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IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,039

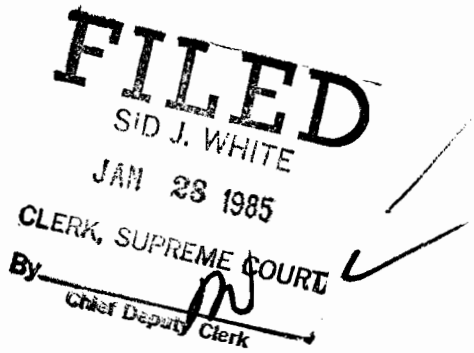
JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION and THE MIAMI DOLPHINS, LTD.,

Petitioners,

vs.

CITY OF MIAMI,

Respondent.



INITIAL BRIEF ON THE MERITS OF PETITIONERS, JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION, AND THE MIAMI DOLPHINS LTD.

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

At a public Commission Meeting held on July 18, 1983, "on the record", the City of Miami Commission voted to approve a settlement of ongoing litigation between the City of Miami and the Miami Dolphins.[1/] The resolution that was approved at this Commission Meeting "instructed" the City Manager to enter into the stipulation of settlement and a supplemental agreement "based upon the terms and conditions presented to the City Commission." This resolution was drafted by the City Attorney's office and approved as to form and correctness by the City Attorney. Well after this "meeting of the minds", the City attempted to impose, unilaterally, an additional term to the settlement which had not previously been discussed. The Miami Dolphins refused to accede to the newly proposed term and insisted upon the enforcement of the settlement as previously agreed upon, but the City of Miami took the position that there was never a settlement at all.

The Trial Court, after a full evidentiary hearing (with testimonial and documentary evidence), held that there was a valid, enforceable settlement agreement. The Third

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1/ Plaintiff/Respondent the City of Miami will be referred to as the "City of Miami" or the "City". Defendants/ Petitioners, Joseph Robbie, the South Florida Sports Corporation, and the Miami Dolphins, Ltd. will be collectively referred to as the "Miami Dolphins" or the "Dolphins".

District Court of Appeal reversed, over a commendably articulate and stinging dissent, on the basis that there was no "meeting of the minds" as to a single aspect of a lengthy, settlement agreement, the terms of which were otherwise undisputed.

This petition concerns the enforcement of that settlement agreement.

1. THE UNDERLYING LITIGATION

The underlying litigation concerned a dispute between the City of Miami and the Miami Dolphins, as to whether the Miami Dolphins were contractually bound to stage a minimum number of nine professional football games in the Orange Bowl and to pay the City a "seat tax" or "rent" for those games whether played or not. (R-8-18.)[2/] Through no fault of the petitioners in this action, the NFL Players' Association strike interrupted the 1982 football season causing the Miami Dolphins to cancel several of the nine scheduled home games. The City of Miami claimed that the underlying contract required that the rent be paid for nine regular season football games regardless of the Players' Strike. (R-1-18). The City claimed that "rent" was due for three additional games.[3/] This dispute was well-publicized

2/ References herein to the Record on Appeal will be cited as (R-); references to the Appendix are to the Appendix to Jurisdictional Brief of Petitioners previously filed on October 17, 1984 herein and will be cited as (A-); and references to the Transcript of August 5, 1983 will be cited as (TR- .), but the Transcript is also reproduced at A-91-190.

3/ The City also alleged that the Miami Dolphins had breached the contract regarding certain insurance and security bond provisions. (R-1-18.) These allegations were denied in the Miami Dolphins' Answer, which also raised numerous affirmative defenses including, but not limited to: (1) asserting the defense of impossibility and frustration of the contract's purpose; (2) asserting the defense of satisfaction and performance, in that the Miami Dolphins had played a total of nine games in the Orange Bowl Stadium during the 1982 football season and had continuously, in the past, played additional games which were not required under the contract; and (3) claiming a set-off for any expenses which the City
(Footnote Cont'd)

and vigorously litigated.

On May 25, 1983, the City filed a Motion for Summary Judgment only as to Count I of the Complaint, which alleged that the Miami Dolphins owed rent for three additional regular season games.[4] At the summary judgment hearing on June 15, 1983, the Miami Dolphins raised a number of factual and material issues with respect to the issue of liability, and particularly protested that the contract was ambiguous with respect to the definition of the "regular season," and that nine games were played in the Orange Bowl pursuant to the contract.[5] With respect to the damage issue the City was attempting to claim $45,000 per game. The Miami Dolphins claimed a set-off for expenses not incurred during the games which had been cancelled because of the strike.[6]

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was normally obligated to incur, but did not incur, as a result of the players' strike. (R-21-27.) The Miami Dolphins also raised a counterclaim.

4/ The Miami Dolphins responded to the Motion for Summary Judgment by filing numerous affidavits (including the affidavit of Joseph Robbie, J. Michael Robbie and Pete Rozelle), and by taking and filing depositions taken in the action. (R-66-524, 528-578, 580-587.)

5/ The Miami Dolphins also raised the doctrines of impossibility of performance and frustration of the contract as defenses. The Miami Dolphins also presented factual issues as to whether the players' strike was in the contemplation of the parties when the contract was signed and whether risk of the strike had been allocated among the parties to the contract. (R-650-702.)

6/ The Miami Dolphins filed the deposition of Walter E. Golby, stadium administrator, who stated that the City incurred costs of $28,000 to $30,000 per Miami Dolphins game when such games were played. (R-437-8.) In
(Footnote Cont'd)

At the conclusion of the hearing, the Trial Court granted the City a summary judgment as to liability only and denied the summary judgment as to the determination of damages. The Trial Court Judge stated "The Defendants [Miami Dolphins] will be able to show every possible offset they have." (R-703.) The judge also stated:

> Mr. Shevin indicated this morning that those items [the setoffs] come to approximately $30,000 a game [out of the City's total rent claim of $45,000 a game].
>
> In determining the damages, I think we are going to be guided by a net profit guideline on this. The City should not profit from the Dolphin's misfortune on these matters. (Emphasis added.) (R-705-706).

