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IN THE
SUPREME COURT OF FLORIDA

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CASE NO. 66,039

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

Petitioners,

v.

CITY OF MIAMI,

Respondent.

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

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STATEMENT OF THE CASE AND OF THE FACTS

The Miami Dolphins[1/] have presented a Statement of the Case and the Facts in their initial Brief. The City of Miami has written its own incomplete Statement of the Facts and the Case. The Miami Dolphins respectfully disagree or wish to elaborate upon the following misstatements or incomplete statements contained in the City's version of the facts:

1. On page 2 of the City's Brief, the City implies that the August 5, 1983 hearing was the Summary Judgment Hearing and that settlement negotiations occurred thereafter. On August 5, 1983, the Circuit Court heard and granted the Miami Dolphins' Motion to Enforce the Settlement, which had previously been reached between the City and the Dolphins on July 18, 1983, when the City of Miami Commission voted, by majority vote, to approve the Resolution "instructing" the City to enter into the settlement. (A-28-44.) Counsel for both parties sent letters on July 19, 1983 (A-21-23) confirming the settlement and letters canceling the specially set trial date of August 1, 1983. Because the case was settled, the Miami Dolphins did not file their Notice of Interlocutory Appeal from the lower court's

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1/ Plaintiff/Respondents 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."

granting of the partial Summary Judgment on liability only. (The last date for filing the appeal was July 21, 1983). The City sent the Miami Dolphins all settlement documents except the Supplemental Agreement, and the Miami Dolphins executed same. On August 4, 1983 (3 days after the cancelled trial date), the City sent the Supplemental Agreement. The Miami Dolphins excised the unauthorized provision -- paragraph 28 -- and executed the remainder of the Supplemental Agreement. (A-53-58.) On August 5, 1983, the Trial Court heard and granted the Miami Dolphins' Motion to Enforce the Settlement. (A-91-190.)

2. On Page 3 of the City's Statement of the Facts and of the Case, the City implies that paragraph 3 of the Stipulation and Order of Dismissal authorized the change to paragraph 28 of the 1977 Agreement between the City and the Dolphins. Paragraph 3 of the Stipulation provided that the Miami Dolphins would enter into a Supplemental Agreement wherein paragraphs 20 and 21 of the June 8, 1977, Agreement (limiting liability for structural deficiencies, negligent maintenance, and willful or negligent actions of the City of Miami employees) would be deleted; the Miami Dolphins would be required to increase their liability insurance; and the Miami Dolphins would agree to play a tenth home football game in the 1985 and 1986 football seasons, or "if for any reason" that tenth home game was not played, to pay the City Thirty Thousand Dollars ($30,000) for each tenth game not

played without set-off, credit or expenses. Paragraph 3 of the Stipulation did not refer to paragraph 28 of the 1977 agreement or to any "force majeure" or "act of God" clauses.

ARGUMENT

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 City of Miami's 13-page Brief is not an "answer brief" in any real sense, as it contains virtually no response to the arguments presented in the initial Brief of the Miami Dolphins. Furthermore, the City does not acknowledge or even refer to the minority opinion of the Third District, nor does the City attempt to answer, distinguish or disagree with any of the logic or reasoning expressed in Judge Jorgenson's stinging dissenting opinion. The City of Miami's argument is predicated on a false premise: That the heart of the settlement agreement centered upon an interpretation of the "force majeure" clause.

The City argues that there was no settlement because the parties did not agree as to whether the Dolphins would have to pay for the additional tenth game during the 1985 and 1986 football seasons, if the stadium was destroyed

as the result of an act of God or war. Contrary to the City's position, the force majeure clause was not a major consideration, not a minor consideration, not a consideration at all, during the lengthy settlement negotiations. Just because something is not part of a "settlement", does not mean there is no settlement.

