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,

Respondents.

# RESPONDENTS' ANSWER TO BRIEF OF PETITION ON THE MERITS

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## STATEMENT OF CASE AND FACTS

Respondent will take an exception as to Petitioner's Statement of Case and Facts and submits that the facts are as follows:

On April 25, 1981, the Defendant, Peitioner, CITY OF MIAMI, was possessed of and had sole control of a public park known as Grapeland Heights and located at 1550 N. W. 37th Avenue, Miami, Dade County, Florida.

On that same day, the Plaintiff, Respondent, MAURICIO AMELLER, a minor, who was an invitee, went to said park and while playing in a fitness structure, commonly known as a "Monkey Climb", fell to the ground and suffered permanent bodily injury.

The Plaintiff, Respondent, MAURICIO AMELLER, joined by his parents JORGE AMELLER and MARIA DE LOS ANGELES AMELLER, filed a Complaint against the Defendant, Petitioner, CITY OF MIAMI, alleging several grounds for recovery under a theory of negligence.

The Circuit Court of the 11th Judicial Circuit in and for Dade County, entered a final order dismissing Plaintiffs', Respondents' Third Amended Complaint with prejudice for failure to state a cause of action. The Third District Court of Appeals reversed and remanded.

Respondent must also respectfully take exception to Petitioner's assertion that there are no statements in the Complaint as to Respondent's legal status, and as to the use

of the monkey bars by Respondent. Paragraphs 5 and 6 of the Third Amended Complaint do allege that Petitioner had constructed said "Moneky Climb" for the use of the general public, especially children, and that the Respondent was there as an "invitee". Also, paragraph 16(a) does allege that Petitioner breached its duty to the Respondent "in allowing Plaintiff (Respondent) to use said structure".

Furthermore, Respondent must take a strong objection at Petitioner's attempt to present to this Honorable Court for the first time issues which were never presented either at the trial court level or at the District Court of Appeals level. The issue before the Honorable Court is one, and only one, and quoting from the District Court of Appeals per curiam opinion, it is whether "this case presents the same question as that addressed in Alegre v. Shurkey, 396 So.2d 247 (Fla. 1st DCA 1981), namely, whether a Complaint alleging that the Defendant placed monkey bars in its public park over a hard-packed ground surface, states a cause of action for negligence." Respondent respectfully submits that it does.

## POINT ON APPEAL

I

WHETHER A COMPLAINT ALLEGING THAT THE DEFENDANT PLACED MONKEY BARS IN ITS PUBLIC PARK OVER A HARD-PACKED GROUND SURFACE, STATES A CAUSE OF ACTION FOR NEGLIGENCE.

## ARGUMENT

I

WHETHER A COMPLAINT ALLEGING THAT THE DEFENDANT PLACED MONKEY BARS IN ITS PUBLIC PARKS OVER A HARD-PACCKED GROUND SURFACE, STATES A CAUSE OF ACTION FOR NEGLIGENCE.

According to Florida Rules of Civil Procedure 1.110, to state a cause of action the Complaint must:

> ".....contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief and (3) a demand for judgment for the relief to which he deems himself entitled."

In the case of Pizzi v Central Bank and Trust Co. 250 So.2d 895 (Fla. 1971), this Honorable Court pointed out that the test to be used in determining whether a Complaint is sufficient under this rule is:

> "Whether, if the factual allegations of the complaint are established by proof or otherwise, the Plaintiff will be legally or equitably entitled to the claimed relief against the defendant."

In this same opinion, this Honorable Court also indicated that when a court is considering the validity of a Complaint under a Motion to Dismiss for failure to state a cause of action, the Court must "confine itself strictly to the allegations within the four corners of the Complaint" at 897.

Furthermore, the Court must accept as true all the allegations of fact contained in the Complaint, and all reasonable inferences are allowed in favor of the Plaintiff's case. Orlando Sports Stadium Inc. v State ex rel Powell, 2626 So.2d 881 (Fla. 1972) Dunnell v. Malone and Hyde, Inc. 425 So.2d 646 (Fla. 3rd DCA 1983).