The Order granting the summary judgment as to the issue of liability was rendered on June 21, 1983. The Miami Dolphins had thirty days, or until July 21, 1983, in which to file an interlocutory appeal from the liability determination. A trial was specially set for August 1, 1983.

SETTLEMENT NEGOTIATIONS AND THE SETTLEMENT DOCUMENTS

Prior to the filing date for the appeal, the City of Miami and the Miami Dolphins entered into settlement negotiations. The early negotiations were principally

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another deposition, Carlos E. Garcia, Director of the Department of Finance of the City of Miami, elaborated at length the various expenses that the City incurred whenever a Miami Dolphins game was played. (R-267-269, 270-78.) Garcia admitted that most of these expenses were not required to be paid during the strike, (R-78, 86) and that the City had not given the Miami Dolphins a credit for costs not incurred by the City although the City gave such a credit to its insurance carrier when it made a claim under its strike insurance. (R-87.)

between Mayor Ferre, on behalf of the City, and Robert L. Shevin, on behalf of the Miami Dolphins. (TR-49-52.) The settlement negotiations culminated in a Settlement approved at a Miami City Commission meeting on July 18, 1983, with the Commission's passage of a resolution authorizing the City of Miami to enter into a stipulation of settlement. Mayor Ferre began the meeting by stating:

> . . . if we could settle this, I think it serves the best purposes of the people of Miami to settle these problems that we are having with Joe Robbie. (A-14.)

During the City Commission meeting, the Miami Dolphins offered to play an additional home game in the Orange Bowl in the 1985 and 1986 football seasons and to guarantee payment of $30,000 (not just $15,000) to the City of Miami for each of the additional games if they were not played, without any right of set-off. (A-17-18,20,23.)7/ The Dolphins also offered significant concessions with respect to insurance obligations at the Orange Bowl.

Towards the end of the City Commission meeting, Commissioner Carollo introduced Resolution No. 83-625 bearing the following title:

7/ Mayor Ferre insisted that the Miami Dolphins would "have to guarantee that they are going to play," (A-19), and added "if for any reason it doesn't occur there's a penalty of $30,000 per game." (A-19.)

> A RESOLUTION INSTRUCTING THE CITY ATTORNEY TO ENTER INTO A STIPULATION OF SETTLEMENT AND ORDER OF DISMISSAL IN THE CIRCUIT COURT CASE OF THE CITY OF MIAMI, PLAINTIFF/COUNTERDEFENDANT, VS. JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION, AND THE MIAMI DOLPHINS, LTD., DEFENDANTS/COUNTERPLAINTIFFS, IN THE COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, CASE NO. 83-4583 (04) BASED UPON THE TERMS AND CONDITIONS PRESENTED TO THE CITY COMMISSION ON JULY 18, 1983; INSTRUCTING THE CITY MANAGER ON BEHALF OF THE CITY OF MIAMI TO ENTER INTO A SUPPLEMENTAL AGREEMENT EFFECTIVE JULY 18, 1983, TO THE AGREEMENT DATED JUNE 8, 1977 BETWEEN THE CITY OF MIAMI AND THE MIAMI DOLPHINS, LTD., BASED UPON THE TERMS AND CONDITIONS PRESENTED TO THE CITY COMMISSION ON JULY 18, 1983; AND AUTHORIZING AND INSTRUCTING THE CITY MANAGER AND CITY ATTORNEY TO EXECUTE ALL OTHER DOCUMENTS NECESSARY TO ACCOMPLISH SAID SETTLEMENT. (Emphasis added.)

This resolution embodied in very specific language, the terms of a "full and complete settlement of all claims and counterclaims in the suit, as well as any other claims Joseph Robbie, the South Florida Sports Corporation, and/or The Miami Dolphins, Ltd. may have against the City of Miami or any City of Miami employee, agent or representative as of the date of this resolution." (See the "Whereas" clause, A-39.)

The crucial terms of the resolution appear in Sections 1(a) and 2(b) as set forth below:

> 1(a) That Joseph Robbie, the South Florida Sports Corporation, and the Miami Dolphins, Ltd. guarantee that the Miami Dolphins football team will play a tenth home game which will not be a playoff game of any sort, in the Orange Bowl Stadium, during both the 1985 and the 1986 regular football seasons, or, in the alternative,

that if the guaranteed tenth game is not played for any reason, that Joseph Robbie, The South Florida Sports Corporation and The Miami Dolphins, Ltd. agree to pay The City of Miami Thirty Thousand ($30,000.00) Dollars for each so guaranteed tenth game, without setoff or deduction for any expenses, costs or obligations not incurred by the City of Miami because of the cancellation of such guaranteed tenth game. (Emphasis added.) (A-40.)

2(b) . . .[T]he Miami Dolphins, Ltd. guarantee to play a tenth home game . . . which game will not be a playoff game of any sort, during each pre-season or regular football season in both 1985 and 1986, thereby guaranteeing $450,000.00 per regular season seat tax for the 1985 and 1986 seasons, or, in the alternative, if any guaranteed tenth game is, for any reason, not played, Joseph Robbie, The South Florida Sports Corporation and The Miami Dolphins, Ltd. agree to pay the City of Miami a straight fee or penalty of Thirty Thousand ($30,000.00) Dollars with no setoffs, credits or deductions for any expenses, costs or obligations not incurred by the City of Miami . . . (Emphasis added.) (A-42.)8/

This Resolution was prepared by an Assistant City Attorney, and approved by Jose Garcia Pedrosa, City Attorney, as to form and correctness. (A-43.) The Resolution was introduced by Commissioner Carollo, and approved by a three-to-one vote at the Commission meeting. (A-38.)

