, such a fracture would be consistent with falls from significant height, or a hard blow to a secured head, so that the body could not absorb the impact. (R. p. 341, 345-46).

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[1] Dr. Gaines explained that the alveolar ridge is a bony structure that is the part of the skull in which the roots of teeth are seated. (R. p. 324).

As discussed below, there are genuine issues of material fact as to whether First Baptist Church can be liable for Lily's severe injuries and damages. A reasonable jury could have determined that the daycare failed to exercise ordinary care in supervising Lily. Accordingly, Lily requests the Court to reverse the grant of summary judgment and to remand this case for trial.

STANDARD OF REVIEW

Of course, a Trial Court's grant of summary judgment is reviewed *de novo* by this Court. *See e.g. Nygaard v. Getty Oil Co.*, 918 So. 2d 1237, 1240 (Miss. 2005); *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004). The familiar standard for summary judgment provides that summary judgment is appropriate only where there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." MISS. R. CIV. P. 56(c). The party seeking summary judgment bears the burden of demonstrating that no genuine issues of material fact exist. *Anderson v. Lavere*, 895 So. 2d 828, 832 (Miss. 2004). The evidence must be viewed in the light most favorable to the non-movant and all doubts as to whether a genuine issue of material fact exists should be resolved in favor of the non-movant. *Malone v. Capital Correctional Res., Inc.* 808 So. 2d 963, 965 (Miss. 2002). A motion for summary judgment is not a substitute for a trial on disputed factual issues. *Anderson*, 895 So. 2d at 832.

In order to escape summary judgment, the plaintiff must have brought forward evidence sufficient for a reasonable jury to find in favor of plaintiff as to the claim. *See Glover v. Jackson State Univ.*, No. 2005-CA-02328-SCT, 2007 WL 2325291 at * 4 (Miss. August 16, 2007). The *Glover* Court explained as follows:

> If one is to faithfully apply the Rule's requirements to a particular case, the inescapable conclusion follows that the court must grant summary judgment unless - as to each material issue of disputed fact raised by the moving party - the

> record demonstrates at least the minimum quantum of evidence sufficient to justify a determination in favor of the non-moving party by a reasonable juror.

Glover, 2007 LEXIS 474 at * 4 (internal footnotes omitted).

Courts "must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury." *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 360 (Miss. 1983). Importantly to this case, summary judgment is inappropriate where differing but reasonable inferences may be drawn from un-contradicted facts. *Delahoussaye v. Mary Mahoney's, Inc.*, 696 So. 2d 689, 691 (Miss. 1997). As summary judgment is such a drastic remedy, any error should be made in favor of allowing the case to proceed to a full trial on the merits. *Id.* at 363.

SUMMARY OF THE ARGUMENTS

There is sufficient evidence in this case from which a reasonable jury could have concluded that the daycare program breached its duty of reasonable care in the supervision of Lily Todd. The evidence in the Record reflects that Carolyn Ward, Lily's caretaker, had to deal with discharging children on the afternoon of the accident, and conversing with the parents of departing children, all while attempting to maintain supervision of the children left in her care. Ms. Ward admits that she turned her back to Lily and the other children for approximately two minutes while she talked with two parents. During this time, Ms. Ward conceded that she had no idea where Lily was, or what she was doing. She was, admittedly, not supervising Lily.

Mississippi law recognizes that whether supervision of a child is reasonable under all of the then-prevailing circumstances is a fact-sensitive inquiry, and is generally a question of fact for the jury. Moreover, the Supreme Court in *Summers v. St. Andrew's Episcopal Sch., Inc.*, 759 So. 2d 1203, 1213 (Miss. 2000) held that the fact that none of a child's purported supervisors witnessed an accident gives rise to a legitimate inference that the supervision was not reasonable

under the circumstances. According to the rationale of *Summers*, this standing alone is sufficient to allow a reasonable jury to find a breach of the duty of care.

The evidence in this case would allow reasonable minds to reach different conclusions as to the reasonableness of Ms. Ward's supervision. While a reasonable jury could conclude that Ms. Ward's inattention to her supervision duties was reasonable under the circumstances, a jury could just as easily conclude that her supervision was not reasonable. Mississippi law does not allow summary judgment under such circumstances. The question of fact – whether Ms. Ward's supervision was reasonable under the circumstances – should have been determined by the jury. This issue could not be properly determined as a matter of law.