A Complaint, to sustain a cause of action in negligence, must allege ultimate facts which establish its four required elements; it must allege: 1) that a relationship exists between the parties which gives rise to a legal duty on the part of the Defendant to protect the Plaintiff from the injury complained of, 2) that the Defendant breached the duty toward the Plaintiff, 3) that the Plaintiff was injured, and 4) that the Plaintiff's injury was proximately caused by the Defendant's breach of this duty. Ankers v District School Board of Paseo County, 406 So.2d 72 (Fla. 2d DCA 1981); Miriam Mascheck, Inc. v Mausner, 264 So.2d 859 (Fla. 3rd DCA 1972); De Wald v Quainstrom, 60 So. 2d 919 (Fla. 1952).

Furthermore, it should also be pointed out that a cause of action in negligence encompasses not only negligent acts, but the negligent failure to act as well. Ankers, supra.

In the case, sub judice, Plaintiff's Third Amended Complaint does allege ultimate facts which establish the four elements required to sustain a cause of action in negligence. As to the first element, Plaintiff alleges that the Defendant

constructed or caused to be constructed in its property a "Monkey Climb" for the use of the general public, that the Plaintiff was an invitee, and that it was the duty of the Defendant "to exercise reasonable care and caution in the construction and maintenance of said amusement or fitness structure" and "to make said amusement or fitness structure and the area beneath and around it a reasonably safe place for children and adults, who were there by Defendant's invitation." See Plaintiffs' Third Amended Complaint, Paragraphs 4, 5, 6 and 7. As to the second element, Plaintiff pleads in the alternative and alleges several facts which constitute the breach of this duty by the Defendant toward the Plaintiff. See id. Parargarphs 8 through 15, and 16(a) through (e). And as to the third and fourth elements see id. Paragraph 18.

It is a well settled principle of law that a property owner or occupier owes two duties to an invitee "he must keep his property reasonably safe and protect the visitor from dangers of which he is, or should be aware". Post v Lunney, 261 So.2d 146, 147 (Fla. 1972). Pittman v Volusia County, 380 So. 2d 1192 (Fla. 5th DCA 1980). Zambito v Southland Recreation Enterprises, Inc. 383 So.2d 989 (Fla. 2d DCA 1980). What is a more troublesome area of the law is whether the "no-duty" doctrine, barring recovery if the danger is open and obvious, has been abandoned in view of the introduction of Comparative Negligence in Florida by Hoffman v Jones, 280 So.2d 431 (Fla. 1973), as Judge Ervin noted in Bennett v Mattison, 382 So.2d 873 (Fla. 1st DCA 1980), "This is a murky area of the law. . ."

The Fitst District Court of Appeal takes the position that superior knowledge of a danger by an invitee excludes the duty of the landowner to take precautions in respect to the invitee. Ball v Ates, 369 So.2d 1023 (Fla. 1st DCA 1978); Vermont Mutual Insurance Company v Conway, 358 So.2d 1023 (Fla. 1st DCA 1979). In the case of Alegre v Shurkey, 396 So.2d 247 (Fla. 1st DCA 1981), with facts strikingly similar with the case, sub judice, the First District Court of Appeals affirmed a dismissal of Plaintiff's Complaint for failure to state a cause of action. On first impression it appears that the Court relied in the opinion of Hillman v Greater Miami Hebrew Academy, 72 So.2d 668 (Fla. 1954), which also had facts fairly similar to the case, sub judice, and which affirmed a dismissal of Plaintiff's Complaint. Yet, as Judge Ervin strongly argued in his dissent in Alegre, supra, Respondent respectfully submits to this Honorable Court that the First District Court of Appeals erred in its decision and the case should have been submitted to the Jury. Also both, the Aelgre and Hillman decisions are distinguishable from the case, sub judice. In both of those cases there was no allegation that the "Monkey Bars" were negligently constructed or maintained, and in the case, sub judice, Plaintiff does allege that the "Monkey Bars" were "negligently, carelessly and improperly constructed or caused to be constructed and maintained." See Paragraphs 10, 16(b) and 16(c) of Plaintiffs' Third Amended Complaint. Furthermore, in Hillman, the Court held that the "Monkey Bars" were "approved standard playground

equipment", and Appellants respectfully submit to this Honorable Court that since the date of the Hillman, supra, decision, to wit: 1954, the state of the art in the construction and maintenance of said playground equipment has considerably improved; and Appellant does allege in its Complaint that the construction of said playground equipment fell below the standard of the industry and approved practices. See id. Paragraphs 11, 12, 13, 14, 15 and 16 (a).