8/ The terms of this Stipulation of Settlement and Supplemental Agreement, as outlined in the Resolution, also called for the amendment of paragraphs 20 and 21 of the original Lease Agreement relating to insurance at the Orange Bowl. Pursuant to the terms of the settlement, the Miami Dolphins agreed to increase the public liability insurance coverage from $250,000 per person to $500,000 per person and from $1,000,000 per occurrence to $2,000,000 per occurrence. The Miami Dolphins also agreed that the provisions relieving the Miami Dolphin's from responsibility for liability arising from structural deficiencies, negligent maintenance, or negligent actions of the City would be deleted. The settlement also contained a requirement that releases be executed and exchanged by the parties. (A-42-43.)

On July 19, 1983, Ms. Julia J. Roberts, Assistant City Attorney, confirmed by letter to the undersigned counsel, with a copy to the Trial Court, that the City Commission accepted the settlement proposal, and offered to draft the necessary settlement documents and releases. (A-22-23.)

After confirming the settlement, both lawyers prepared a total of three letters to Judge Henderson advising the Judge on July 19, 1983 of the settlement and cancelling the specially set trial date of August 1, 1983. (A-21-25.) Petitioners, in reliance on the settlement, also waived their right of interlocutory appeal from the June 21, 1983 partial judgment of liability by not filing by July 21, 1983 a notice of interlocutory appeal. (Tr. 6.) (Although not officially part of the record, the undersigned officer of the court also represents that he discarded a Notice of Non-Final Appeal which had been prepared for filing on or before July 21, 1983, had a final settlement not been consummated.)

On or before August 4, 1983, the City forwarded to counsel for the Miami Dolphins a proposed Stipulation of Settlement, Order of Dismissal, a Release, and a Supplemental Agreement. (A-45-58; excluding handwritten notations.) Paragraph 3 of the Stipulation of Settlement and the supplemental agreement, both drafted by the City Attorney, contained the terms that had been outlined in the

Resolution passed by the City Commission. The following language was included in paragraphs 3 of the Stipulation of Settlement and the Supplemental Agreement:

> Stipulation of Settlement
>
> 3. . . . the provisions of the June 8, 1977 Agreement, shall be amended to reflect that the MIAMI DOLPHINS, LTD. agree to 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, to pay the City of Miami Thirty Thousand Dollars ($30,000.00) 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. (A-46.) (Emphasis added.)
>
> Supplemental Agreement
>
> 3. If, for any reason, the Miami Dolphins fail to play a tenth home football game as provided above during both the 1985 and the 1986 regular football seasons as defined by the terms of the JUNE 8, 1977 AGREEMENT, the PARTNERSHIP agrees to pay the CITY Thirty Thousand dollars ($30,000.00) for each such tenth game not played in 1985 and/or 1986, 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. (A-55.) (Emphasis added.)

The Supplemental Agreement, drafted by the City Attorney and delivered August 4, 1983, for the first time, proposed a change to Paragraph 28 of the original 1977 Agreement (one of the "Act of God" provisions). That change, which was unequivocally never (a) addressed at all

in the comprehensive language of the approved City Commission Resolution (A-39-44), (b) discussed at all in settlement negotiations (as admitted by Mayor Ferre) (TR. 62-63), or (c) discussed at the City Commission meeting of July 18, 1983 (A-26-38), stated as follows (A-56):

> Further, paragraph No. 28 of the JUNE 8, 1977 AGREEMENT is amended as follows:
>
> 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 be played (sic) 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 and any renewal or extension of this Agreement in a safe physical condition and suitable for the playing of professional games. (Emphasis added.)9/

9/ It should be noted that the Resolution referred to modifications of specific paragraphs of the June 8, 1977 Agreement. The Resolution did not refer to any change in paragraph 28 of that Agreement. The June 8, 1977 Agreement at paragraph 29 (A-76.) contained an additional "force majeure clause." The City Attorney did not attempt to amend paragraph 29. This further evidences the hasty attempts by the City Attorney (Garcia-Pedrosa) to draft terms which were never included in the Resolution or agreed to by the parties and also evidences his unauthorized unilateral and unskilled attempt to kill the final settlement between the parties.

The Miami Dolphins deleted this last unauthorized provision and fully executed the Stipulation of Settlement, the Release, and the Supplemental Agreement. Robert L. Shevin, as attorney for the Miami Dolphins, also executed the Stipulation of Settlement. The City of Miami refused to execute its own settlement documents solely because of the deletion of this single, unilateral, unauthorized change it sought to impose (but which had never been discussed or agreed upon and was not part of the settlement).

THE TRIAL COURT HEARING ON THE DOLPHINS' MOTION TO ENFORCE THE SETTLEMENT

The Miami Dolphins moved to enforce the Settlement Agreement as embodied in the documents executed by Joseph Robbie and Robert L. Shevin. At the settlement hearing, Mayor Maurice Ferre was called by the City as a witness. Upon cross-examination Mayor Ferre admitted that he never discussed amending any "act of God" or "force majeure" provision with Robert L. Shevin. (T-62-63, 65-66, 67, 68). In fact, on cross-examination, the following discussion ensued:

> Q. (By Mr. Shevin) And do you know that the Miami Dolphins have signed all the agreements that have all that language, if for any reason; do you know that?
>
> A. No, I don't know that.
>
> Q. All right.
>
> Isn't it also a fact, Mr. Mayor, that you never discussed with me, never, the act of God provision?

A. Never discussed it.

Q. Never discussed it with me?

A. Never discussed it.

Q. You never did?

A. Never came up.

Q. You never discussed with me Paragraph 28 of the June 8, 1977, agreement, did you?

A. Bob, if you had told me that, I would have asked you what Paragraph 28 is. You never told me about Paragraph 28, and I wouldn't know today what Paragraph 28 is.

Q. And you don't know what force majeure is.

A. I know what force majeure means.

Q. Did we ever discuss the words force majeure?

A. No, we never -- you never brought that up in discussion.

Q. And did you ever bring it up at the Commission meeting on July 18, 1983?

A. No, sir, I did not bring that up at the Commission meeting. (TR. 62-63.) (Emphasis added.)

On re-cross Mayor Ferre once again admitted that the force majeure clause had not been discussed.