Finally, in addition to Lily's negligent supervision claim, the Trial Court erred in granting summary judgment as to Lily's breach of contract claim. Lily's parents contracted with the daycare to supervise Lily, and at this the daycare clearly failed. Lily, as a third-party beneficiary of the contract, is entitled to pursue an action for breach of the contract. Accordingly, this theory of liability should have likewise been tried to a jury.

ARGUMENT I.

THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT AS TO PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM AS PLAINTIFF PRESENTED SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND EACH ELEMENT OF THE TORT.

A. The framework for a negligent supervision claim.

The elements of a negligent supervision claim are the same as in all negligence cases. *Williamson v. Daniels*, 748 So. 2d 754, 759 (Miss. 1999). That is, a plaintiff in a negligent supervision case must establish 1) the existence a duty; 2) a breach of the duty; 3) causation; and 4) damages. *Williamson*, 748 So. 2d at 759.; *Levandoski v. Jackson Cty. Sch. Dist.*, 328 So. 2d 339 (Miss. 1976).

The party charged with supervising a child is not an insurer of the safety of its charges, "but has the duty of exercising ordinary care, of reasonable prudence, or acting as a reasonable person would act under similar circumstances." *Summers*, 759 So. 2d at 1213. This Court has often held that both public and private schools "have the responsibility to use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment." *Id.*; *see also L.W. v. McComb Sep. Mun. Sch. Dist.*, 754 So. 2d 1136, 1142 (Miss. 1999). The level of supervision of a minor child must be commensurate with the age of the child. *Summers*, 750 So. 2d at 1213 (citing *Sutton v. Duplessis*, 584 So. 2d 362, 365 (La. Ct. App. 1991)). Other jurisdictions echo this logic. S*ee, 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."). Accordingly, other jurisdictions have held that pre-school nurseries, which are primarily intended for the supervision of very young children, require the highest degree of supervision. *See Fowler v. Seaton*, 394 P.2d 697, 688 (Cal. 1964).

Mississippi law recognizes that "[t]he issue of ordinary care is a fact question." *Summers*, 759 So. 2d at 1213. That is, this Court has previously recognized that whether a teacher exercised ordinary care in supervising a child is a question of fact for the jury. S*ee Summers,* 759 So. 2d at 1213 (reversing summary judgment in favor of school) *Henderson v. Simpson County Pub. Sch. Dist.*, 847 So. 2d 856 (Miss. 2003) (same). Whether a teacher's supervision is reasonable under the circumstances is highly fact dependent. *See, e.g., Garrett v. Northwest Miss. Comm. College*, 674 So. 2d 1, 9 (Miss. 1996) (noting that whether a teacher's supervision breached the standard of care "usually requires a factual determination that can only be made upon the unique facts of each case"). *See also Bunch v. Shaw*, 355 So. 2d 1383, 1385

(Miss.1978) (noting, in *dicta*, that parent's failure to watch their child while in a bowling alley was evidence of negligent supervision). *See also Kandkhorov v. Pinkhasov*, 756 N.Y.S.2d 65 (N.Y. App. Div. 2003) (holding that issues of fact precluded summary judgment as to whether supervision of infant was reasonable under the circumstances).

The reasoning of the *Summers* case, where the Court held that issues of fact precluded summary judgment, is particularly applicable in this case. In *Summers*, the plaintiff was a five-year-old child who was accosted by a group of children while on the playground at a private school. *Id.* at 1206. Several other children held the plaintiff's arms and legs down, removed her clothing and exposed her private parts. *Id.* The children were near the back of the playground, under some trees, and out of the sight of supervision. *Id.* Although several kindergarten teachers were present on the playground (more than the State mandated ratio of teachers to children), the teachers were sitting on a bench, talking to each other, with their backs to the children. *Id.* at 1213.

