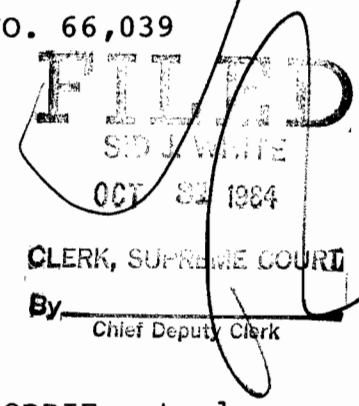
IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,039



JOSEPH ROBBIE, et al.,

vs.

Petitioner,

CITY OF MIAMI,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

LUCIA A. DOUGHERTY, City Attorney
GISELA CARDONNE, Assistant City Attorney
Attorneys for CITY OF MIAMI
169 East Flagler Street, Suite 1101
Miami, Florida 33131 (305) 579-6700

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STATEMENT OF THE FACTS AND CASE

The respondent, City of Miami, was the appellant before the Third District Court of Appeal and the plaintiff at trial. Petitioners were the appellees before the Third District and defendants at trial.

This petition arises out of an opinion by the Third District reversing the trial Court's order enforcement of a settlement, whose terms were disputed by the parties. References will be made to petitioners' appendix.

The City of Miami made a claim against Joseph Robbie, the South Florida Sports Corporation and the Miami Dolphins Ltd., among other claims, for unpaid rent. The pleadings include a complaint, amended complaint, counterclaim, answers and affirmative defenses. The trial Court also had before it extensive depositions and affidavits.

The trial Court granted respondent's summary judgment motion and held that petitioners are liable to the City for the unpaid rent claimed, but the amount of damages was to be determined at trial of the amended complaint. The parties then entered into settlement negotiations with reference to all claims on which the Court had not ruled. The petitioners presented a settlement proposal to the City Commission (A 26-38), which passed a resolution authorizing the Manager and City Attorney to prepare settlement papers on behalf of the City (A 39-44).

The City Attorney's Office drafted a Stipulation and Order of Dismissal, which included the following clause:

> 1. That JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION, and THE MIAMI DOLPHINS, LTD., agree that the Miami Dolphins football team will play a tenth home football game,

> which game will not be a playoff game of any sort, in the Miami Orange Bowl Stadium during both the 1985 and 1986 regular football seasons as defined by the June 8, 1977 Agreement between the MIAMI DOLPHINS, LTD. and the CITY OF MIAMI or, in the alternative, if the said tenth home game is not played for any reason, that JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION and THE MIAMI DOLPHINS, LTD. agree to pay to the CITY OF MIAMI Thirty Thousand ($30,000.00) Dollars for each such tenth game not played, without credit or setoff for any expenses, costs or obligations not incurred by the CITY OF MIAMI because of the non-occurrence of such tenth game in 1985 and/or 1986. [Emphasis added] (A 45).

Although the general terms were set out, the parties agreed to enter into a supplemental agreement pursuant to Paragraph No. 3 of the Stipulation and Order of Dismissal also prepared by the appellant. The supplemental agreement included the following:

> No liability of any kind shall be incurred by either of the parties hereto should the Orange Bowl Stadium, during the term of this Agreement become unfit for events to the played or staged therein because of any Act of God or public enemy except that this provision will in no fashion or way relieve the PARTNERSHIP of its obligation to pay Thirty Thousand Dollars ($30,000.00) per each guaranteed tenth home game in the 1985 and 1986 seasons not played as set forth in Paragraph No. 2 of this Supplemental Agreement as such obligation is assumed in partial compensation for the PARTNERSHIP's failure of performance under the June 8, 1977 Agreement prior to July 18, 1983. The CITY agrees to maintain the [ORANGE BOWL] during the term of and any renewal or extension of this Agreement in a safe physical condition and suitable for the playing of professional football games (A 56).

The petitioners refused to sign the supplemental agreement if it included the above paragraph. Respondent refused to delete the paragraph at issue (A 17-20). Petitioners filed a motion to

enforce the settlement, without the paragraph at issue (A 17-20) and a hearing took place before the Court on August 5, 1983 (Vol. VI, A 91-190), which ruled that the challenged paragraph (referred to as "Act of God/Public Enemy" clause) should be stricken (A 13, Paragraph 5).

The Court further ruled that the City was deemed to have signed the settlement "exclusive of the proposed change to Paragraph 28 of the June 8, 1977 Agreement which was properly stricken" (A 14, Paragraphs 8 and 9).

