

CAUSE NO. _____

**JAMES DOE and MARY DOE,
Individually and As Next Friends of JOHN
DOE, Minor,**

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IN THE COUNTY COURT

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Plaintiffs,

§

§

V.

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AT LAW NUMBER _____

**LAUREN HUMPHREY, CHILDTIME
CHILDCARE, INC., and LEARNING
CARE GROUP, INC. d/b/a TUTOR TIME,**

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Defendants.

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WILLIAMSON COUNTY, TEXAS

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, JAMES DOE and MARY DOE, Individually and As Next Friends of JOHN DOE, Minor, Plaintiffs herein, who hereby complain of LAUREN HUMPHREY, CHILDTIME CHILDCARE, INC., and LEARNING CARE GROUP, INC. d/b/a TUTOR TIME, and for this cause of action would respectfully show the Court as follows:

**I.
DISCOVERY CONTROL PLAN**

Plaintiffs assert that discovery is to be conducted under **Level Two (2)**, pursuant to Rules 190.1 and 190.3 of the Texas Rules of Civil Procedure.

**II.
PARTIES AND SERVICE**

Plaintiffs James Doe (hereinafter, "Mr. Doe") and Mary Doe (hereinafter, "Mrs. Doe") are husband and wife, and the parents of minor Plaintiff John Doe (hereinafter, "John"). Plaintiffs reside at 7501 Reed Drive, Leander, Texas 78641 (Williamson County).

Upon information and belief, Defendant Lauren Humphrey (hereinafter, “Defendant Humphrey”) is an individual, and is the listed “director” (as that term is defined by 40 Texas Administrative Code § 746.1001) of the commercial facility known as the Tutor Time childcare learning center, located at 6801 Dallas Drive, Austin, Texas 78729 (Williamson County), and may be served with process at this address. **Plaintiffs are requesting citation only, and will arrange for private process service at this address.**

Upon information and belief, Defendant Childtime Childcare, Inc. (hereinafter, “Defendant Childtime”) is a corporation, duly organized and lawfully doing business in the State of Texas, and is the listed owner of the property identified as 6801 Dallas Drive, Austin, Texas 78729. Defendant Childtime may be served with process by and through its registered agent, Corporation Service Company, 211 East 7th Street, Suite 620, Austin, Texas 78701. **Plaintiffs are requesting citation only, and will arrange for private process service at this address.**

Upon information and belief, Defendant Learning Care Group, Inc. d/b/a Tutor Time (hereinafter, “Defendant Tutor Time”) is a corporation, duly organized and lawfully doing business in the State of Texas under the assumed business name, Tutor Time childcare learning center. Defendant Tutor Time is a “licensed child-care center” (as that term is defined by 40 Texas Administrative Code § 746.101 *et seq.*), doing business in the State of Texas as Operation No. 865861, located at 6801 Dallas Drive, Austin, Texas 78729 (Williamson County). Defendant may be served with process by and through its registered agent, Corporation Service Company, 211 East 7th Street, Suite 620, Austin, Texas 78701. **Plaintiffs are requesting citation only, and will arrange for private process service at this address.**

III. JURISDICTION AND VENUE

This Court has personal jurisdiction over Defendants because they are residents of the State

of Texas and/or avail themselves of the privilege of doing business in the State of Texas. Furthermore, this Court has subject matter jurisdiction because this cause of action arises under both the common law and statutes of the State of Texas. Finally, the amount of damages sought is within the jurisdictional limits of this Court.

Venue is proper in this Court because all or a substantial part of the events or omissions giving rise to this cause of action occurred in Williamson County, pursuant to Texas Civil Practice & Remedies Code § 15.002(a)(1).

IV. FACTUAL BACKGROUND

At all times relevant to this cause of action, Plaintiffs Mr. and Mrs. Doe had their minor son, Plaintiff John, enrolled in daytime childcare at Defendant Tutor Time. Plaintiffs had John enrolled since approximately August 2008, and were current on all weekly tuition and fees.

