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.

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, the City of Miami was the defendant and appellee; the respondents, the Amellers, were the plaintiffs and appellants below.

This case arises out of a claim for personal injuries suffered by a minor.

The parties will be referred to by their proper names or as they stand before this Court. The only relevant pleadings are attached to petitioner's brief and marked "A".

STATEMENT OF FACTS AND CASE

There is no statement which informs this, or the trial Court, how the underlying alleged accident occurred, so petitioner is at a loss to state the cause of respondent's injuries, first mentioned in paragraph 18. The respondents sued petitioner for injuries suffered by nine year-old Mauricio Ameller, and although 17 paragraphs are devoted to the ground underneath a structure referred to as "monkey bars" there are no statements as to respondent's legal status (was he a business invitee, a licensee, a trespasser?) and absolutely no statement as to the use of the monkey bars by respondent.

Respondent informs us that "...in allowing plaintiff to use said structure..." petitioner should have known that the ground was dangerous. The gap between a plaintiff at defendant's park and the use by that plaintiff of available equipment must be guessed by the reader.

The third amended complaint (A-1-5) was dismissed for failure to state a cause of action (A-6).

The allegations of the third amended complaint are important to the issues on appeal and deserve scrutiny. The entirety of respondents' complaint is directed to the quality of the ground beneath a structure referred to as a monkey climb.

One is required to presume, since the complaint fails to state it, that Ameller was in contact with the monkey climb (Par. 16[d]). Without any statements of fact as to how it happened, count two of the complaint refers to an "accident" (Par. 20), which allegedly caused Ameller's parents to incur medical expenses and other damages.

It appears from respondents' assertions that the subject structure was rigid in nature and that their main complaint relates to the ground beneath it. Paragraph 16(e) asserts that "...defective condition was so open and obvious and existed for such a length of time that..." petitioner should have known about it. In other words, the defective condition, whatever it is that respondents referred to at 16(e) was in no way obscured from view or represented a trap to the respondent, a nine year-old minor.

Although the general allegation is made that petitioner "...knew or should have known that the adults and children who use said structure fell with frequency to said ground beneath..." there are no factual allegations that anyone else in fact had fallen and that petitioner knew about it.

It is apparent that respondents undertook some research with reference to the subject structure since several paragraphs allege standards for the ground allegedly followed by "the industry" (Par. 11), by Dade County (Par. 12), and by petitioner (Par. 13). If respondents had discovered any other similar incidents it is reasonable that they would have plead them with the same specificity that they plead the standard number of inches of sand under monkey bars. There are no statements of fact anywhere in the third amended complaint that support the first sentences of paragraphs six and seven which refer to the "...construction and maintenance of said amuzement (sic.) or fitness structure"

Whereas respondents devote 18 paragraphs to the specifics of the alleged problem with the ground, there is not one sentence, not one clause to inform the Court of the problem with the monkey bar itself. Thus, this Court is left to wonder whether the equipment is regular, standard playground equipment; whether the design is proper for the park; whether the structure is made of material free from defects; whether any pieces were broken or missing on the date in question; whether the structure is properly assembled; whether the structure was not assembled in a workmanlike manner and so on. There are no statements of material fact to sustain the non-existent allegations of latent defects or negligent construction. The complaint fails to allege the existence of latent defects, improper construction, or ultimate facts to support such allegations.

After three attempts, the trial Court dismissed respondents' complaint and the Third District reversed (A 7-8), based on conflict with Alegre v. Shurkey, 396 So.2d 247 (Fla. 1st DCA 1981). This petition ensued.

ISSUE

WHETHER THE RESPONDENTS' COMPLAINT WAS PROPERLY DISMISSED WHERE IT FAILED TO ALLEGE PROXIMATE CAUSE, OR THE EXISTENCE OF LATENT DEFECTS.

The law contemplates that an owner of playground equipment furnish children with a reasonably safe place to play commesurate with their knowledge and impulses. Alegre v. Shurkey, 396 So.2d 247 (Fla. 1st DCA 1981). There is no requirement that the owner became an insuror of the children who use the equipment.