The conflict between the parties was correctly perceived by the Third District:

> The City's version of the settlement is that notwithstanding certain language of the 1977 agreement which relieves the Dolphins of any obligation should the Orange Bowl Stadium become unfit for the playing of football games because of any Act of God or public enemy, the Dolphins were not to be relieved of their 'obligation to pay Thirty Thousand Dollars ($30,000.00) per each guaranteed tenth home game in the 1985 and 1986 seasons not played . . . as such obligation is assumed in partial compensation for the [Dolphins'] failure of performance under the . . . 1977 AGREEMENT prior to July 18, 1983.'
>
> Thus, the Dolphins understood the parties' settlement to be that they would not owe the $30,000 to the City per each unplayed tenth home game in the 1985 and 1986 seasons under circumstances where the cause of not playing the game was the unfitness of the Orange Bowl because of any Act of God or public enemy; and the City understood the parties' settlement to be that these moneys would be due and owing as a postponed payment of a past-due obligation even if the Orange Bowl became unfit for play for the described reasons. In short, while the Dolphins concede that under their own version of the settlement they agreed to pay the $30,000 'if any guaranteed tenth game is, <u>for any reason</u>, not played,' they contend that 'for any reason' does not include the unfitness of the Orange Bowl

> because of an Act of God or public enemy or, at least, that the uncertainty of this phrase should await determination in future litigation if and when the highly improbable events occur (A 2).

An appeal ensued from the order and final judgment enforcing settlement and dismissing action to the Third District Court of Appeal, which ruled:

> It is clear to us that the parties did not have a meeting of the minds as to an essential element of their proposed 'settlement' and that, therefore, the trial court's judgment purporting to enforce the Dolphins' version of the settlement agreement must be reversed. As we stated in Gaines v. Nortrust Realty Management, Inc., 422 So.2d 1037, 1039 (Fla. 3d DCA 1982) (quoting from United Mine Workers v. Consolidation Coal Co., 666 F.2d 806, 809-10 (3d Cir. 1981)):
>
> > 'To be judicially enforceable . . . a settlement agreement . . . must be sufficiently specific as to be capable of implementation . . . [C]ourts will not attempt to enforce a settlement agreement that is too vague or ambiguous in its meaning or effect.'
>
> In Gaines, we set aside a judgment enforcing an agreement to exchange releases where:
>
> > 'Gaines and his counsel believed the undertaking to exchange releases involved releasing Nortrust from any part and further claim under the lease that the base rental was to be computed by averaging the rent paid by all tenants and being relieved of Nortrust's claim that only the average rents of new and renewal tenants were to be used in the computation; Nortrust and its counsel believed that the release was to be a general release, that is, a release of any and all claims of any type and description that either party might have against the other; . . . Which of these possible releases was to be exchanged was neither clearly expressed nor mutually understood during the discussions.'
>
> 422 So.2d at 1040 (footnote omitted).

> Here, for like reasons, we must conclude that no settlement capable of being enforced by a court was reached.
>
> Reversed and remanded for further proceedings (A 3).

ARGUMENT

NONE OF PETITIONER'S CASES IS IN DIRECT CONFLICT WITH THE THIRD DISTRICT DECISION BELOW AND CERTIORARI SHOULD BE DENIED.

This Court's discretionary jurisdiction can be invoked only where the decision sought to be reviewed "expressly and directly" conflicts with the decision of another District Court "on the same question of law." Jenkins v. State 385 So.2d 1356 (Fla. 1980). In Jenkins, this Court reviewed the history of conflict jurisdiction and held:

> The pertinent language of §3(b)(3), as amended April 1, 1980, leaves no room for doubt. This court may only review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same question of law.

In Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1359 (Fla. 1980) this Court held that a per curiam affirmance, without opinion, where other cases were cited, could not give ground to conflict jurisdiction. Dodi, in conjunction with Jenkins, clearly indicate this Court's definition of "express and direct conflict" jurisdiction.

The primary purpose of District Courts of Appeal is to stop litigation at that level. Article V of the Florida Constitution has been narrowly construed by this Court with reference to the jurisdiction of the District Courts. Short v. Grossman, 245 So.2d 217 (Fla. 1971).

An examination of the cases proposed by petitioners shows that none is in express and direct conflict with the Third District decision below, as defined by the Florida cases on conflict certiorari before this Court.

In Blackhawk Heat. & P. Co. Inc. v. Data Lease Fin. Corp., 302 So.2d 404 (Fla. 1974), the Supreme Court quashed a District Court decision which upheld a final judgment interpreting a contested section of an option agreement between the parties. The Supreme Court reviewed the case law on contracts as interpreted by Professor Corbin and ruled that the option agreement was not so uncertain that it could not be enforced.

The argument raised there was that since the amount of money could not be determined from the wording of the challenged section, the contract was unenforceable. Not so, said the Court, since mathematical computations would disclose the correct amount. Here, the dispute is not over the amount of money per tenth game (all parties agree that the amount would be $30,000 per game without any setoffs), but under what circumstances it would be paid: Was the guarantee of $40,000 represented to the City Commission without any exceptions? Or could the petitioners avail themselves of acts of God for nonperformance?

The real issue in Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957) involved improper instructions to the jury. The judge allowed the jury to consider an invoice, initialed by the parties with the intent of identification only, as evidence of a contract agreed to as an account stated. The question of intent of the parties was discussed and quotes Justice Holmes at 608:

> The making of a contract depends not on the agreement of two minds in one intention, but

> on the agreement of two sets of external signs -- not on the parties having meant the same thing but on their having said the same thing.

