JERRY MOORE, JR., INDIVIDUALLY AND ON BEHALF OF MINOR, JERRY MOORE, III, AND ANITRA MOORE	*****	**NO. 2018-CA-0603**
	*****	**COURT OF APPEAL**
	*****	**FOURTH CIRCUIT**
VERSUS	*****	**STATE OF LOUISIANA**
CHOICE FOUNDATION D/B/A LAFAYETTE ACADEMY CHARTER SCHOOL, KAREN LEWIS, AND XYZ INSURANCE COMPANY	*****	
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	*** * * * * * ***	

ATKINS, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent. I would affirm the denial of the motion for new trial and the confirmation of the default judgment rendered by the district court. I find that the district court did not abuse its discretion in denying the motion for new trial and did not err in confirming the default judgment.

Although the majority's opinion finds there was no competent, admissible evidence to establish a prima facie case of negligence, I find that the affidavits and testimony of Ms. Moore and Mr. Moore, without considering hearsay evidence, is sufficient to support a finding of negligence and the confirmation of default judgment.

"In reviewing default judgments, the appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment." *Habitat, Inc., v. Commons Condominiums, LLC,* 2011-1384, p. 8 (La. App. 4 Cir. 7/11/12), 97 So.3d 1126, 1132 (citing *Bordelon v. Sayer,* 2001–0717, p. 3 (La. App. 3 Cir. 3/13/02), 811 So.2d 1232, 1235). "This determination is a factual one governed by the manifest error standard of review." *Id.* A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that was manifestly erroneous or clearly wrong. *Stobart v. State, Dept. of Transp. and Development,* 617 So.2d 880, 882, n. 2 (La. 1993).

At the hearing on the confirmation of default judgment, Plaintiffs offered the testimony and affidavits of Jerry and Anitra Moore.

Ms. Moore reported in her affidavit that her son Little Jerry was a thirteen-year-old, non-verbal child with Autism Spectrum Disorder ("ASD"). Although unable to communicate, Ms. Moore described Little Jerry as highly active and social. She explained that Little Jerry requires twenty-four-hour supervision when moving about the house, getting in and out of vehicles, traversing stairs, eating, using the bathroom, bathing, attending to personal needs, dressing and hygiene. Ms. Moore and her husband enrolled Little Jerry in Lafayette Academy in the fall of 2014, choosing that school over others because it provided a paraprofessional who would assist Little Jerry at all times, providing constant supervision to him while also allowing him to interact with other children. Prior to attending Lafayette Academy, Mr. and Ms. Moore attended a meeting at the school to discuss Little Jerry's special needs, noting his poor coordination, spatial difficulties, and being prone to seizure disorders, for which he took medication. Ms. Moore stated that she specifically advised the school that Little Jerry would need assistance with "going up and down the stairs because he did not like to look down while going down stairs." She explained that Little Jerry would also raise his arms above his head while descending stairs. Lafayette Academy indicated they had an experienced paraprofessional, and they assigned Lewis to supervise Little Jerry.

In her affidavit, Ms. Moore reported that, on August 19, 2015, she received a call from Lewis and immediately had to pick up Little Jerry at school because he had fallen on the playground and was crying. Ms. Moore testified that Little Jerry was brought out of the school in a wheelchair and she had to lift him and put him into her car in order to bring him home. Because he is non-verbal, Little Jerry could not tell his mother what had occurred. Ms. Moore noted that Little Jerry had swelling in the knees, left ankle, shoulder scratches, and a left swollen elbow. Ms.

Moore and her husband decided to take Little Jerry to a hospital, and Little Jerry was treated at the emergency room. Ms. Moore also attested that Ms. Lewis sent her photographs of the location where the accident occurred, the stairs near the school playground area. These photos were admitted into evidence.

Ms. Moore indicated in her affidavit that, after she and her husband took Little Jerry to the emergency room on August 19, 2015, he was sent home with a diagnosis of "right knee swelling" and "left shoulder swelling" but no testing was performed. She also testified that, at first, Little Jerry would not even stand and would "crawl around." After a few days, he would pull up and stand up while holding on to something. He would whine and cry but could not tell his parents what was wrong. She indicated that Little Jerry seemed agitated and in pain – he was also still exhibiting right knee and left shoulder swelling. On August 24, 2015, Mr. and Ms. Moore took Little Jerry back to the emergency room and a CT scan was performed which indicated a femoral neck fracture to the hip. Little Jerry was immediately admitted to the hospital for surgical hip repair.

Considering the aforementioned evidence, I find that Plaintiffs sufficiently supported their default judgment, based on a theory of general negligence, with competent, admissible evidence, and that Plaintiffs would prevail at trial. The majority is correct that neither Ms. Moore nor Mr. Moore were eyewitnesses to the accident, as neither was physically present at the time their son was injured. Furthermore, unlike most plaintiffs, Little Jerry is incapable of testifying to the circumstances that led to his injury. However, without considering hearsay evidence, the testimony of Mr. and Ms. Moore established that their son, Little Jerry, a thirteen-year-old, non-verbal, autistic child, was placed in the Defendants' custody and care on August 19, 2015; that Ms. Moore was required to pick him up from Lafayette Academy that afternoon after receiving a call from the school to do so; that Little Jerry was presented to her in a wheelchair and bore signs of physical

injury; that Little Jerry was subsequently treated at the emergency room; and, upon a return trip to the hospital, medical professionals discovered that Little Jerry had sustained a femoral neck fracture, which required surgery and follow-up care.

The testimony and affidavits offered by Mr. and Ms. Moore also demonstrated that Defendants were placed on notice regarding Little Jerry's limitations and, in particular, that Little Jerry would need assistance using the stairs. Defendants, through its agents, failed to conform their conduct to an appropriate standard of care, in light of their assumed obligation in caring for a child with disabilities, therefore breaching the duty that they owed to Little Jerry. A school board, through its agents and teachers, is responsible for reasonable supervision over students. *Wallmuth v. Rapides Parish School Bd.*, 2001-1779, 2001-1780, p. 8 (La. 04/03/02), 813 So.2d 341, 346; *Adams v. Caddo Parish Sch. Bd.*, 25,370 (La. App. 2 Cir. 1/19/94), 631 So.2d 70, 73. The supervision required is reasonable, competent supervision appropriate to the age of the children and the attendant circumstances. *Wallmuth*, 2001-1779, 2001-1780 at p. 8, 813 So. 2d at 346. In essence, when the school accepts custody, it stands in the shoes of the parent regarding the authority to control the student while there; in turn, it must also assume the responsibility to supervise. *Frederick v. Vermilion Parish Sch. Bd.*, 2000-382, p. 4 (La. App. 3 Cir. 10/18/00), 772 So.2d 208, 212. . For a breach of a school's duty to adequately supervise the safety of students to be found, "the risk of unreasonable injury must be foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised." *S.J. v. Lafayette Parish Sch. Bd.*, 2009-2195, p. 9 (La. 07/06/10), 41 So.3d 1119, 1125; *Wallmuth*, 2001-1779, 2001-1780 at p. 8, 813 So.2d at 346.

The risk of harm to Little Jerry was foreseeable, constructively or actually known to Defendants. *Wallmuth*, 2001-1779, 2001-1780 at p. 8, 813 So.2d at 346. Mr. and Ms. Moore's statements established that Defendants were aware that Little

Jerry required assistance going up and down the stairs. Had Defendants exercise reasonable care in supervising Little Jerry, the incident could have been prevented.

I find that the district court did not err in confirming the default judgment. Additionally, I do not find that the default judgment was contrary to the law and the evidence and thus the district court did not abuse its discretion in denying the motion for new trial.