Essential allegations will not be imported into a complaint by inference and the allegations of a complaint are construed most strongly against the pleader. Edwards v. Maule Industries, Inc., 147 So.2d 5 (Fla. 3rd DCA 1962); Southern Liquor Distributors v. Kaiser, 150 Fla. 52, 7 So.2d 600 (Fla. 1947); Mathews v. Mathews, 122 So.2d 571 (Fla. 2d DCA 1960). It is petitioner's position that respondents' pleadings are fatally defective in that:

1. There are no allegations of contact between Ameller and the monkey bars;

2. There are no allegations asserting that the contact between Ameller and the monkey bars was the proximate cause of Ameller's injury;

3. There are no allegations that there were any latent defects or that there was negligent construction of the monkey bars.

A plaintiff must allege proximate cause between a defective condition and the claimed injury. Stahl v. Metropolitan Dade Co., 438 So.2d. 14, 19 (Fla. 3d DCA 1983).

Without waiving petitioner's foregoing arguments addressed to insufficient pleadings, petitioner will argue that Alegre, supra, and Hillman v. Greater Miami Hebrew Academy, 72 So.2d 668 (Fla. 1954), are controlling.

Assuming that the facts here are the same as those in Alegre, where a minor sued for negligence in allowing the ground surface under monkey bars to become hardpacked and in failing to provide cushioning to prevent injury to children who might fall while playing thereon, there is no cause of action. Alegre follows Hillman, supra, where a minor alleged negligence for constructing a monkey bar so that it extended over the trunk of a coconut tree and for failure to maintain competent supervision (an element not at issue here).

Hillman, supra, recognizes that liability may attach where the equipment is infected with some latent defect, where it is inherently dangerous or not such as minors would appreciate the danger in its use, or where those in whom supervision was imposed failed to warn the minor. Absent such allegations, plaintiffs seek "... to make appellee an insurer of the safety of minor children who used its playground equipment..." Hillman, at 669; Alegre, at 248.

Hillman relies on Miller v. Bd of Education Union Free School Dist. No. 1, Town of Oyster Bay, 1936, 249 App. Div. 738, 291 NYS 633, which discusses the lack of duty of the owner to provide supervision and the failure of the plaintiff to allege latent defects:

> No part of the apparatus was in a state of disrepair and the risk of falling from it was one which was assumed by those who made use of it, which possibility was known to the mother in the case at bar. It is common knowledge that children younger than this infant make safe use of this type of apparatus and similar apparatus in school yards and playgrounds.

Hillman is followed by Elmore v. Jones, 140 So.2d 59 (Fla. 2d DCA 1962) where a minor used monkey bars, while a business invitee of defendant. The complaint was dismissed for failure to state a cause of action in absence of allegation of facts sufficient to charge defendant with reasonable foreseeability of tortious acts which caused the injury. The plaintiffs alleged that pushing and shoving by children using the equipment had occurred on previous occasions. Notwithstanding said allegations, the Court dismissed since "... specific previous incidents... were not alleged to have been known to the defendants; nor did the complaint allege any incident of horseplay by any particular individual which would charge the defendants with knowledge of danger from that source" Elmore, at 61, 62. A similar case of a negligence action involving playground equipment involved the Third District's affirmance of the dismissal of the case following Hillman and Elmore, supra.

Solomon v. City of No. Miami Beach, 256 So.2d 399 (Fla. 3rd DCA 1972).

The respondent, Ameller, appears to have been an invitee on petitioner's park, assuming from facts not alleged that he was invited to enter or remain in the park during its open hours for the purpose for which the park is held open. Although there is no allegation that Ameller was at the park during hours when it was open to the public, respondents may argue that they were not trespassers.

If Ameller was a invitee on the premises, the City only owed him the duty to exercise reasonable or ordinary care under the circumstances to keep the premises in a reasonably safe condition. The owner may also have a duty to refrain from wanton negligence or from wilful misconduct which would injure the licensee or to refrain from intentionally exposing the licensee to danger. Further, there may be a duty to warn the person: to warn him of a defect or condition known to the owner to be dangerous when the danger is not open to ordinary observation by the licensee. Post v. Lunney, 261 So.2d 146 (Fla. 1972); Camp v. Gulf Counties Gas Co., 265 So.2d 730 (Fla. 2d DCA 1972); Wood v. Camp, 284 So.2d 691 (Fla. 1973); Maxymow v. Lake Maggiore Baptist Church, 212 So.2d 792 (Fla. 2d DCA 1968).