On or about March 23, 2010, Mr. and Mrs. Doe had entrusted John, then approximately eighteen (18) months old, to Defendant Tutor Time for daytime care, as usual, in the “Infant 2” classroom. Upon information and belief, during a late morning outdoor play period, John was allowed to escape from the outdoor play area adjoining his classroom, this area being purportedly a fenced-in, secure playground area for the classroom children to have outdoor time.

As a result, John walked all the way around the back of the Tutor Time center, and began walking along the main road of Dallas Drive. He walked as far as to the intersection of Dallas Drive and Parmer Lane, a major intersection in the area (Parmer Lane being a 60-mile-per-hour street). No employee at Defendant Tutor Time apparently noticed him missing or went to search for him. Upon information and belief, there were two (2) employees of Defendant Tutor Time who were assigned to be full-time teachers (or one teacher and one teacher’s assistant), supervising John’s classroom, i.e., the Infant 2 classroom.

Eventually, a water utilities worker in the area spotted John walking in or near a ditch along the main roadway of Parmer Lane. He tried to block off traffic in order to safely get to John. Upon information and belief, a female motorist also stopped to render assistance. The male utilities worker and female motorist together took John back to the Tutor Time center, which was apparently the first time that Defendant Tutor Time realized what had happened and that John had walked away completely unsupervised.

V. NEGLIGENCE

As the director of Defendant Tutor Time, Defendant Humphrey was charged with a duty of care toward John and Mr. and Mrs. Doe, to ensure that Defendant Tutor Time operated according to generally accepted safety standards for a child care center operating in the normal course of business, and to ensure that employees of Defendant Tutor Time were properly supervised and trained in such standards and procedures. By allowing John to walk completely out of the center, down a main road, and along a major intersection, completely unsupervised, Defendant breached that duty.

Defendant Humphrey's actions or omissions also constitute negligence *per se*, in that they were violations of one or more of the laws of the State of Texas, including 40 Texas Administrative Code § 746.1003 *et al.* With respect to negligence *per se*, in particular:

- a) Mr. and Mrs. Doe, and John, are within the class of persons that 40 Texas Administrative Code § 746.1003 was designed to protect; and,
- b) Defendant Humphrey, without excuse, violated the statute.

The employees of Defendant Tutor Time, including but not limited to the teachers and/or assistants assigned to John's classroom (Infant 2), were charged with a duty of care toward John and Mr. and Mrs. Doe to provide appropriate care, custody, and supervision. By allowing John

to walk completely out of the center, down a main road, and along a major intersection, completely unsupervised, they breached that duty. Their actions also constitute negligence *per se*, in that they were violations of one or more of the laws of the State of Texas, including 40 Texas Administrative Code § 746.1205 *et al.* In particular:

- a) John and Mr. and Mrs. Doe are within the class of persons that 40 Texas Administrative Code § 746.1205 was designed to protect; and,
- b) The employees, without excuse, violated the statute.

In addition, Plaintiffs assert negligence under the doctrine of *res ipsa loquitur*, in that:

- a) The nature of the occurrence giving rise to Plaintiffs' claim (i.e., for eighteen (18) month old John to walk completely out of the center, down a main road, and along a major intersection, completely unsupervised) is such that it could not have happened in the absence of negligence; and,
- b) The instrumentalities giving rise to the harm (the gate, fence, or other outdoor enclosures and/or the procedures and safeguards designed to prevent such an occurrence from taking place) were within the exclusive control of Defendant Tutor Time at the time the negligence occurred.

VI. PREMISES LIABILITY

Defendant Childtime is the listed owner of the property and premises described as the Tutor Time childcare learning center, 6801 Dallas Drive, Austin, Texas 78729. Plaintiffs Mr. and Mrs. Doe, and their minor son John, were “invitees” upon the premises, in that they entered the premises for a business purpose, for the mutual benefit of themselves and Defendant Childtime, and with Defendant Childtime’s knowledge and consent. As invitees, they were owed the highest duty of care by Defendant Childtime, to be warned of or made safe from any

conditions or activities on the property that posed a danger to Plaintiffs that Defendant Childtime either knew of, or through the exercise of reasonable diligence, should have known of.