In *Summers*, the defendant, St. Andrew's school, relied on the fact that by meeting the required student-to-teacher ratio it was necessarily shielded from liability. The Supreme disagreed and held that triable issues of fact precluded summary judgment, and thus reversed summary judgment entered by the trial court. *Id.* at 1216. The Court reasoned as follows:

> 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 Court noted that "[s]itting on a bench engaging in conversation with fellow teachers when 10 or more of the 16 children in your care are out of sight for a significant period of time is not reasonable." *Id.* at 1213. The Court concluded that "whether 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 also a triable factual issue." *Id.* at 1214. The *Summers* Court cited with approval the New York Court's decision in *James v. Gloversville Enlarged Sch. Dist.*, 548 N.Y.S.2d 87, 88-89 (N.Y. App. Div. 1989), where that Court similarly held that "whether the assigned lunchroom aides violated the rules and procedures for supervision by allegedly sitting on a bench talking to each other with their backs to the children is also a triable factual issue." Finally, as to the defendant's argument that it had met the required ratio of supervisors-to-children, the *Summers* Court held that this was not dispositive. *Id.* The Court reiterated that "the adequacy of the supervision under the prevailing circumstances is an issue for jury determination." *Id.*

B. There is sufficient evidence in the record for a reasonable jury to find that the daycare failed to exercise ordinary care in supervising Lily, and that the failure caused Lily's damages.

Parts of Lily's claim are ostensibly undisputed. First, there is apparently no dispute as to the existence of a duty owed by the daycare to Lily. Under legions of Mississippi authority, the daycare owed Lily a duty of "ordinary care" – that is to act reasonably under the circumstances. Of course, the circumstances included Lily's very young age and the presence of the toddlers in the room. As explained by cases such as *Summers* and *McComb Sch. Dist.*, the daycare owed a duty to take reasonable steps to provide for Lily's safety and to provide a safe environment. Similarly, as to the fourth element of the tort, there can be no dispute that Lily suffered extreme damages. Accordingly, at most, the disposition of Lily's negligent supervision claim revolves around whether a reasonable jury could have found that the daycare breached the duty of care, and whether that breach caused Lily's damages.

As *Summers* made clear, whether the daycare in this case exercised ordinary care or not is a fact question, which should not be resolved on summary judgment. This case, of course,

presents facts markedly similar to those in *Summers*. Here, as in *Summers*, Lily was left without supervision at the time her accident occurred, and no would-be caretaker witnessed the accident. The Supreme Court in *Summers* reasoned that the mere fact that no adult witnessed the accident is itself enough to give rise to an inference of inadequate supervision. That is, a reasonable jury could infer a breach of the duty of care from this fact. This, standing alone, presented an issue for a jury to determine.

The similarities to *Summers*, however, do not end there. Just as in *Summers*, Carolyn Ward, the supervisor in this case, had her back turned to her entire class when the accident and Lily's injury occurred. Ms. Ward was talking to the parents of two departing children, and was not supervising the remainder of her class in any respect when Lily was injured. Ms. Ward admitted that she did not know what the children were doing, or even precisely where they were in the room, while her she was discharging the other children. This is notwithstanding the fact that, as of the last time Ms. Ward looked at the children, two toddlers were playing alone and a two-year was ambling about.

A reasonable jury could manifestly find that Ms. Ward's supervision of Lily was not reasonable under the circumstances. Indeed, a reasonable jury could determine that Ms. Ward provided no supervision at all for at least a period of two minutes, as she was attending to business other than watching the children. A reasonable jury could determine that Ms. Ward should have either not been engaged in handling child departures when there was no one else to watch the children, or at a minimum, she should have bothered to glance in the direction of the children during the process. In light of Lily's extremely young age, it cannot be said as a matter of law that leaving Lily completely unsupervised for a period of one to two minutes was reasonable under the circumstances. Of course, this was for a jury to determine.

First Baptist Church will attempt to make much of the fact that it had met the minimum ratio of supervisors to children pursuant to State regulations. First, however, this is not dispositive of whether the daycare program breached the duty of ordinary care owed to Lily. As explained by *Summers*, there may nevertheless be a jury question, where a jury could conclude that the supervision was not reasonable under the circumstances. As the Court noted in *Summers*, and as particularly applicable here, alleged "supervision" with one's back turned to the children being supervised can easily be found to be unreasonable. Further, however, there are triable issues of fact in this case as to whether the daycare really did meet all State requirements of supervision, and whether Ms. Ward's supervision violated the daycare's own policies. The State requirements mandate that "[c]hildren shall not be left unattended at any time." (R. p. 201). Similarly, the daycare's own policies note that the children must be actually supervised, and that accidents are most likely to occur when a supervisor is not watching. Of course, that is exactly what occurred in this case. Ms. Ward violated the State regulations by leaving Lily, and two other children, unattended for at least one to two minutes. For this time period, Lily and the other children were supervised by zero caretakers. Just as predicted by the daycare's handbook, an accident occurred during the lapse in supervision. Under the Court's reasoning in *Summers*, there are triable issues of fact as to whether the daycare violated the State regulations, as well as its own policies, and for this reason as well summary judgment should have been denied.