Dorson v. Dorson, 393 So.2d 632 (Fla. 4th DCA 1981) involved parties who agreed that they had reached a settlement. Their dispute centered on whether a procedure required under the settlement agreement had been followed. Dorson is followed in Gaines, supra, at 1039 for the proposition that settlement agreements are to be interpreted by and governed by the some principles of contract law. Not one of petitioners' cases conflicts with Gaines, supra, upon which the Third District relied for reversal. Petitioners' brief instead has attempted to argue the facts to this Court -- a totally improper forum for such argument.

The law on settlements is that "there must be mutuality of agreement, and there can be no such mutuality where there is no common intention. Kuharske v. Lake County Citrus Sales, 44 So.2d 641 (Fla. 1949). See also Hewitt v. Price, 222 So.2d 247 (Fla. 3d DCA 1969).

The Third District relied on Gaines v. Nortrust Realty Mgt., Inc., 422 So.2d 1037, 1039 (Fla. 3d DCA 1982). Gaines involved a dispute between a landlord and a tenant over the computation of the base rental rate of property where the lease had been extended. The parties included as part of the settlement negotiations the nature of releases to be exchanged. The landlord insisted on general releases while the tenant agreed to sign a release pertaining to the action at issue and reserving the right to sue the landlord on any other matters which might arise in the future.

The attorneys' discussion, crucial in the Gaines case, was off the record and the Third District, held that the lower Court erred in conjecturing that the parties had at least agreed to release each other from claims pertaining to the lease:

> In the present case, no meeting of the minds as to an essential element of the agreement existed. . . .Which of those possible releases was to be exchanged was neither clearly expressed nor mutually understood during the discussions. While the trial judge may have logically concluded that Nortrust would not have agreed to accept anything less than a release of all claims arising under the lease, his logic is not a substitute for the missing ingredient, that is, a mutual understanding between the parties. (Emphasis added). Gaines, at 1040.

In the case at bar the parties' position simply stated is as follows: Respondent contends that petitioners agreed to pay the sum of $30,000 for an additional game during 1985 and 1986, whether such a game is played or not; petitioners believe that they do not owe the rental if the game cannot be played as a result of an Act of God or war.

The existence of ambiguity in a proposed settlement agreement will prevent its enforceability. To cite Gaines again:

> For [a settlement] to be binding on the parties it should be clear that it is full and complete, covers all issues, and is understood by all litigants concerned. Cross v. Cook, 147 Ga. App. 695, 250 S.E. 2d 28, 29 (1978). See also Rock-Weld Corporation of Puerto Rico v. Rock-Weld Equipment Corp. of Florida, 184 So.2d 186 (Fla. 3d DCA 1966) (in order to constitute a settlement agreement, the language of the agreement must be clear. Gaines, at 1040.

In the instant case the parties never reached an agreement as to the payment of rental in the event of an Act of God or war.

Unlike other cases where a procedure is established to resolve a problem and the parties then disagree as to whether the procedure was followed, the parties here never reached an accord as to the procedure itself. Dorson v. Dorson, 393 So.2d 632, 633 (Fla. 4th DCA 1981); See, Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096, 1103-1105 (5th Cir. 1981).

In determining the issue of mutual consent to a contract courts will only look at the "objective intent" of the parties. Objective intent has been defined in Gendzier v. Bielecki, 97 So.2d 604, 608 (Fla. 1957), cited above at page 6.

In the instant case, when the parties attempted to reduce to writing what each though it had said at the Commission meeting, the results were very different. In the event of an Act of God or war, which would prevent the playing of a tenth game, the parties became $30,000 apart. There was never any agreement on this issue and the Court was powerless to rule in either one's favor or to have struck a compromise of its own.

The party which seeks a judgment on a settlement has the burden of establishing assent by the opposing party. Massachusetts Casualty Ins. Co. v. Formon, 469 F.2d 259, 261 (5th Cir. 1972). The assent may be clear from the contract itself, or by accepting the benefits of the agreement. Kisz v. Massry, 426 So.2d 1009, 1011, (Fla. 2d DCA 1983). Here, the parties never completed the settlement agreement itself, much less accept any of its benefits.

Based on the foregoing arguments and analysis of petitioners' citations of authority no conflict exists and this Court should deny the petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I certify that a copy hereof was hand delivered this 30th day of October, 1984 to: Robert L. Shevin, Esq., One Southeast 3rd Avenue, Suite 3000, Miami, Florida 33131.

LUCIA A. DOUGHERTY, City Attorney
GISELA CARDONNE, Asst. City Atty.
Attorneys for Respondent
169 East Flagler Street, Suite 1101
Miami, Florida 33131 (305) 579-6700

By Gisela Cardonne
GISELA CARDONNE

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