Q. Mr. Mayor, during all of these negotiations involving one face-to-face meeting, an appearance before the City Commission, and probably eighteen phone calls, did you ever say to me or did I ever say to you that a guarantee meant that we were giving up our rights under the force majeure clause, an act of God?

A. Never discussed. (T-68.) (Emphasis added.)

After the testimony of Mayor Ferre and at the conclusion of the hearing, Judge Henderson entered an Order enforcing the settlement, holding that the terms of the settlement, as executed by the Miami Dolphins, were

> consistently encompassed by the transcript of the proceedings before the Miami City Commission on July 18, 1983, at which time the settlement was reached, and Resolution No. 83-625 passed by the Miami City Commission . . . which properly authorized the settlement of this action. (Emphasis added.) (A-12.)

Accordingly, the Trial Court enforced the settlement (without the City's unilaterally proposed change to paragraph 28) and dismissed the action. (A-13-15.)

APPELLATE PROCEEDINGS AT THE THIRD DISTRICT COURT OF APPEAL

Despite the objective evidence of settlement intent, lengthy negotiations before and on the record at the City Commission meeting resulting in the approval of Resolution 83-625 (bearing the title "A Resolution instructing the City Attorney to enter into a stipulation of settlement"), and despite the Trial Court's determination after a lengthy evidentiary hearing that the settlement documents, as executed by the Miami Dolphins, "were and are in full conformity with the expressed intent of the parties to the settlement," (A-13) the majority invalidated the settlement on the sole basis of a subjective failure, supposedly, of a "meeting of the minds" as to the "if for any reason" clause

of otherwise detailed and specific settlement documents. Vigorously objecting to the majority opinion, Judge Jorgenson wrote a lengthy and closely argued dissent which focused upon a record that evidences the careful negotiation and agreement by the parties to the terms of the settlement.

ISSUES

I. THE TRIAL COURT PROPERLY ENFORCED A SETTLEMENT AFTER THE CITY OF MIAMI COMMISSION VOTED AFFIRMATIVELY TO APPROVE THE SETTLEMENT.

II. THE DISTRICT COURT'S ERRONEOUS APPLICATION OF A SUBJECTIVE, RATHER THAN AN OBJECTIVE TEST TO THE INTERPRETATION OF SETTLEMENT DOCUMENTS CONFLICTS WITH THE SUPREME COURT'S RECOGNITION THAT THE PROPER AND EXPEDIENT ADMINISTRATION OF JUSTICE IS ASSISTED WHEN PARTIES ARE ABLE TO ENTER INTO BINDING AND ENFORCEABLE SETTLEMENT AGREEMENTS THAT CANNOT BE UNILATERALLY AND CASUALLY SET ASIDE.

III. THE DISTRICT COURT IMPROPERLY REWEIGHED THE EVIDENCE BEFORE THE TRIAL COURT.

ARGUMENT

I. THE TRIAL COURT PROPERLY ENFORCED A SETTLEMENT AFTER THE CITY OF MIAMI COMMISSION VOTED AFFIRMATIVELY TO APPROVE THE SETTLEMENT.

As aptly expressed in the dissenting opinion by Judge Jorgenson (A-4; emphasis added):

> [T]he majority opinion not only sanctions an improper extra period of play, it allows the game's rules to be changed well after the game has ended.

Judge Jorgenson recognized (A-6; emphasis added), as did the trial judge, that the Supplemental Agreement, "contained all the terms agreed to at the city commission meeting and contained in the stipulation and order of settlement and general release plus an additional term that was never discussed or negotiated, much less agreed to by the parties." The Trial Court reviewed "the transcript of the . . . city commission meeting, the stipulation of settlement and order of dismissal (drafted by the City) and the release of all claims (also drafted by the City)," held that the settlement should be enforced, dismissed the action, and "struck the proposed changes to paragraph 28 but enforced the remainder of the settlement." (A-7.)

A. THE SETTLEMENT DOCUMENTS AS EXECUTED BY THE MIAMI DOLPHINS REFLECTED THE FULL AND ENTIRE AGREEMENT OF THE PARTIES.

The Resolution prepared by the City Attorney's office subsequent to the negotiations and the City

Commission's actions as reflected in the transcript of the proceedings was five legal pages long. The transcript of the City Commission meeting was thirteen pages long. What the City bargained for and received was the assurance of an extra tenth game in the 1985 season and an extra tenth game in 1986; the original contract called for only nine games.10/ The evidence shows that the staging of these two extra games in the Orange Bowl will net the City approximately $100,000.00 for each extra tenth game in the form of "rent", concession and parking revenues (R. 254, 257, 261). The City also got the assurance that "if for any reason" (A-55) the Miami Dolphins did not play a tenth game, they would pay the City $30,000.00 per game for each tenth game not played, as opposed to only $15,000.00 per game ($45,000.00 "rent" less $30,000.00 in City expenses as a set-off).

The City, therefore, received assurances that if the Miami Dolphins simply choose to play the tenth games in

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10/ Mr. Joseph Robbie's deposition testimony established that the Miami Dolphins normally schedule three out of four pre-season football games away because the "away" games earn more revenues due to increased ticket sales at the "away" games than at their own "home" pre-season games. (R. 620-622). Therefore, to play the extra tenth game in the Orange Bowl in 1985 and 1986 will require scheduling two pre-season games at "home" and only two pre-season games "away." The Dolphins will not benefit economically, - but the City will, because of the extra rent, concession and parking revenues the City will receive.

1985 and 1986 in the Gator Bowl or Tampa Stadium, the City will be paid the $30,000.00 for each tenth game.