Under the same reasoning as *Summers*, and legions of Mississippi precedent, there are similarly questions of fact as to whether the daycare's breach of the duty of reasonable care was a cause in fact and proximate cause of Lily's injuries. To be a cause-in-fact, a fact-finder must conclude that but-for the defendant's negligence the injury would not have occurred. *See Gulledge v. Shaw*, 880 So. 2d 288, 293 (Miss. 2004). An event is also a proximate cause if it is

of the type or classification that the defendant should have reasonably foreseen as a consequence of the negligent action. *Mauney v. Gulf Ref. Co.*, 9 So. 2d 780, 780-81 (Miss. 1942). This Court has routinely held that questions of causation are generally issues reserved for the jury. *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134, 1143 (Miss. 2004).

Obviously, a reasonable jury in this case could conclude that, had the daycare provided adequate supervision, Lily's accident would not have occurred. Any reasonable jury might well infer that, had Ms. Ward watched Lily and the other two children for two minutes while she conversed with the parents, Lily's accident could have been prevented. Indeed, the prevention of accidents and injuries to two-year old children is the very reason for supervising them in the first place. A reasonable jury, exercising their own common sense, could permissibly conclude that when extremely young children are left unattended, they are likely to be injured, and that such injuries are foreseeable consequences of the failure to supervise the children. Stated differently, it is reasonably foreseeable that leaving a two-year-old unattended and unsupervised, in the presence of other children, can result in a fall or bump, causing injury to the child. Thus, a reasonable jury could clearly find that Lily's injuries were caused by the daycare's negligence supervision in this case.

Lily is not asking this Court, and did not ask the Trial Court, to hold that the daycare breached its duty of care and caused her damages as a matter of law. Of course, no Court should make such findings as they are for a jury to determine. Similarly, the Court should not hold that the daycare did not breach its duty and cause Lily's damages as a matter of law, as there is evidence from which a reasonable jury could determine otherwise. Again, these findings are for a jury to decide, after a full trial on the merits.

These are manifestly issues which a jury should be allowed to determine. A reasonable jury could draw differing inferences from the facts here presented, and could either find Defendant liable, or not. Under such circumstances, this Court's precedent mandates that summary judgment should not be granted. Accordingly, the Trial Court's grant of summary judgment should be reversed, and this case remanded for trial.

ARGUMENT II.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFF'S BREACH OF CONTRACT CLAIM.

In addition to the claim for negligent supervision, Plaintiff stated a viable claim for breach of contract in the Trial Court, and this claim should have likewise been submitted to a jury. To establish a breach of contract claim the plaintiff must prove: 1) the existence of a binding contract; 2) that Defendant breached the contract; and 3) that plaintiff suffered damages. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992).

The elements of a binding contract are: 1) two or more contracting parties; 2) consideration; 3) an agreement that is sufficiently definite; 4) parties with legal capacity to contract; 5) mutual assent; and 6) no legal preclusion to the contract. *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003) (quoting *Lanier v. State*, 635 So. 2d 813, 826 (Miss. 1994)). It is well established that the existence of a contract is a question of fact for the jury. *Hunt v. Coker*, 741 So. 2d 1011, 1014 (Miss. Ct. App. 1999) citing 75A AM. JUR. 2d *Trial* § 791 (1991).

A third-party to a contract may prosecute an action for breach of the contract, if the contract was made for their benefit. *Burns v. Washington Savs.*, 171 So. 2d 322, 324 (Miss. 1965). That is, a non-party to a contract may sue on the contract where the non-party was a third-party beneficiary of the agreement. *Rein*, 865 So. 2d at 1134 (Miss. 2004). A party is a third-party beneficiary of a contract where the contracting parties entered into the contract for the

benefit of the third-party. *Id.* at 1145. In order to be a third-party beneficiary, there must be more than mere incidental benefit to the third party. *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006). The Court in *Adams* explained as follows:

> [T]he principle that one not a party or privy to a contract but who is the beneficiary thereof is entitled to *maintain an action for its breach* is not so far extended to give a third person who is only indirectly and incidentally benefitted by the contract the right to sue upon it. A mere incidental, collateral, or consequential benefit which may accrue to a third person by reason of the performance of the contract, or the mere fact that he has been injured by the breach thereof, is not sufficient to enable him to maintain an action on the contract. Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefitted does not give him a right to sue for its breach.
>
> In order for the third person beneficiary to have a cause of action, *the contracts* between the original parties must have been *entered for his benefit*, or at least *such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms*. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. The obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the *right of the third party beneficiary* to maintain an action on the contract *must spring from the terms of the contract itself.*

Adams, 943 So. 2d at 708 (internal citations omitted) (emphasis in original) quoting *Burns*, 171 So. 2d at 325.

Such third-party beneficiary relationships may give rise to a claim for personal injuries sustained against one of the contracting parties. *Rein*, 865 So. 2d at 1134. In *Rein*, an Alzheimer's patient was attacked by fire ants at a nursing home and subsequently died from the injuries. *Id.* at 1136-37. The Supreme Court reversed summary judgment granted in favor of a company that had contracted to provide fire ant control with the nursing home, noting that the plaintiff could have been a third-party beneficiary of the contract. *Id.* at 1145-46. The Court held that a jury could find for the plaintiff under her breach of contract theory against the company. *Id.* at 1148.

To begin the analysis, there can be no doubt that Lily Todd's mother and First Baptist Church entered into a valid and binding contract. The Record establishes that Kimberly Todd promised to pay sixty-five dollars per week, and the daycare program in turn promised to supervise Lily. First Baptist and Kimberly Todd had a definite agreement, they both had legal capacity to contract, and they both indicated their assent to the agreement.

Next, it is equally clear that Lily was an intended third-party beneficiary of the contract. Quite obviously, Lily's supervision was the sole purpose of the contract between Lily's parents and the daycare program. Undoubtedly, the contract was entered into for her benefit. Thus, under Mississippi law, Lily was a third-party beneficiary to the contract, and may maintain an action for breach of the contract.

Finally, a reasonable jury could well determine that the daycare program breached the contract, and failed to supervise Lily. The daycare program's own handbook is riddled with admonitions to vigilantly supervise children, and cautions that accidents usually happen in the absence of supervision. Indeed, the first policy of the daycare program is that "[t]eachers are responsible at all times for the safety of all the children in their room." (R. p. 215). However, it is now undisputed that Lily's supervisor failed to supervise Lily and other children, or even glance in their direction, for approximately one to two minutes while she conversed with other children's parents. During this absence of supervision, Lily was grievously injured. Adequate supervision of Lily was the daycare's obligation under the subject contract. At this, the daycare clearly failed.

A reasonable jury could manifestly determine that a valid contract existed between Kimberly Todd and the daycare, that the daycare failed to provide adequate supervision and that Lily Todd was a third-party beneficiary of the contract such that she can maintain an action

based on its breach. Accordingly, Lily's breach of contract claim should have likewise been decided by a jury. The Trial Court erred in granting summary judgment in this regard.

CONCLUSION

The Trial Court erred in concluding, as a matter of law, that First Baptist Church could not be liable for Lily Todd's injuries. A reasonable jury could have determined that the daycare program breached the duty of ordinary care owed to Lily by leaving her unsupervised for a period of time. A reasonable fact-finder could have determined that the supervision of Lily was not reasonable under the circumstances. As the Supreme Court noted in *Summers*, the fact that Lily's would-be supervisor did not even observe the accident is itself sufficient evidence for a jury to infer that the supervision was not reasonable under the circumstances.

Similarly, Lily's alternative breach of contract claim should have been submitted to the jury. A reasonable jury could have found, based on the evidence, that the daycare breached its contract to supervise Lily, and that Lily could recover for her damages as a third-party beneficiary of the contract.

Based on the foregoing, Lily requests this Court to reverse the Trial Court's grant of summary judgment, and to remand this case for trial.

RESPECTFULLY SUBMITTED, this the 5th day of November, 2007.

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ATTORNEYS FOR APPELLANT

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 **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:

Wade G. Manor
Kenneth T. O'Cain
Scott, Sullivan, Streetman & Fox
P.O. Box 13847
Jackson, MS 39236-3847

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

This the 5th day of November, 2007.

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 **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 5th day of November, 2007.

R. Shane McLaughlin