The Fifth District Court of Appeals adheres to the view that the "no-duty" doctrine no longer bars recovery if the danger is open and obvious, and that the degree to which a Plaintiff causes his own injuries is an issue of comparative negligence. In Ferber v Orange Blossom Center, Inc., 388 So.2d 1074 (Fla. 5th DCA 1980), the Plaintiff sued the owners of a shopping center when he tripped and fell on a ramp leading from the parking are to the sidewalk in front of the store where he worked. The Fifth District Court of Appeal in reversing a directed verdict held:

> "A person like Ferber, clearly a business invitee, who is injured by a hazardous condition existing on land owed by another is no longer barred from recovery because of his equal or even superior knowledge of the hazard, where the landowner knew or should have known of the condition and failed to keep the premises in good repair. . . (citations omitted). The degree to which Ferber caused his own injuries because of his awareness of the hazardous ramp is an issue of comparative negligence, to be determined by the jury."

In another deicison by the Fifth District Court of Appeals, Pittman v Volusia County, 380 So.2d 1192 (Fla. 5th DCA 1980), the Plaintiff had stepped in, and slipped upon, a foreign substance on the steps of a public building owned and operated by the Defendant. The Appellate Court, in reversing a directed verdict opined:

> "The fallacy is in the premise that the discharge of the occuper's duty to warn by the Plaintiff's actual knowledge necessarily discharges the duty to maintain the premises in a reasonably safe condition by correcting dangers of which the occupier has actual or constructive knowledge. To extend the obvious danger doctrine to bar a plaintiff from recovery by negating a landowner's or occupier's duty to invitees to maintain his premises in a reasonably safe condition would be inconsistent with the philosophy of Hoffman v Jones, 280 So. 2d 431 (Fla. 1973), that liability should be apportioned according to fault."

The Second District Court of Appeals emphatically also adheres to the veiw that, because of comparative negligence, the "no-duty" doctrine no longer bars recovery if the danger is open and obvious. In Zambito v Southland Recreation Enterprises, Inc., 383 So.2d 989 (Fla. 2d DCA 1980), the Plaintiff visited the Defendant's skating ring and engaged in a game of "follow the leader", and as the skaters skated off an elevated area and stepped down six inches to the skating surface, the Plaintiff fell, suffering some injuries. In reversing a final order dismissing Plaintiff's Third Amended Complaint with prejudice, the Appellate Court held:

> "We propose to rectify the fallacy in the patent danger defense and clarify the murky

> area of the law by holding that any defense based on invitee's negligence is no longer a complete bar to recovery in a negligence action, and the doctrine of comparative negligence applies where this defense is raised. This ruling comports with the supreme court's statement in Hoffman v Jones..."

In the case of Metropolitan Dade County v Yelvington, 392 So.2d 911 (Fla. 3rd DCA 1980), the Plaintiff brought suit against the Defendant for injuries he sustained when she slipped on an algae-coated boat launching ramp at a recreational facility operated and maintained by the Defendant. The Third District Court of Appeals opined, and also took the position, that "where a possessor of land should anticipate the harm which maybe caused by a condition on the land, he may be liable despite the obviousness of the hazard". See also Greener v Central Bank and Trust Co., 391 So.23d 704 (Fla. 3rd DCA 1980).

By analogy, in a products liability cause of action, the "no-duty" or "oepn-and-obvious hazard" doctrine is not a bar to recovery, but a defense to which the principles of comparative negligence apply. Auburn Machine Works Co., Inc. v Jones, 366 So. 2d 1167 (Fla. 1979); West v Caterpillar Tractor Company, 336 So.2d 80 (Fla. 1976).

The thrust of Petitioner's argument relies on the legal reasoning behind both the Alegreand the Hillman decisions. Yet, as it has been pointed out there are not only factual but also legal differences between these two cases and the one, sub judice.

In both the Alegre and Hillman Complaints there were no allegations that the monkey bars were negligently constructed, there were no allegations of the standard of the industry;

there were no allegations of the Defendant's own construction standards, and in Hillman, there was a stipulation that the monkey bar was approved standard equipment. Here, Respondent's Complaint does base allegations of negligent construction of the monkey bars, of the standard of the industry, of the standard of the Metropolitan Dade County Park and Recreation Department, of the standard of the Defendant, and that these standards exist to provide protection for the children. And in the case at bar, there existed no stipulations regarding approval of subject monkey bars as standard equipment.

