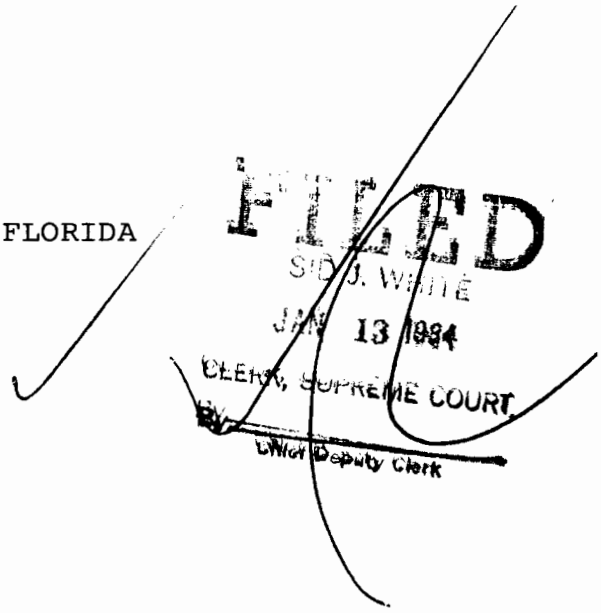
IN THE SUPREME COURT OF FLORIDA



MICHELE HESS, a minor,
by and through her parents
and next friends, DON HESS and
CONNIE TIPPETT; and DON HESS
and CONNIE TIPPETT, Individually,

Petitioners,

vs.

Case No. 64,586

METROPOLITAN DADE COUNTY,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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By

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STATEMENT OF THE CASE AND FACTS

Although Petitioners' Introduction and Statement of the Case and Facts is largely accurate, it contains one important misstatement. Respondent has never defied the judgment of the circuit court below, and in fact paid the judgment to the extent required by the Legislature's general waiver of sovereign immunity. §768.28(5), Fla.Stat. (1979). Nor does Respondent contest the general authority of the Legislature to pass a claims bill; it only insists that any law passed by the Legislature comport with the Florida Constitution.

ARGUMENT

THE DECISION OF THE DISTRICT COURT, HOLDING THAT MANDAMUS NEED NOT ISSUE BECAUSE ALTERNATIVE REMEDIES ARE AVAILABLE, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A PRIOR SUPREME COURT HOLDING THAT §55.11, FLA.STAT. (1941), DOES NOT PRECLUDE MANDAMUS TO ENFORCE A JUDGMENT AGAINST A MUNICIPALITY

Petitioners have requested review of the Third District Court of Appeal's decision that because alternative remedies are available, mandamus shall not issue to compel Respondent, a home rule charter county, to comply with Local Act 83-393. Although mandamus is a discretionary writ, see, e.g., Dickinson v. Stone, 251 So.2d 268 (Fla. 1971), Petitioners contend that the lower decision conflicts with an earlier pronouncement of this Court. In seeking review by this Court, Petitioners rely upon Fla.R.App.P. 9.030(a)(2)(A)(iv).[1/] In so doing, not only

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1/ "The discretionary jurisdiction of the Supreme Court may be sought to review decisions of district courts of appeal that expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on the same question of law." (Emphasis supplied).

do Petitioners disregard the jurisdictional limitations imposed by that rule, but they additionally misapprehend the holding of the Third District Court of Appeal in the present case.

The 1980 amendment to Art.V, §3(b)(3), Fla.Const., greatly restricts this Court's jurisdiction over decisions purported to be in conflict with prior cases. As stated in the Committee Notes to Rule 9.030: "Subsection (a)(2)(A)(iv) represents the most radical change in the Supreme Court's discretionary jurisdiction." The amendment to Art.V and the parallel rule do away with the "record proper" rule stated in Foley v. Weaver, 177 So.2d 221 (Fla. 1965), and add the requirement that there be an "express" as well as a "direct" conflict of district court decisions as a prerequisite to Supreme Court review. This Court has, as it must do, strictly construed this new limitation on its jurisdiction. See Jollie v. State, 405 So.2d 418 (Fla. 1981); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi v. State, 385 So.2d 1369 (Fla. 1980). Although not treated in Petitioners' brief, this jurisdictional foundation for review is not a mere technicality, but rather is a matter of constitutional significance. City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632 (Fla. 1976). If express and direct conflict does not exist, then this Court must not and cannot disturb the decision of the District Court of Appeal.

Petitioners rely on the single case of City of Ocoee v. State ex rel. Harris, 155 Fla. 514, 20 So.2d 674 (1945) in their attempt to show express and direct conflict.