The settlement also called for increases in public liability insurance coverage carried by the Miami Dolphins from $250,000 per person to $500,000 per person, and from $1,000,000 per occurrence to $2,000,000 per occurrence (A-57); deleted specific exemptions that excused the Miami Dolphins from defending third party insurance claims resulting from "improper maintenance and structural deficiencies" of the Orange Bowl (A-57); and required that the Miami Dolphins execute general releases with respect to any disputes against the City, its officers, agents, employees, or representatives (A-47, 49-52).11/

Judge Jorgenson, in his dissent, succinctly characterizes the series of events following the City's adoption

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11/ Commissioner Joe Carollo's description of the proposed settlement was:

> I think that number one, the Dolphins have increased the insurance benefits, that is a plus that we have received, and a compromise on their part. Number two, the proposal that they have made for the extra game in '85 and '86 is going to represent to this City [a] more substantial amount than even if we were to take it to court and win the most we possibly could. I think that Mr. Shevin and the Mayor have presented this quite well. So, I think that what we have now is a situation where both parties are willing to compromise. I think that while it is a fair compromise for the Dolphins, it is an excellent compromise for the City of Miami. (Emphasis added.)

of the resolution "instructing" the city to enter into the settlement (A-5-7, notes omitted):

> "The City Commission meeting adopting the resolution took place on July 18, 1983. On July 19 a letter was sent to the Dolphins' legal counsel from the city attorney's office confirming "that the City Commission accepted your settlement proposal," canceling a deposition scheduled in anticipation of trial, and informing the Dolphin's legal counsel that the proposed stipulation and order of dismissal would be sent by the end of the week.
>
> On August 3, 1983, the legal counsel for the City delivered to the legal counsel for the Dolphins a stipulation and order of settlement and general release, both drafted by the City's legal counsel. The Dolphins and their legal counsel fully executed the documents which provided that (1) the Dolphins would enter into a supplemental agreement to the 1977 agreement amending paragraphs 20 and 21 of the 1977 agreement, increasing insurance coverage; (2) the Dolphins would play a tenth game in 1985 and 1986 "or, in the alternative, if the said tenth home game is not played for any reason, [would] pay to the City of Miami "Thirty Thousand ($30,000) Dollars for each tenth game not played . . ."; and (3) "the parties hereby released admit no liability of any sort by reason of past conduct."
>
> Then, on August 4, 1983, the City sent its "Supplemental Agreement to the June 8, 1977 Agreement" to the Dolphins' legal counsel. It contained all the terms agreed to at the City Commission meeting and contained in the Stipulation and Order of Settlement and General Release plus an additional term that was never discussed or negotiated, much less agreed upon by the parties.
>
> The 1977 Agreement contained two force majeure clauses, paragraphs 28 and 29. They provided:

> 28. 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 be played or staged therein because of any Act of God or Public Enemy . . . .
>
> 29. If ORANGE BOWL Stadium is condemned or is so damaged due to fire, windstorm, or other catastrophe, and CITY decides not to repair or rebuild, either part may cancel, terminate, and declare this Agreement terminated.

The Supplemental Agreement sent by the City on August 4, 1983, provided:

> Further, paragraph No. 28 of the June 8, 1977 agreement is amended as follows:
>
> 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 be pla4ed(sic) or stated therein because of any Act of God or Pubic 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 Supplemental Agreement sent by the City, with its "compensation for . . . failure of performance" language, contradicted the "no liability" provision of the release and added the additional term of modification of paragraph 28, the "force majeure clause." (Emphasis added.)

There was no attempt made to amend the other "force majeure clause," Paragraph 29 -- evidence of a hasty and unauthorized action, by the City Attorney (Garcia-Pedrosa), for his own political purposes. The City Attorney did not want the case settled. He publicly "condemned" the Dolphins, held several press conferences, and obviously wanted the publicity of a jury trial against the Miami Dolphins. The Court can take judicial notice that shortly thereafter, he ran unsuccessfully for State Attorney of the 11th Judicial Circuit.

B. THE CITY, IN DRAFTING THE SUPPLEMENTAL AGREEMENT ADDED AN AMENDMENT A TO PARAGRAPH 28 (A "FORCE MAJEURE CLAUSE") WHICH WAS UNAUTHORIZED AND WHICH WAS NEVER DISCUSSED OR AGREED UPON BY THE PARTIES DURING SETTLEMENT NEGOTIATIONS.

It is elemental contract law that the making of a contract depends "not on the parties having meant the same thing but on their having said the same thing." *Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Financial Corporation*, 302 So.2d 404, 407 (Fla. 1974). Before the City Commission and in the Resolution that is before this Court,

the parties detailed each and every one of their intentions. The parties did not mention in the elaborate Resolution drafted by the City attorneys that there would be an amendment or modification to Paragraph 28 of the City of Miami contract with the Miami Dolphins. Neither at the settlement negotiations, nor during the City Commission debate, nor in the Resolution (as demonstrated, supra) was there any mention of any modification of the force majeure or "act of God" clause set forth in Paragraph 28 of the original June 8, 1977 City of Miami Agreement with the Miami Dolphins.

The Miami Dolphins were not insisting on an amendment to Paragraph 28 of the June 8, 1977 Lease Agreement to excuse a possible future "players' strike" from coming under the "force majeure" clause, and neither did the City, at any time, in negotiations or in the debate before the Commission, or in the Resolution approving and authorizing settlement, insist or suggest that the settlement encompassed or required any amendment to Paragraph 28. The amendment of Paragraph 28 is not within the scope of the settlement agreement, nor could it be logically inferred from the terms of the agreement as embodied in the negotiations, the Commission meeting transcript, or the Resolution.

The City argued in its brief to the Third District that the proposed amendment of Paragraph 28 could be inferred from the terms of the settlement agreement. The

amendment of Paragraph 28 was not incorporated into any of the early drafts of the settlement documents. It was incorporated into the Supplemental Agreement, which was the very last document delivered to the Miami Dolphins by the City of Miami attorneys. Why didn't the City of Miami attorneys also, at the last moment, ask for an amendment to Paragraph 29 of the June 8, 1977 Agreement? The failure to amend Paragraph 29 of that Agreement evidences, as noted, the hasty and unauthorized attempts by the City Attorney to draft terms which were never included in the Resolution and never agreed to by the parties as part of the settlement. All the Miami Dolphins ever insisted upon was the enforcement of the settlement (and to leave Paragraph 28 as is and neutral).