There are no allegations to indicate that the City engaged in any wanton misconduct, or that it intentionally exposed Ameller to a known danger, or that it failed to warn him of a latent defect known only to the City. On the contrary, the complaint alleges that the condition was "...open and obvious..." (Paragraph 16 [e]). In Maxymow, supra, the

alleged dangerous condition, a canopy or ramp over an outside stairway was found to be "...open to ordinary oberva-tion, as a matter of law, by the 10-year old deceased" at 795. In Trowell v. United States, 526 F.Supp. 1009 (Fla. M.D. 1981), which contains a very succint statement of Florida law in the issues before this Court, recovery was denied a plaintiff who was aware of the location of a parking barrier over which she tripped, and which was clearly visible at the time of the accident. The respondents here allege that petitioner failed to "maintain signs, posts" or other warnings relative to the ground beneath the monkey bars (Paragraph 16 c). There is no duty, however, to warn an invitee of visible or obvious hazards. Miami Coin-O-Wash, Inc. v. Mc Gough, 195 So.2d 227 (Fla. 3d DCA 1967); Bashoaw v. Dyke, 122 So.2d 507 (Fla. 1st DCA 1960); Trowell, supra, at 1013.

Here, Ameller was a nine year-old who by his own pleadings was in the midst of an "open and obvious" condition. There is no duty to warn of an obvious and not inherently dangerous condition. Schoen v. Gilbert, 436 So.2d 75 (Fla. 1983); Hoag v. Moeller, 82 So. 2d 138 (Fla. 1955); General Development Corp. V. Dales, 309 So.2d 596 (Fla 2d DCA 1975); John v. Tierra Verde City, Inc., 166 So. 2d 768 (Fla. 2d DCA 1964).

Notwithstanding the very fine dissent in Alegre, Maxymow, at 794, supra, states the current status of the law in Florida:

> No decision in this state has ever allowed recovery where the injured plaintiff fell from some fixed or stationary object which could not be described as inherently dangerous or which did not conceal some latent condition or trap of which a person of tender years would not be readily apprised.

Even as to the former classification of business invitee, an owner thus is not required to maintain the premises absolutely safe, or in such a condition that no accident could possibly happen. Miami Coin-O-Wash, Inc. v. Mc Gough, 195 So.2d 227 (Fla. 3rd DCA 1967); Gifford v. Galaxie Homes of Tampa, Inc., 194 So.2d 25, 27 (Fla. 2d DCA 1967).

The landowner's duty is to use ordinary care to maintain the premises in a reasonably safe condition for use in a manner consistent with the invitation, and to warn of latent perils which are known or should be known to the owner, but which are not known to the invitee or which by the exercise of due care, could not be known to him. Thus, in Rice v. FPL , 363 So.2d 834 the widow of a university student was precluded from recovering against the university and the utility, where the student, who was flying a wire airplane over the university's open field, was electrocuted when the airplane came into contact with uninsulated power lines. The testimony revealed a dry, clear day, with clearly visible power line, which the decedent and his companion failed

to notice. The summary judgment in favor of the utility was upheld, as well as that in favor of the university. The Court reasoned at 840 that:

> Where an obviously dangerous condition exists, an underlying requirement to liability of a landowner is that he have knowledge of the condition which is superior to that reasonably obtainable by the invitee. (Citations omitted).

See, Ball v. Ates, 369 So.2d 1023 (Fla. 1st DCA 1979).

In a fatal fall from a tree, where an 11 year-old hit his head on partially covered pieces of brick or concrete lying beneath the tree, the summary judgment in favor of defendants was upheld. The Court observed "...simply that trees and tree-climbers have been with us for many centuries, but appellants have not brought to our attention any case in which liability for injuries received in an accidental fall from a tree to the ground has been predicated upon the lack of 'fall-worthiness' of the ground surface." Cassel v. Price, 396 So.2d 258, 265 (Fla. 1st DCA 1981). The Cassel opinion relied on Rice v. FPL, supra, which took ". . .into account the absence of actual knowledge by the defendant of the specific danger ..." (emphasis in original). Similarly, the

plaintiffs in the Cassel case failed to allege actual knowledge of incidents similar to the child's fall from the tree. Cassel, at 266.