(See Exhibit A, Appendix). In that case, in a concise, four-paragraph opinion, this Court held that §55.11, Fla.Stat. (1941)[2/] did not preclude mandamus against a municipality to require payment of judgment. In no way does that limited ruling directly and expressly conflict with the Third District's decision to decline issuance of the writ. A decision that mandamus is appropriate under certain conditions is not even implicitly in conflict with the decision sub judice which finds mandamus inappropriate under wholly different conditions.

This Court's decision in City of Ocoee involved no more than a straightforward construction of a specific statute which is totally irrelevant to the present case. Even if §55.11 were involved in the case sub judice, the fact that it does not preclude mandamus under certain circumstances does not mean that it requires mandamus in all others. Nowhere in City of Ocoee did this Court hold that mandamus is appropriate if alternative remedies are available. In fact, it is well established in the State of Florida that mandamus, an extraordinary writ, shall issue only when no other remedy exists. See, e.g., Heath v. Becktell, 327 So.2d 3 (Fla. 1976); State ex rel. Clendinen v. Dekle, 173 So.2d 452 (Fla. 1965). Neither issue addressed by the Third District, viz, whether alternative remedies were available to Petitioner, and, if so, whether mandamus

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2/ "Judgments; no lien against municipalities. No money judgment or decree against a municipal corporation shall be a lien upon its property nor shall any fieri facias or any writ in the nature of a fieri facias based upon any such judgment be issued or levied."

should issue against Respondent, were even remotely within the scope of this Court's decision in City of Ocoee. Because each decision addresses wholly different legal issues, it can hardly be said that the two decisions expressly and directly conflict on the same issue of law, as required by Art.V, §3(b)(3), and Rule 9.030(a)(2)(A)(iv).

Equally disparate as the legal issues are the factual settings in the two cases. Whereas this Court, in City of Ocoee, construed the applicability of a general act to a judgment against a small municipality, the Third District was presented with a dispute over the legislature's power to compel, by special, local legislation, a home rule charter county to expend monies in excess of the general limits of the waiver of sovereign immunity. One of the most significant differences between the two cases is that whereas the petitioners in City of Ocoee sought to compel satisfaction of a judgment, the present Petitioners seek to compel compliance with an act of the legislature. The latter therefore have remedies available to them, such as declaratory judgment action, which were not relevant to the action in City of Ocoee.[3/] The only commonality in the two cases is the request for mandamus in each, hardly sufficient to support Petitioners' argument that the granting of the writ in one case "expressly and directly conflicts" with its denial in the other.

3/ Even if City of Ocoee had involved facts which lent themselves to declaratory relief, it is unclear from the opinion whether such relief was available, inasmuch as the Declaration Judgments Act was enacted in 1943. Acts of 1943, Ch.21820.

It is actually Petitioners' reluctance to recognize the existence of alternative remedies, and not any conflict with a prior decision of this Court, which leads Petitioners to this Court. Petitioners cite to no case holding, in conflict with the Third District's decision sub judice, that no other remedy exists. Petitioners reject, for no apparent reason, the availability of declaratory relief, despite its use in a case very similar to the present one. See Dickinson v. Bradley, 298 So.2d 352 (Fla. 1974). Instead, they complain, although they made no motion for clarification or rehearing before the Third District, that the Court was "unable or unwilling" to identify the relief available to them. (Petitioner's Brief at 4). Nor did they make any showing or arugment before that Court, as it was their burden to have done,[4/] that there were no other remedies unavailable. Petitioners instead now argue before this Court, for the first time, that mandamus is their only hope. Respondent respectfully suggests, as it did in the Third District below, that Petitioners' true alternative is to request the Florida Legislature to allocate funds from the State Treasury. See Dickinson v. Board of Public Instruction of Dade County, 217 So.2d 553 (Fla. 1968).

Petitioners' last suggestion that the constitutional question at issue requires the exercise of this Court's discretionary review is similarly without merit. Petitioners make this suggestion despite their failure to request the

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4/ See, e.g., City of Coral Gables v. State ex rel. Worley, 44 So.2d 298 (Fla. 1950).

District Court of Appeal to certify its decision pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v). More importantly, and regardless of the timeliness of Petitioners' request, the issue of whether the legislature has the constitutional power to compel Dade County, by local act, to appropriate County funds to compensate Petitioners, has already been fully and clearly decided by this Court. Dickinson v. Board of Public Instruction of Dade County, 217 So.2d 553 (Fla. 1968).

CONCLUSION

The Third District's discretionary denial of the petition for mandamus is in complete accordance with established law, and in no way conflicts with City of Ocoee v. State ex rel. Harris. The legal issues addressed by the two cases are totally disparate, as are the factual settings of each. Respondent, therefore, respectfully requests that this Court deny the petition for discretionary review.

Respectfully submitted,

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By: _____
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Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON JURISDICTION was mailed on this 10th day of January, 1984, to JULIAN CLARKSON, RICHARD NICHOLS, of Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302.

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Assistant County Attorney