Defendant was on notice of such dangerous condition because it had been previously cited, less than one (1) year prior to this incident, by the Texas Department of Family & Protective Service's childcare licensing division, for danger created by a hole and/or missing boards in the outdoor fence enclosing the 18-to-24-month-old children's outdoor play area. It therefore had actual and subjective knowledge and awareness of problems with risk of escape by children exactly in Plaintiff John's age group.

By allowing John to escape through the very same or similar outdoor fence, and walk completely out of the center, down a main road, and along a major intersection, completely unsupervised, Defendant Childtime failed to make John safe from the unreasonably dangerous condition, and it was foreseeable that Plaintiffs would have been harmed and injured as a result.

VII. RESPONDEAT SUPERIOR

Plaintiffs additionally assert liability under the doctrine of *respondeat superior*, in that:

- a) Plaintiffs were injured as the result of employees' acts or omissions, including but not limited to Defendant Humphrey and the teachers / assistants assigned to John's classroom (Infant 2); and,
- b) At the time of said acts or omissions, the aforementioned employees were acting in the course and scope of their employment with Defendant Tutor Time, and in furtherance of Defendant Tutor Time's business.

Accordingly, Defendant Tutor Time is liable for the aforementioned acts or omissions.

**VIII.
BREACH OF CONTRACT**

Mr. and Mrs. Doe and Defendant Tutor Time had entered into a valid contract for the provision of childcare services for their minor son, John. There was a meeting of the minds, evidenced by Mr. and Mrs. Doe' signature to all enrollment forms, applications, and other paperwork generated by Defendant Tutor Time. Mr. and Mrs. Doe performed all obligations under said contract, including but not limited to payment of all weekly tuition and other fees for the childcare services, from approximately August 2008 until the time of this incident.

Defendant Tutor Time breached its duties and obligations under the contract, both explicit and implicit, pertaining to providing appropriate care, custody, and supervision for John, by allowing John to walk completely out of the center, down a main road, and along a major intersection, completely unsupervised.

Defendant Tutor Time's breach was the proximate cause of damages to Plaintiffs, both direct and incidental / consequential, as set forth in more detail below.

**IX.
DAMAGES**

Defendants' acts and omissions, jointly and singularly, were the proximate cause of injuries and damages to John and Mr. and Mrs. Doe, including but not limited to:

- a) Loss of value of the weekly tuition / fees that Plaintiffs paid for childcare for John, for the week of March 22, 2010 (as the incident occurred on Tuesday, March 23, and no reasonable person could expect that Mr. and Mrs. Doe would continue to use Defendant Tutor Time for childcare for John for the remainder of that week, or for that matter, at any time thereafter);

- b) Loss of wages that Mr. and/or Mrs. Doe incurred by staying home and caring for John while beginning the long, slow, and careful process of finding another childcare center to whom they could entrust their son, after undergoing such a traumatic ordeal;
- c) Medical expenses for all reasonable and necessary examination of John;
- d) Medical expenses for all reasonable and necessary family counseling and therapy for Mr. and Mrs. Doe;
- e) Pain, suffering, and mental anguish for Plaintiffs, individually and collectively; and,
- f) Reasonable and necessary attorney's fees incurred by Plaintiffs for the preparation and prosecution of this lawsuit.

**X.
JURY DEMAND**

Plaintiffs, by and through their attorney of record, respectfully demand their right to have a trial by jury, and hereby tender the jury fee to the County Clerk of Williamson County, Texas.

**XI.
DISCOVERY REQUESTS**

A. REQUEST FOR DISCLOSURE

Defendants are hereby requested to disclose, within fifty (50) days of service of this petition and incorporated request, the information or material described in Rule 194.2 of the Texas Rules of Civil Procedure, to the undersigned counsel for Plaintiffs.

B. INTERROGATORIES

Defendants are hereby requested to answer, separately, fully, in writing, and under oath, the interrogatories set forth in the attached "Exhibit A," and serve said answers, within fifty (50) days of service of this petition and incorporated request, to the undersigned counsel for Plaintiffs, pursuant to Rule 197 of the Texas Rules of Civil Procedure.