In its Brief addressed to the Third District, the City argued that the Miami Dolphins guaranteed $30,000 for each tenth game during the 1985-1986 season. The Miami Dolphins agree. However, does that mean that the Miami Dolphins would pay for the tenth game, if a hurricane or tornado destroys the Orange Bowl Stadium and there is no place to play the tenth game, while being excused from paying rent for the first nine games? If the Stadium was destroyed, would it make any sense for the Miami Dolphins to be excused from paying the "seat tax" for the first nine games, but to be held responsible for paying the seat tax for the tenth game, when there are no seats to assess the

tax against? In any event, the chance of an Act of God rendering the stadium unusable is infinitesimal.[12/]

The majority opinion of the Third District (A-2), in comparison to the so-called "City's version of the settlement" found what it characterized as the "Dolphins' version" and the "Dolphins' understanding" of the Settlement Agreement as:

> Thus, the Dolphins understood the parties' supplement 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.

Of course, as Judge Jorgenson correctly observed (A-6, n.2), "there is no Dolphins' version. The only versions are the agreed-upon settlement and the City's unilaterally altered version of the settlement." Thus, the Third District majority confused the determination of the merits of an unlikely contingency (i.e., do the Dolphins owe $30,000 if a tenth game is not played due to an Act of God?) with the issue of the sufficiency of the parties objectively

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12/ More importantly, the Miami Dolphins urged, and the Trial Court found (A-13-14), that in the event of a "force majeure", a future court would determine whether the Act of God clause (paragraph 28) (or, we would add, paragraph 29) would prevail or not prevail over the $30,000 obligation "if for any reason" the tenth game was not played in accordance with the settlement. It does not follow that there was a failure of the "meeting of the minds" because a future court might have to adjudicate a dispute arising under a highly unlikely scenario.

expressed intent to settle their disputes (i.e., was the language of the settlement documents consistent with the previously stated agreements?). As Judge Jorgenson suggests (A-11), "Should the 'highly improbable' events occur and render the Orange Bowl unfit to play a tenth game in 1985 or 1986, the parties should then be free to litigate any differences concerning interpretation of the whole 1977 agreement, including the modification agreed to in the settlement. That issue is not before this Court. The sole issue is whether an enforceable settlement was reached." (Emphasis added.)

During the evidentiary hearing on the Dolphins' Motion, Mayor Ferre repeatedly admitted, as noted above, that he never discussed amending any "Act of God" or "force majeure" provision with the Miami Dolphins' attorney. (In addition, the City's attorney admitted during oral argument before the Third District, in response to a question from Judge Baskin, that the City of Miami never even discussed any modification of the "force majeure" clause until after the City Commission meeting and after the drafting and execution of the controlling Resolution.)

At the hearing on the motion to enforce the settlement, the City stipulated to the enforceability of oral agreements of settlement. (TR-4.) The City also did not take exception to the principle that settlement agreements are highly favored by the law and should be enforced.

Dorson v. Dorson, 393 So.2d 632 (Fla. 4th DCA 1981).

The controlling theory of law which is applicable to the interpretation of this settlement agreement was best expressed by this Court in *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957):

> . . . in determining whether there has been a mutual consent to a contract, the courts will not explore the "subjective intent" of the parties but only their "objective intent"; that is, the courts will undertake only to determine what a reasonable man would believe from the outward manifestations of the consent of the parties as evidenced by the language of the written document. (Emphasis added.)

Here, the Resolution speaks for itself. This Resolution, drafted by the City attorneys, properly embodied the full and complete terms of the settlement. The Trial Court heard lengthy arguments and testimony regarding the settlement, and had access to all of the documents contained in Petitioners' appendix at the August 5, 1983 hearing, including the transcript of the proceedings at the City Commission meetings. Judge Henderson correctly concluded, based upon substantial competent evidence:

> The documents prepared and forwarded to Defendants' counsel by Plaintiff's counsel for purposes of consummation of the settlement. . . were and are in full conformity with the expressed intent of the parties to the settlement, save and except for the single change proposed by the City of Miami for inclusion in the Supplemental Agreement (Defendants' exhibit G, middle of Page Number 3) to paragraph 28 of the original June 8, 1977 Agreement, the so-called "Act of

> God/Public Enemy" clause. (Emphasis added.) (A-13.)

The Trial Court also stated (A-14):

> The terms of that original contract in regards to Paragraph 28 were plainly not discussed, and in the event that any other of the terms of the main contract were to be changed beyond those discussed as part of the settlement, the City of Miami should have brought them up and discussed them at the time of the settlement, which it did not do. (Emphasis added.)

Plainly, when parties agree to settle a dispute by agreeing to modify three paragraphs of a 37 paragraph agreement (such as the June 8, 1977 Agreement), the silence concerning any question of changing a fourth paragraph indicates a meeting of the minds calling for no change to the unmentioned fourth paragraph.

The Miami Dolphins, respectfully request this Court to adopt Judge Jorgenson's determination (A-9-10), (consistent with the Trial Court's findings based on substantial competent evidence) that "considering the settlement reached by the Dolphins and the City (as reflected in the transcript of the City Commission Meeting and the original settlement documents) not in a vacuum, but as part of the whole 1977 Agreement between the parties, the inescapable conclusion is that the parties did reach an agreement sufficiently specific as to be capable of implementation."

II. THE DISTRICT COURT'S ERRONEOUS APPLICATION OF A SUBJECTIVE, RATHER THAN AN OBJECTIVE TEST TO THE INTERPRETATION OF SETTLEMENT DOCUMENTS CONFLICTS WITH THE SUPREME COURT'S RECOGNITION THAT THE PROPER AND EXPEDIENT ADMINISTRATION OF JUSTICE IS ASSISTED WHEN PARTIES ARE ABLE TO ENTER INTO BINDING AND ENFORCEABLE SETTLEMENT AGREEMENTS THAT CANNOT BE UNILATERALLY AND CASUALLY SET ASIDE.