The parties did not spend their time debating the infinitesimal possibility that the stadium would be destroyed as the result of an act of God or war. That is not what the parties were bargaining for. What the City did bargain for, and received, was that the Dolphins' football team would play an extra 10th home game in 1985 and in 1986, in the Orange Bowl Stadium, and if the tenth home game was not played for any reason, the Dolphins would pay the City of Miami Thirty Thousand and No/100 Dollars ($30,000.00) for each tenth game not played.2/ The "if for any reason"

2/ The excerpt from the transcript of the City Commission meeting that appears on page 7 of the City's Brief on the Merits was part of a debate as to the amount that would be reimbursed to the City if the Dolphins decided not to play the extra tenth game (A-29-32), and was not, as the City suggests, a declaration of the Mayor's understanding that the "act of God" clause would have to be amended. The Mayor admitted he never discussed the force majeure clause at the Trial Court hearing on the Dolphins' Motion to Enforce the Settlement. (A-153-154, 158.) The issues being discussed were: Should it be the $15,000 profit per game the City now receives (after set-offs of police and security costs, ticket sellers, ticket takers, clean-up crews, etc.) or should it be the $30,000 per game Mayor Ferre was insisting on or should it be the $100,000 per game Vice-Mayor Plummer was suggesting. (Vice-Mayor Plummer voted against the settlement). (A-31-32, 34-35.)

language was included in all the settlement documents drafted by the City, and the Dolphins executed documents which included the "if for any reason" language. The City also bargained for, and received, the Dolphins' agreement to increase the public liability insurance coverage from Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00) per person to Five Hundred Thousand and No/100 Dollars ($500,000.00) per person and from One Million and No/100 Dollars ($1,000,000.00) per occurrence to Two Million and No/100 Dollars ($2,000,000.00) per occurrence. The City also bargained for, and received, an agreement deleting the provisions of the original June 8, 1977 Agreement between the Dolphins and the City, which relieved the Dolphins from responsibility for liability to third persons, arising from structural deficiencies and improper maintenance of the Orange Bowl Stadium, or negligent actions of the City. These major settlement concessions were accurately recorded in the transcript of the July 18, 1983 City Commission meeting, and in the Resolution, prepared and approved by the City of Miami attorneys, and by the City Commission, and in the settlement documents, which were also prepared by the City of Miami attorneys and executed by the Dolphins. The Dolphins have consistently challenged the City of Miami to pinpoint one iota of objective evidence that the "force majeure" term was ever considered or negotiated as part of the settlement, by the parties. No discussion of the force majeure clause appears in the record.

If a change to paragraph 28 was absolutely necessary to effect a settlement, as the City argues on Page 12 of its Brief, then why wasn't it also absolutely necessary to amend paragraph 29 of the 1977 Agreement, which was also a "force majeure" clause? The term "guaranty" does not imply or require the deletion of the force majeure clauses. In fact, the preamble to the original June 8, 1977 agreement for the use of the Orange Bowl Stadium, between the Dolphins and the City, stated that it would not be feasible for the City to enter into the Agreement, unless certain "guarantees" were made concerning the payment of the seat tax (see whereas clause, A-60), yet that 1977 agreement contained two force majeure clauses in paragraphs 28 and 29, neither of which were inconsistent with the "guarantees". (A-75-76.) It should also be noted that on page 12 of its Brief, the City admits that an amendment to paragraph 28 was never "phrased or vocalized by anyone"!

The City's obvious discomfort with the record that they helped to create, is most apparent when they attempt to psychoanalyze the Dolphins' "beliefs." On page 6 of the City of Miami's Brief, the City states "petitioner's believed that they do not owe the rental if the game cannot be played as a result of an act of God or war." Once again, 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." (Emphasis added.)

The Miami Dolphins are not insisting on an amendment to paragraph 28 of the June 8, 1977 Agreement to spell out that a possible "future player's strike" would be excused under the "force majeure" clause. The Dolphins are not even insisting that the "force majeure" clause would excuse them from paying the $30,000.00 or the $60,000.00 in the unlikely event the Orange Bowl is destroyed due to an Act of God or war. That, if necessary, can be settled by another court on another day. The Dolphins are not looking for a "victory" on paragraph 28. The Dolphins simply want to leave paragraph 28 as is and neutral, since amending paragraph 28 was never part of the settlement.