Furthermore, and most important, there are some very significant legal distinctions to be made. The Alegre court determined that the question posed before it was controlled by the Hillman decision, and Petitioner in its brief also agrees with this kind of legal reasoning. Yet, the Respondent submits to this Honroable Court that the fallacy is in saidline of legal reasoning is that at the time of the Hillman decision, the doctrine of comparative negligence had not been adopted in the State of Florida, and both the no-duty doctrine and the assumption of the risk doctrine were a complete bar to a Plaintiff's recovery. Today, in light of the recent developments in this area of the law, a Plaintiff is only barred from recovery when he

is the sole legal cause of his damages, Hoffman, supra, and the principles of comparative negligence are to be applied in all cases where the defense of assumption of the risk, or the no-duty doctrine, is raised. See Blackburn v Dorta, 348 So.2d 287 (Fla. 1977); Ferber v Orange Blossom Center, Inc., 388 So. 2d 1074 (Fla. 5th DCA 1980); Zambito v Southland Recreation Enterprises, Inc., 383 So.2d 989 (Fla. 2d DCA 1980); Metropolitan Dade County v Yellington, 392 So. 2d 911 (Fla. 3rd DCA 1980).

Petitioner, in its brief also argues that the case of Maximow v Leke Maggiore Baptist Church, 212 So.2d 792 (Fla. 2d DCA 1968) states the current status of the law in Florida, but, again, said decision is from 1968, and it is from before the introduction of comparative negligence in Florida, before the abandonment of the no-duty doctrine, and before the merge of the assumption of the risk doctrine into the defense of contributing negligence.

Here, Respondent respectfully submits that even if assuming that the Amended Complaint indicates that the Plaintiff is himself guilty of negligence, such is not a basis for a dismissal of a Complaint for failure to state a cause of action. Where questions of negligence are close, any doubt should always be resolved in favor fo a jury trial. Goode v Walt Disney World Co., 425 So. 2d 1151 (Fla. 5th DCA 1982); Atlantic Christian Schools

Inc. v Salinas, 422 So.2d 362 (Fla. 3rd DCA 1982); Hernandez v Mortica,370 So. 2d 836 (Fla. 3rd DCA 1979); Furthermore, in order for a court to enter an order dismissing a Complaint, there must be no basis upon which the Plaintiff may recover. Seigel v Mt. Sinai Hospital, Inc., 250 So.2d 332 (Fla. 3rd DCA 1971).

In the case, sub judice, Respondent claims that the Petitioner has a duty which was breached and which proximately caused injury to him; such allegations being sufficient to sustain a cause of action in negligence. Furthermore, since the fact of the Complaint is the only matter a trial court may consider in ruling on a Motion to Dismiss, and since all reasonable inferences are to be allowed in favor of Appellant's case, it was error for the trial judge to dismiss this case with prejudice.

WHEREFORE, counsel respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeals.

## CONCLUSION

The Respondent stated a cause of action upon which relief can be granted in so much as Petitioner has alleged extensive facts pertaining to the duty of the Petitioner to provide protection in the area beneath and around the Monkey Bars as required by Petitioner's standards and the standars of the industry, Respondent has alleged extensive facts in support of how Petitioner has breached that duty, and Respondent has alleged extensive facts indicating how the breach of that duty was the proximate cause of Respondent's injuries.

Furthermore, the cases of Hillman and Alegre pointed out are different than thiscase as a matter of fact and as a matter of law. And finally, the Court must accept as true all the allegations of facts contained in the Complaint and all inferences are allowed in favor of the Plaintiff's case. Orlando Sports Stadium, Inc. v State Ex Rel Powell, 262 So. 2d 881 (Fla. 1972), Dunnell v Malone & Hyde, Inc., 425 So. 2d 646 (Fla. 3rd DCA 1983).

Respondent respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeals.

## CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Answer to Brief of Petition on the Merits was mailed this 16th day of January, 1985 to: Lucia A. Dougherty, City Attorney, Gisela Cardonne, Deputy City Attorney, City of Miami Law Department, 169 E. Flagler Street, Suite 1101, Miami, Florida 33131.

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