

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

JENKINS, J., DISSENTS WITH REASONS

I respectfully dissent with majority’s conclusion that the Moores did not establish a prima facie case of negligence with competent, admissible evidence. Specifically, the majority rejects the sufficiency of proof only with respect to the cause-in-fact and breach of duty elements of negligence.

According to Black’s Dictionary, prima facie evidence is sufficient to establish a given fact, or the group or chain of facts constituting the parties’ claim or defense, and if not rebutted or contradicted will remain sufficient. It is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. BLACK’S LAW DICTIONARY 1190 (6th ed. 1990).

The elements of a prima facie case are established with competent evidence that convinces the court that it is probable that the plaintiff would prevail at trial on the merits. *McIntyre v. Sussman*, 10-1281, p. 7 (La. App. 4 Cir. 10/26/11), 76 So.3d 1257, 1262.

In order for a plaintiff to obtain a default judgment, “he must establish the elements of a prima facie case with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant.” “In other words, the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail on a trial on the merits.” A plaintiff seeking to confirm a default must prove both the existence and the validity of his claim.

“There is a presumption that a default judgment is supported by sufficient evidence, but this presumption does not attach when the record upon which the judgment is rendered indicates otherwise.”

Sessions & Fishman v. Liquid Air Corp., 616 So.2d 1254, 1258 (La. 1993) (citations omitted).

The determination of whether there is sufficient proof to support a default judgment is a question of fact that should not be disturbed on appeal unless it is manifestly erroneous. *Xavier Univ. of Louisiana v. Coleman*, 18-0660, p. 2 (La. App. 4 Cir. 10/3/18), 257 So.3d 730, 732.

The substantial admissible, competent evidence presented at the confirmation trial includes the following taken from the affidavits of the Moores:

- Little Jerry is a 13-year-old, non-verbal child with Autism Spectrum Disorder.
- Little Jerry requires 24-hour supervision when moving about the house, getting in and out of vehicles, going up and down stairs, eating, using the bathroom, bathing, attending to personal needs, dressing and hygiene.
- Ms. Moore and her husband enrolled Little Jerry in Lafayette 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, Mr. and Mrs. 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.
- Mrs. Moore 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.”
- Mrs. Moore also told the school Little Jerry would raise his arms above his head while descending stairs.
- Ms. Lewis was assigned as Little Jerry’s paraprofessional for the full year prior to the date of his injury at school.
- Mrs. Moore stated that, on August 19, 2015, she received a call from Ms. Lewis and immediately went to pick up Little Jerry at school.

- Mrs. Moore said that when she arrived, Little Jerry was being brought out of the school in a wheel chair, and she had to lift him and put him into her car in order to bring him home.
- Mrs. Moore noted that Little Jerry had swelling in the knees, left ankle, shoulder scratches, and a left swollen elbow.

Here, this competent, admissible evidence convinced the trial court that it was probable that the Moores would prevail at trial. First, Little Jerry left home for school on August 19, 2015, without any injuries. Lafayette knew Little Jerry had special needs and required 24-hour supervision, including during his time at school. While he was at school that day, Little Jerry was, in fact, supposed to be under the constant supervision by a paraprofessional who knew that Little Jerry needed special assistance. The school, through its agents and teachers, owed a duty of reasonable supervision over Little Jerry. *See Wallmuth v. Rapides Parish Sch. Bd.*, 01-1779, 01-1780, p. 8 (La. 4/03/02), 813 So.2d 341, 346. The supervision required is reasonable, competent supervision appropriate to the age of the children and the attendant circumstances. *Id.* 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. *Huey v. Caldwell Parish Sch. Bd.*, 47,704, p. 6 (La. App. 2 Cir. 1/16/13), 109 So.3d 924, 928.

There is no dispute that when Little Jerry was injured, he was in the school's custody and control, where he was supposed to be receiving constant supervision based upon his special needs. On the same day he left for school, Mrs. Moore received a phone call from Ms. Lewis, and left to pick up Little Jerry at school. When Mrs. Moore arrived, Little Jerry was in a wheel chair, with swelling in the knees, left ankle, shoulder scratches, and a left swollen elbow. A week later, Little Jerry was diagnosed femoral neck fracture.

With respect to the breach of duty issue, I would find that the risk of unreasonable injury was foreseeable, constructively or actually known, and preventable if the school had exercised the requisite degree of supervision. *See Wallmuth*, 01-1779, 01-1780, p. 8, 813 So.2d at 346.

The trial court properly found that the school and Ms. Lewis were liable for Little Jerry's injuries because, with knowledge that he had special needs and required constant care and supervision, the school and Ms. Lewis failed to protect Little Jerry from foreseeable harm.