This Court stated in *Blackhawk Heating & Plumbing v. Data Lease Financial Corp.*, 302 So.2d 404, 407-409 (Fla. 1974) (emphasis added):

> 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. (Emphasis added.)
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> * * *
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> 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 City of Miami has mischaracterized the context and holding of *Blackhawk*. In *Blackhawk*, the parties entered into an option agreement which included the following terms:

> 6(b) "Any cash flow benefit, including any tax benefits, derived by Data as a consequence of its holding, hypothecation, assignment, pledge, etc., of MNB stock shall inure proportionately to Blackhawk in calculation of any payments due between the parties." (Emphasis added.)

Blackhawk, by lending its credit to *Data Lease*, rescued *Data Lease* from financial problems. However, when *Blackhawk* wanted to exercise the option, *Data Lease* refused. *Blackhawk* brought the action for specific performance, and *Data Lease* defended on the ground that the term "cash flow benefit" was so vague and indefinite that the agreement was void and unenforceable. This Court rejected the "indefiniteness" argument. Needless to say, the "cash flow benefit" terminology in the option agreement was very critical to the *Blackhawk-Data Lease* contract. If the "cash flow benefit" term in *Blackhawk* was so indefinite as to be incapable of interpretation, the parties could not have fulfilled the option contract at all. In the instant case, however, it is extremely improbable that the "if for any reason" clause will require any kind of interpretation (judicial or otherwise) because it is extremely improbable that an act of God or war will prevent the Dolphins from playing the tenth game in the Orange Bowl Stadium in the 1985 and 1986 seasons.

The "if for any reason" language appears on several different occasions in the documents that the Dolphins executed. Once again, as Judge Jorgenson appropriately stated, "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 the 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.)

It is incomprehensible that the City of Miami, on pages 8, 10 and 12 of its Brief, is arguing that there was no settlement, when the City of Miami Commission approved a Resolution "instructing the City Attorney to enter into a Stipulation of Settlement and Order of Dismissal in the Circuit Court case . . . based upon the terms and conditions presented to the City Commission." The City is simply engaging in a semantic ploy when it states in its Brief, "the petitioner's presented a settlement proposal to the City Commission (R-601-604), which passed a resolution authorizing the manager and city attorney to execute settlement papers (A-39-44)." The City Manager and City Attorney were not "authorized" to execute settlement papers, they were instructed to do so. This Resolution was prepared by

the Assistant City Attorney, and approved by Jose Garcia-Pedrosa, City Attorney, as to form and correctness. Ms. Julia J. Roberts, Assistant City Attorney, confirmed by letter to the undersigned, that the City Commission accepted the settlement proposal, and offered to draft the necessary settlement documents and releases. Before confirming the settlement, both lawyers prepared letters to Judge Henderson, the Trial Court Judge, advising him of the settlement and canceling the specially set trial date of August 1, 1983. When the Stipulation of Settlement, Order of Dismissal, and Releases were sent by the City to the undersigned law offices, the Miami Dolphins, and the undersigned counsel, executed those documents.

The Trial Court, in determining that there was a settlement did not "impose his own logic" or "conjecture" anything (see p. 5-6 of the City's Brief). The Trial Court simply drew a correct conclusion based on objective, competent, substantial evidence. The Trial Court, as finder of fact, acted precisely within the parameters of its judicial function as trier of fact.

In the majority opinion, the Third District Court of Appeal acted outside its parameters by reweighing the evidence and drawing a different conclusion based upon a psychoanalysis of the thought functions of the parties. Since the Trial Court, in the instant case, had a complete record consisting of documentary and testamentary evidence,

the District Court of Appeal was required to accept the Trial Court's findings of fact unless they were based on "inherently incredible or improbable evidence or testimony."

The City continuously cites *Gaines v. Nortrust Realty Management, Inc.*, 422 So.2d 1037 (Fla. 3d DCA 1982) as the governing authority in this case.[3/] Because the record in the instant case is extremely well documented, this case is entirely distinguishable from *Gaines*. However, to the extent that *Gaines* is at odds with the principles of contract resolution expressed by this Court in *Blackhawk*, 302 So.2d at 409, that "the law does not favor, but leans against the destruction of contracts because of uncertainty," it is not "good law." Surely, the instant decision by the Third District Court of Appeal should be reversed.