The transcript of the Commission meeting, the Resolution, the letter stating the City accepted the settlement, and the settlement documents prepared by the City demonstrate a complete "meeting of the minds." The City Attorney's "afterthought" as to the settlement terms has no bearing on the question of a "meeting of the minds." The "afterthought" was simply an attempted change of mind.

Settlement agreements are to be interpreted by the same principles governing the interpretation of contracts. *Dorson v. Dorson*, 393 So.2d 632 633 (Fla. 4th DCA 1981). By attempting to subjectively psychoanalyze the "understanding" and "beliefs" of the parties (words from the opinion of the Third District) -- rather than looking at the objectively ascertainable statements and settlement documents drafted by the party who now objects to the settlement and the transcribed minutes of the settlement hearing held at a public commission meeting -- the Third District applied an incorrect "subjective test" to contractual interpretation

that directly and expressly conflicts with opinions of this Court and opinions of other District Courts of Appeal.

Blackhawk Heating & Plumbing v. Data Lease Financial Corp., 302 So.2d 404, 407-409 (Fla. 1974) (emphasis added), comprehensively states a recurrent theme of this Court:

> 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.
>
> * * *
>
> Even though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them. A subsequent difference as to the construction of the contract does not affect the validity of the contract or indicate the minds of the parties did not meet with respect thereto.
>
> * * *
>
> If the parties have concluded a transaction in which it appears they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.
>
> * * *
>
> The law does not favor, but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.

According to the majority (A-2), the City "understood" the parties' settlement to be that moneys would be due and owing . . . "even if the Orange Bowl became unfit for play" as the result of any of the reasons enumerated under the "force majeure" clause of paragraph 28 of the 1977 Orange Bowl Agreement. The sole document that reflects the City of Miami's alleged "understanding" appears in the Supplemental Agreement, again, drafted as the very last document and by the City Attorney. The Supplemental Agreement which is in dispute was prepared by the City Attorney and delivered to counsel for the Dolphins after all of the other settlement documents had been delivered and reviewed. Paragraph 4 of the Supplemental Agreement contained, for the first time, and at the last moment, a provision which had not been addressed at all in the comprehensive language of the approved City Commission Resolution or even discussed at all in settlement negotiations (between Shevin and Ferre) or at the City Commission meeting of July 18, 1983.

At the time that the City of Miami approved the Resolution, the settlement structure was complete, the "meeting of the minds" of the parties was clearly and comprehensively recorded, and it was only necessary to draft the actual settlement documents in conformance with the terms of the Resolution (A-39-44). At the end of the City Commission meeting, through the City's Resolution No. 83-628

(A-39-44), all parties looked at the settlement as a complete and sufficient structure. By unilaterally attempting to add a provision which admittedly had never been discussed by any of the parties, the City, through its attorney (who did not personally approve of the settlement and who argued against the settlement before the Trial Court and before the City Commission) (A-36 and all through Transcript argument), attempted to defeat the settlement.

Similar factual situations have been reviewed in contractual disputes by this Court and by other jurisdictions, and it has been uniformly held that where the "external signs" of the written agreements speak for themselves and manifest that the parties have agreed on essential terms, there is a "meeting of the minds," and any unwritten, secret, or unilateral intention is not admissible, relevant or proper. E.g., *Gendzier v. Bielecki*, 97 So.2d 604, 608-609 (Fla. 1957) (the document "should be permitted to 'speak for itself' and the evidence as to the secret unilateral intention of any of the parties would be inadmissible").13/ The majority opinion directly and

13/ Accord, *Blackhawk Heating & Plumbing v. Data Lease Financial Corp.*, 302 So.2d 404 (Fla. 1974); *Hanover Realty Corp. v. Codomo*, 95 So.2d 420 (Fla. 1957); *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So.2d 671 (Fla. 1944); *McDonald v. Allstate Insurance Company*, 408 So.2d 580 (Fla. 4th DCA 1982). See also, *City of Homestead v. Raney Construction, Inc.*, 357 So.2d 749, 752 (Fla. 3d DCA 1978); *Torcise v. Perez*, 319 So.2d 41 (Fla. 3d DCA 1975); *Bal Harbour Shops, Inc. v. Greenleaf & Crosby Co.*, 274 So.2d 13, 15 (Fla. 3d DCA 1973), cited by Judge Jorgenson for the proposition that
(Footnote Cont'd)

expressly conflicts with these decisions by improperly attempting to analyze the subjective, "versions", "understandings" and "beliefs", rather than the objective statements.

As Judge Jorgenson recognized, municipal corporations are bound to recognize their contracts. *City of Miami v. Bus Benches Co.*, 174 So.2d 49, 52 (Fla. 3d DCA 1965); *accord Williams v. City of Jacksonville*, 118 Fla. 671, 160 So. 15 (1935). In *City of Homestead v. Raney Construction, Inc.*, 357 So.2d 749, 752 (Fla. 3d DCA 1978), a contract was signed by the mayor, the city clerk attested the signature and the city attorney approved the contract as to form. Judge Jorgenson stated (A-9):

> "The court in *Raney* held that once a contract was accepted by a motion of the Homestead City Council and notification of the acceptance was sent to the other party to the contract, a binding contract came into being which the city council could not subsequently unilaterally rescind. We did not allow the Homestead City Council to take such a reprehensible action then and should not allow the City of Miami to do so now.
>
> The court in *Raney*, quoting the Florida Supreme Court, *State ex rel. Wadkins v. Owens*, 62 So.2d 403, 404 (Fla. 1953), said,
>
> > Fair dealing is required by all parties and public officials should set the example. There is no question raised in this proceeding of any concealment,

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the majority opinion expressly conflicted with case law from the Third District itself governing contractual interpretation.