Before closing, petitioners would like to review the dissent in Alegre, from 249 to 252, with which the Third District appears to have agreed. Judge Ervin first questions whether the Hillman Court dismissed the complaint for failure to allege "that a child of tender years could not comprehend the patent, dangerous condition of monkey bars perched from the trunk of a palm tree?" The Hillman minor had alleged negligent supervision of "children of tender age" Hillman, at 669. The Ameller plaintiff here was nine years-old at the time of the accident and would hardly be considered a child of tender years, who, according to Judge Ervin would be "...incapable of comprehending a patent risk..." Alegre at 249. By contrast, the Alegre minor appears to have been only three years old, from Judge Ervin's comment that "...it has been recognized that a three-year old child is incapable as a matter of law of conduct amounting to contributory negligence." At 249.

The next question is whether the complaint was dismissed for failure to allege the existence of a latent defect. There is no question that the Ameller complaint totally fails to allege the existence of any latent defects in the structure of the monkey bars.

Although Judge Ervin "seriously doubts" that the invitee is required to plead latent defects, that is exactly what the majority of his Court, and all three judges in the Hillman Supreme Court require as a matter of law.

Hillman recognizes liability in those cases where:

> ...the equipment was infected with some latent defect, that it was inherently dangerous...

The Alegre majority adopted Hillman, and found an allegation of negligence "...in allowing the ground surface under the monkey bars to become hard-packed" to be insufficient to state a cause of action.

The dissent then interprets Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977). First, neither case involves the specific facts considered by the Courts in Hillman, Alegre or Atlantic Christian Schools, Inc. v. Salinas, 422 So.2d 362 (Fla. 3rd DCA 1982). Secondly, the discussion at 250 regarding primary and secondary assumption of the risk is entirely negated by Blackburn's own holding that such a dichotomy has been "...a thorn in the judicial side" and the Blackburn Court holds that:

> It is apparent that no useful purpose is served by retaining terminology which expresses the thought embodied in primary assumption of risk.
> Blackburn at 291.

Although the dissent then embraces Section 343A(1) of the Restatement (Second) of Torts (1965), it acknowledges that "... no Florida cases... have explicitly adopted..." it as law. At 250-251. Once again none of the five Florida

cases cited at 251 involves facts even similar to those of the case at bar.

Not only has Florida retained the doctrine of voluntary assumption of the risk (although the dissent states that "...Blackburn did not abolish the volenti doctrine in its entirety," but only one of its elements), it is a very viable doctrine in cases where the plaintiff engages in a contact sport with another participant who injures him without deliberate attempt to injure. Kuehner v. Green, 406 So.2d 1160 (Fla. 5th DCA 1981).

Finally, the dissent interprets Blackburn:

> If the effect of Blackburn is as I believe it to be, then in all cases in which the obviousness of the danger is asserted as a defense, the reasonableness of the plaintiff's conduct in confronting the risk should now be determined by a jury--not a judge.

That is not what Blackburn holds, that an obvious danger allegation always precludes a summary judgment, or a directed verdict, or, as here, a dismissal of the complaint. Blackburn only holds that:

> ...the affirmative defense of implied assumption of the risk is merged into the defense of contributory negligence and the principles of comparative negligence enunciated in Hoffman v. Jones,

supra, shall apply in all cases where such defense is asserted. Blackburn at 293.

Mr. Justice Frankfurter is quoted in Blackburn, at 292 where he comments on "...the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetion; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." Petitioner prays that this Court reject the commentary upon which the Alegre dissent "explains" the Courts' willingness to direct verdicts or enter judgments n.o.v. The explanatory footnote charges the Courts' reasonings (no duty and assumption of the risk) as an effort "...to escape criticism for taking the contributory negligence issue away from the jury and thus invading the jury's function. Doctrinal semanticism serves their psychological reaction." Alegre, at 252, footnote 6.

CONCLUSION

Based upon the foregoing authorities and arguments: that the complaint fails to allege that the use by respondent of petitioner's equipment was the proximate cause of the alleged injuries; that the respondents fail to allege any latent defects in the subject structure; that the complaint fails to allege any ultimate facts to sustain its bare allegations regarding the construction and maintenance of the structure; and that the allegations regarding the ground beneath the monkey bars fail to state a cause of action pursuant to Alegre and Hillman, supra, the decision of the Third District Court should be quashed, the holding of the Circuit Court should be reinstated and the writ of certiorari should be discharged.

Respectfully sumitted,

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I certify that a copy of the foregoing was mailed this 17th day of December, 1984, to: JUAN CARRERA, ESQUIRE Attorney for Respondents, 835 Southwest 37th Avenue, Suite 102, Miami, FL 33135, and to Gaston Alvarez, Esquire, at the same address.

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