The Miami Dolphins particularly take umbrage to the statement by the City of Miami on pages 10 and 11 of its Brief, that "the parties never completed the Settlement Agreement, itself, much less accepted any of its benefits." Because of the settlement, the Dolphins waived the benefits of a specially set early trial date and also waived

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3/ It is notable that Judge Jorgenson was on the judicial panel in the Gaines case, and he clearly distinguished the two cases stating: "Unlike *Gaines v. Nortrust Realty Management, Inc.*, 422 So.2d 1037 (Fla. 3d DCA 1982), where all settlement discussions were held off the record, the parties to the instant settlement agreement ratified it during a public meeting of the City of Miami Commission and, in addition, exchanged letters of acceptance."

their right to an Interlocutory Appeal from the June 21, 1983 partial Summary Judgment on liability, by not filing the Notice of Appeal by July 21, 1983.[4/] Furthermore, after the commencement of these appellate proceedings, the City began to forward letters demanding that the Dolphins defend third party claims seeking compensation for injuries resulting from "improper maintenance and/or structural deficiencies" of the Orange Bowl.

The Miami Dolphins attempted to supplement the appellate record with evidence of these claims but the Third District Court of Appeal denied the Motion to Supplement the Record on Appeal or to Relinquish Jurisdiction filed by the Dolphins. (R-756-769.)

According to the original terms of the 1977 Agreement between the Miami Dolphins and the City of Miami, the City was responsible for third party claims resulting from "improper maintenance and structural deficiencies" of the Orange Bowl. The settlement documents deleted these exemptions, and the Dolphins have actually been defending these claims, involving "improper maintenance and structural deficiencies," since the date of the Settlement. Also,

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4/ The settlement negotiations culminated on July 18, 1983. On July 19, 1983 counsel sent confirming letters and letters canceling the specially set trial date of August 1, 1983. The City did not send the settlement documents to the Dolphins' counsel until August 3 and August 4, 1983, well after the last date for filing the Interlocutory Appeal and well after the specially set trial date.

since the date of the Settlement, the City has received the benefit of increased public liability insurance coverage, as they bargained for.[5/] Factually, for all of the above reasons, the City of Miami has clearly accepted substantial benefits of the settlement agreement, while simultaneously attacking its viability. The City should be estopped from asserting that there was no settlement. *Kisz v. Massry*, 426 So.2d 1009 (Fla. 2d DCA 1983).

There was and is a settlement in all respects in this case. 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 in fact there was "a complete meeting of the minds." The Third District Court of Appeal's decision should be reversed and the Trial Court's Order and Final Judgment Enforcing the Settlement should be reinstated. To do otherwise, would be to encourage others to casually and unilaterally undo binding and enforceable settlement agreements.

5/ In the past few days, the Dolphins (in keeping with their firm belief that the settlement is both complete and enforceable) have been required to firm up their 1985 schedule to include an additional 10th game in 1985, so that they can begin their 1985 season ticket sales, in an orderly fashion, and avoid a breach of the settlement agreement.

CONCLUSION

For public policy reasons, settlement agreements should be encouraged, not discouraged. This case is extremely significant because the Third District Court of Appeal decision encourages parties to "kill" carefully negotiated settlements by interposing an objectionable and unilateral provision into settlement documents long after a settlement is reached and when there was in fact a "meeting of the minds." The Third District Court's decision sets a dangerous precedent and infringes unwisely upon the rights of parties to free themselves of the burdens of litigation, thereby allowing our Courts' scarce resources to be made available to others. It is respectfully requested that the Third District Court's decision be reversed.

Respectfully submitted,

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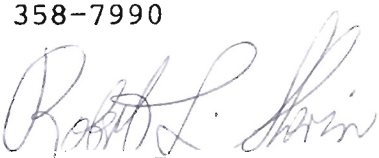
By: 
ROBERT L. SHEVIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on February 21, 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.

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