> fraud, collusion or any other misconduct on the part of the [citizen] and the [government] should have been required to comply with the plain and unmistakable provisions of the law.
>
> *Raney* at 754. The City of Miami should be held to this same standard."

Both the City of Miami and the Third District majority relied upon *Gaines v. Nortrust Realty Management, Inc.*, 422 So.2d 1037, 1039 (Fla. 3d DCA), in concluding that "the parties did not have a meeting of the minds as to an essential element of their proposed settlement." In *Gaines*, the parties had an off-the-record discussion in open court agreeing to the entry of a final judgment which would resolve the lawsuit. The trial court recalled nothing of the settlement discussion. There was, unlike this case, absolutely no record in *Gaines* as to the documents to be executed. In sharp contrast, the terms of the settlement agreement between the Miami Dolphins and the City of Miami, were definite, were complete, and were recorded at length in the transcript of the City Commission meeting and in the Resolution prepared by the City attorneys.[14/]

14/ To the extent *Gaines* relied upon words such as what the negotiating parties "believed", *Gaines* appears to be improperly applying the "subjective" test which is inconsistent with *Blackhawk, Gendzier* and similar cases applying the objective test. However, because *Gaines* is so factually inapposite to A case with a clear record, such as this case, it is irrelevant.

In applying the incorrect standard of contractual interpretation to the settlement agreement, the majority opinion has not been faithful to, and is in direct and express conflict with, the often stated cardinal "rules of play": "Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Dorson v. Dorson*, 393 So.2d 632 (Fla. 4th DCA 1981) (emphasis added). The clear message here of the majority opinion is that anyone who wants to get out of a settlement, can simply invent a new "term of settlement," long after the actual "meeting of the minds" of the parties, and insist on it unilaterally and purposefully in order to "kill" the settlement. This Honorable Court cannot allow this to happen, without jeopardizing the settlement process that is so vital to the ability of the courts to handle properly the ever-expanding crush of litigation. Petitioners respectfully request this Court to reverse the Third District and to reinstate the trial court's order enforcing the settlement as executed by the Miami Dolphins. Time is of the essence, in order for the Miami Dolphins to fix forthwith their 1985 (and 1986) game schedule.

III. THE DISTRICT COURT IMPROPERLY REWEIGHED THE EVIDENCE BEFORE THE TRIAL COURT.

In *Blackhawk*, 302 So.2d at 407-409, and its predecessor cases and its progeny, this Court has repeatedly required that an objective test (not a subjective test) be applied to determine whether the parties have entered into a valid contract. Even if the "intentions" of the parties are analyzed, however, the Trial Court's conclusions based, as here, upon substantial competent evidence must be upheld unless such findings are based upon inherently incredible or improbable evidence.

When the Dolphins moved to enforce the settlement, provided that the unilateral and unauthorized changes to Paragraph 28 were stricken, the Trial Court had before it the Transcript of the Commission Meeting; the Resolution, drafted by the City; the Stipulation of Settlement and Order of Dismissal, drafted by the City; the Release of Claims, drafted by the City; the Supplemental Agreement, drafted by the City; the letters sent between the City Attorney's office and counsel for Dolphins confirming the settlement; a letter to the Judge advising the Judge that the parties had settled and cancelling the specially set expedited trial and additional live testimony taken at the hearing; all of which corroborated that the proposed modification to one of the force majeure clauses had never been discussed and was not part of the Settlement.

The majority opinion (A-3) reversed "the Trial Court's judgment purporting to enforce the Dolphins' agreement." As Judge Jorgenson pointed out, "there is no Dolphins version. The only versions are the agreed-upon settlement and the City's unilaterally altered version of the settlement." However, if there was a "Dolphins' version" of the settlement, the task of weighing the evidence, as to whether the "Dolphins' version" or the "City of Miami's version" of the settlement was correct is delegated solely to the Trial Court Judge. The majority opinion did not reject (as it obviously could not) the Trial Court's findings as based on "inherently incredible or improbable evidence or testimony." The majority simply reweighed the evidence and came to a different conclusion. The decision below therefore:

> conflicts with the myriad cases setting forth the rule that an appellate court cannot substitute its judgment by a reevaluation of the evidence. *Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972).

This Honorable Court is urged, for this reason as well, to reverse the Third District and to reinstate the decision of the finder of fact, the Trial Court Judge.

CONCLUSION

The majority decision of the Third District Court of Appeal will discourage parties from carrying settlement agreements to fruition and further burden the proper

administration of justice. Settlements are strongly encouraged, because without them the system will fall of its' own weight, particularly in today's litigious society. That is why this case is extremely significant from a "public policy" standpoint. When parties have a "meeting of the minds," as here, and when a full and complete settlement is reached, as here, then one of the parties (here, the City of Miami) cannot be allowed to renege on the Settlement by their attorney unilaterally insisting on a new and obnoxious provision, that was never part of the Settlement and then insisting wrongfully that just because the other party properly objects, that there is no "meeting of the minds." Here, the Miami Dolphins (a) have given up their right to an interlocutory appeal from a summary judgment on liability, (b) have given up their right to an expedited jury trial, (c) promised to play additional games in the Orange Bowl (which will generate at least $100,000 gross income per game for the City), and (d) in fact took other steps (significantly changing insurance coverages), all in reliance on the settlement, (improperly "undone" by the Third District). No one should be encouraged to "kill" a carefully negotiated settlement by interposing an objectionable and unilateral provision into settlement documents long after the settlement was reached and when there was in fact a "meeting of the minds."

The Third District's decision, if not reversed (as it should be) sets a dangerous precedent, indeed, with the potential to infringe unwisely upon the rights of parties to free themselves of the burdens of litigation and help make the courts' scarce resources available to others.

Respectfully submitted,

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03-104-158/6*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered on January 28, 1985 to Lucia A. Dougherty, City Attorney of the City of Miami, and Gisela Cardonne, Assistant City Attorney, at 1101 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131.

ROBERT L. SHEVIN

03-104-158/6*