IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,267



CITY OF MIAMI,

Petitioner,

vs.

MAURICIO AMELLER, a Minor, by and through Jorge Ameller and Maria De Los Angeles Ameller, his parents, and JORGE AMELLER and MARIA DE LOS ANGELES AMELLER individually,

Respondent.

BRIEF OF RESPONDENTS ON JURISDICTION

JOSE M. INSUA, ESQ. and JUAN M. CARRERA, ESQ. for the Law Office of
GASTON R. ALVAREZ
835 S. W. 37th Avenue, Suite 102
Miami, Florida 33135 (305) 443-3812

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## Citation of Authorities

## INTRODUCTION

The Respondent, MAURICIQ AMELLER, a minor, JORGE AMELLER and MARIA DE LOS ANGELES AMELLER, his parents, and JORGE AMELLER and MARIA DE LOS ANGELES AMELLER, individually, were the Plaintiffs in the trial court and the Appellants before the Third Circuit Court of Appeals.

The Petitioner, City of Miami, was the Defendant in the trial court and the Appellee in the Third Circuit Court of Appeal.

This appeal arises out of a reversal by the Honorable Third District Court of Appeal of an Order entered into by the Circuit Judge, dismissing the Respondent's Third Amended Complaint for failure to state a cause of action.

Reference to the Record on Appeal will be designated by the letter "R", and reference to the Appendix will be referred to by the letter "A".

## ISSUE ON APPEAL

WHETHER THE PER CURIAM OPINION OF THE THIRD DISTRICT COURT OF APPEAL "EXPRESSLY AND DIRECTLY" COMPLIED WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN ALLEGRE v. SHURLEY, 396 So.2d 247 (Fla. 1st DCA 1981) AS TO WEHTHER A COMPLAINT THAT ALLEGES A DEFENDANT WHO PLACES A HARD-PACKED GROUND SURFACE INTO ITS PUBLIC PARKS, UNDER A "MONKEY BAR" WHERE CHILDREN ARE KNOWN TO VISIT AND USE SAID "MONKEY BARS" STATES A CAUSE OF ACTION FOR NEGLIGENCE.

## STATEMENT OF FACTS AND CASE

The City of Miami maintained and was in sole possession of a city park with a playground structure commonly known as a "Monkey Climb" or "Monkey Bars". The Respondent child, AMELLER, went to said park to play, an5 while playing on the "Monkey Bars", he fell sustaining injuries.

The Respondent's parents filed a Third Amended Complaint against the Petitioner, City of Miami, requesting relief on the grounds that the City had placed the Monkey Bars in the public park over a hard-packed ground surface and was therefore liable for the child forseeable injury.

The Third Amended Complaint was dismissed by the Circuit Court Judge for failure to state a cause of action with prejudice. (A-1-6)

The Respondent appealed to the Third District Court of Appeal which reversed and remanded by Res Curiam decision the Circuit Court Judge's Order.

This responsive Petition is filed in opposition of Petitioner's request to revoke the discretionary jurisdiction of the Court.

## ARGUMENT

THE SUPREME COURT OF THE STATE OF FLORIDA SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION BASED ON A PER CURIAM OPINION OF THE THIRD CIRCUIT COURT OF APPEALS WHICH DIFFERS AS THE DECISION REACHED IN ALLEGRE v. SHURKEY 396 So.2d 247 (FLA. 1ST DCA 1981) THAT A COMPLAINT ALLEDGING THAT THE DEFENDANT NEGLIGENTLY PLACED MONKEY BARS IN ITS PUBLIC PARK OVER A HARD-PACKED SURFACE GROUND FAILED TO STATE A CAUSE OF ACTION GROUNDED IN NEGLIGENCE.

This Honorable Court should deny the Petitioner's request for discretionary review based on Fla. R. App. P. Rule 9.030(a)(2)(A)(iv), Fla. Const. Art. V 3(b)(3), and the letter and spirit of Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The Court in Jenkins vs. State, 385 So.2d 1356 (Fla. 1980) when confronted with what was then the newly enacted Constitutional Amendment Art V 3(b)(3) which in effect stated the the Court could only review decision of a District Court of Appeals that expressly and directly conflicted with a decision of another District Court of Appeals as to the same question of law Id, et 1359, held:

> . . . . . .Supreme Court of Florida lacked jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendred without opinion regardless of whether they are accompanied by a dissenting or concurring opinion when the basis at such

review is, an alleged conflict of that decision with a decision of another district court of appeals or of the Supreme Court.

Id, et 1359. As stated by Justice Adkins in the decision of Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1980):

"It is conflict of decisions, not conflict of opinions or reviews that supplies jurisdiction for review of certiorari."

In the case at bar, the Third Circuit Court of Appeals specifically stated:

"In Alegre, a majority of the court held no cause of action was stated, here, a majority of this Court agreeing with the dissenting opinion of Judge Ervin in Alegre, 396, So.2d at 248, held otherwise (A-7-8)."

The Third District Court of Appeals made such statement "per Curiam" in effect they differed as to the "opinions or reasons" which the majority court in Alegre reached and agreed that the dissenting opinion would be a more just and equitable determination. Therefore, based on the holding in Jenkins v. State, 385 So.2d 1356 (Fla. 1980) and its interpretation of Fla. Const. Art V 3(b)(3) this Court should deny Petitioner's request for discretionary review.

## CONCLUSION

Based on the foregoing argument and citations of law, this court should deny the Petitioner's request for discretionary review.

Respectfully submitted,

JOSE M. INSUA, ESQ.
JUAN M. CARRERA, ESQ.
For the Law Offices of GASTON R. ALVAREZ
Attorneys for Respondents
835 S. W. 37th Avenue, Suite 102
Miami, Florida 33135
(305) 443-3812

By _____
JOSE M. INSUA

## CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was mailed the 1st day of June, 1984 to Julia J. Roberts, Assistant City Attorney, Attorneys for the Petitioner, 869 E. Flagler Street, Suite 1101, Miami, Florida 33131.

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JOSE M. INSUA

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JUAN M. CARRERA