C. REQUESTS FOR PRODUCTION

Defendants are hereby requested to produce the documents or tangible items set forth in the attached "Exhibit B," within fifty (50) days of service of this petition and incorporated request, to the undersigned counsel for Plaintiffs, pursuant to Rule 196 of the Texas Rules of Civil Procedure.

XII. PRAYER

WHEREFORE, Plaintiffs request that Defendants be cited to appear and answer, and that on final trial Plaintiffs have and recover:

- a) Judgment against Defendants for a sum in excess of the minimum jurisdictional limits of this Court;
- b) Pre-judgment interest at the highest legal rate;
- c) Reasonable and necessary attorney's fees;
- d) Taxable costs of Court;
- e) Post-judgment interest on the above amounts at the highest legal rate; and,
- f) Such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

PATRICIA L. BROWN & ASSOCIATES, P.C.
819 ½ West 11th Street
Austin, Texas 78701
(512) 853-9068 – Telephone
(512) 853-9064 – Facsimile

ALI A. AKHTAR
State Bar No. 24027271

ATTORNEY FOR PLAINTIFFS

“EXHIBIT A”

PLAINTIFFS’ FIRST SET OF INTERROGATORIES

1. Identify by name and title (i.e., relationship or affiliation to Defendant Tutor Time), all of the following individuals (if any of the individuals no longer have relationship or affiliation to Defendant Tutor Time, then identify by name and last known address and telephone):
 - a. All individuals supplying information or assisting in any way with the preparation of answers to these interrogatories;
 - b. The individual whose name is subscribed to the oath / verification to the answers to these interrogatories;
 - c. All individuals who were assigned to the care and supervision of Plaintiff John’s classroom on the date of the incident made the basis of this lawsuit; and,
 - d. Any and all individuals who were questioned, investigated, or disciplined in any way (to include written or verbal warnings, notes in their personnel file, suspension, or termination, etc.) in connection with the incident made the basis of this lawsuit.
2. Describe with specificity what your investigation revealed was the means by which Plaintiff John was able to get out of the enclosed outdoor area in the incident made the basis of this lawsuit (i.e., an unlocked gate, missing boards in the fence, climbing over the fence, etc.).
3. If you are contending that Plaintiff(s) were contributorily or comparatively negligent in any way pertaining to the incident made the basis of this lawsuit, please describe in what way(s) Plaintiff(s) were negligent.
4. Describe in detail (i.e., date, location, contents of conversation, and all participants and witnesses present) any conversations you have had with Plaintiff(s) following the incident made the basis of this lawsuit, including but not limited to any statements made by Plaintiff(s) that you believe constitute an admission or declaration against interest.
5. For all individuals identified in answer to parts c-d of Interrogatory No. 1, please state their employment history for the past ten (10) years, to include the name / address of their employers, their job titles, their starting and ending dates, and the reason for the ending of each employment.
6. For all individuals identified in answer to parts c-d of Interrogatory No. 1, please state whether any of them has received any type of warnings, reprimands, safety violations, “write-ups,” counseling, suspension, or any other type of disciplinary action (written or verbal) prior to the incident made the basis of this lawsuit. If so, please describe such disciplinary action in detail, to include the action taken, the reason for the action, and the date of the action.

7. For all individuals identified in answer to parts c-d of Interrogatory No. 1, please state whether any of them received any type of warnings, reprimands, safety violations, “write-ups,” counseling, suspension, termination, or any other type of disciplinary action (written or verbal) as a result of the incident made the basis of this lawsuit. If so, please describe such disciplinary action in detail, to include the action taken, the reason for the action, and the date of the action.
8. With regards to childcare tuition and fees for Plaintiff John, please state the following:
 - a. Since what starting date Plaintiff John had been enrolled for childcare at Defendant Tutor Time;
 - b. What was the weekly childcare tuition amount for Plaintiff John as of that starting date;
 - c. If different from part b, what was the weekly childcare tuition amount for Plaintiff John as of the date of the incident made the basis of this lawsuit;
 - d. What was the total amount paid by Plaintiffs for childcare tuition and fees for Plaintiff John, from the start date to the date of the incident made the basis of this lawsuit; and,
 - e. What was the amount paid by Plaintiffs for the week beginning March 22, 2010.
9. With regards to the Texas Department of Family and Protective Services violation assessed against Defendant Tutor Time on or about April 21, 2009, pertaining to: “Section 746.4601(3) – Safety Requirements for Outdoor Equipment – No Entrapment Openings,” please state the following:
 - a. What type of hole and/or missing boards were identified in the fence surrounding the 18-to-24-month playground area;
 - b. What steps were taken to correct that danger identified in the 18-to-24-month playground area fence, and on what date(s) such steps were taken;
 - c. If any outside company, contractor, or repair person was involved in the steps identified in answer to part b, state their name, address, and telephone; and,
 - d. Whether this fence surrounded the same outdoor playground area used for Plaintiff John’s classroom in the incident made the basis of this lawsuit.

“EXHIBIT B”

PLAINTIFFS’ FIRST REQUESTS FOR PRODUCTION

1. Please produce the entire employment / personnel files for all individuals identified in answer to parts c-d of Interrogatory No. 1 (NOTE: this request specifically excludes any tax information or Social Security numbers. This request also specifically includes, but is not limited to, all records of disciplinary action, either prior to, or as a result of, the incident made the basis of this lawsuit).
2. Please produce copies of all documentation of internal investigation conducted by Defendant Tutor Time into the incident made the basis of this lawsuit, including but not limited to, any incident reports, forms, company memos, flyers to employees, or other paperwork generated or filled out (whether that information was provided by, or prepared for the benefit of, any investigative agency, investigating officer, any insurance carrier, any employee, or any non-privileged third party). NOTE: this request specifically excludes any documents prepared by or for your attorney, for purposes of this lawsuit.
3. Please produce any and all video footage (e.g., in-classroom or outdoor surveillance camera, “webcam,” or any other such video recording device) pertaining to the incident made the basis of this lawsuit, e.g., video of Plaintiff John’s classroom going outside to the playground area, video of Plaintiff John’s classroom playing outside, etc. If you contend that no such footage exists, please state on what date it was erased, disposed of, or recorded-over (if applicable), and by whom.
4. Please produce copies of all contracts, applications, enrollment forms, or other such forms submitted by Plaintiffs to Defendant Tutor Time with respect to the childcare of Plaintiff John, from the starting date of such childcare to the present.
5. Please produce copies of all ledgers, computer accounting printouts, or other such documentation of all payments, fees, etc., submitted by Plaintiffs to Defendant Tutor Time with respect to the childcare of Plaintiff John, from the starting date of such childcare to the present.
6. If you contend that Plaintiffs were not current or were in some manner deficient on payment of any tuition, fees, etc., to Defendant Tutor Time, pertaining to the childcare of Plaintiff John, please produce copies of any correspondence, letters, flyers, reminder notes, etc. given by Defendant Tutor Time to Plaintiffs relating to same.
7. Please produce copies of any citations, penalties, violations, assessments, and any correspondence enclosing or including any of the aforementioned items, sent to Defendant Tutor Time by any investigative officer or agency, pertaining to the incident made the basis of this lawsuit.
8. Please produce copies of any documentation sent to, or received from, Plaintiffs (or any

agent or representative of Plaintiffs) from the date of the incident made the basis of this lawsuit to the present.

9. Please produce all documentation relating to your answer to Interrogatory No. 9 (i.e., the violation assessed on or about April 21, 2009, and your corrective steps with regard to same).
10. Please produce any and all employee handbooks, training manuals, videos, safety or certification course materials, or any other job orientation or training items that were provided to any of the individuals identified in answer to parts c-d of Interrogatory No. 1, at any time during their employment with Defendant Tutor Time.
11. Please produce copies of any depositions you intend to use in order to impeach any of Plaintiffs' experts.
12. Please produce copies of any criminal backgrounds you intend to use in order to impeach any parties or witnesses.
13. Please produce any and all other documents or tangible items, not already produced above, which you plan to submit to the jury or other trier of fact in this lawsuit, and/or which you contend to be relevant to any issues of liability, causation, or damages in this lawsuit.