SUPREME COURT OF FLORIDA

CASE NO. 69,202

SOUTHERN BELL TELEPHONE & TELEGRAPH CO.,

Appellant,

v.

AFM CORPORATION,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF CASE AND FACTS

On this appeal from a jury verdict in favor of the plaintiff/appellee, all of the testimony and all proper inferences therefrom must be construed most favorably to the plaintiff/appellee, AFM. Because the Eleventh Circuit's statement of the facts is somewhat abbreviated and because that court has invited this court to consider this case entoto, the undersigned, in light of the proper standard of review and at the risk of repetition, will restate the facts as originally presented to the Eleventh Circuit. Any disagreement with the facts as contained in the Eleventh Circuit's opinion will be duly noted with an appropriate cite to the record on appeal.

Appellee, AFM Corp., was a Florida corporation which specialized in the sale and servicing of photocopy equipment in the vicinity of Dade and Broward Counties and southern Florida. (2SR 14) The highly competitive retail photocopy business is unique to the extent that the retailer almost always brings the product to the customer, (2SR 6) where the particular machine is demonstrated by the salesman, and in some cases, left overnight. Because of the unique character of the business, great reliance is placed on Yellow Page advertising. In the words of Jerry Applebaum, AFM's Vice President, "the Yellow Pages is our lifeline." (2SR 6)

AFM Corp. originally purchased Yellow Page advertising following periodic solicitation by Southern Bell salesmen. (2SR 10)

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The salesmen on several occasions advised AFM representatives that as much as 80% to 90% of the people purchasing photocopy equipment do so through the Yellow Pages. (2SR 11) Be that as it may, the Yellow Page salesmen further advised the company to advertise under as many catagories as possible. (2SR 11) For example, ads were placed under "copy machines", "duplicating machines" and "office equipment." (2SR 11-12) As a final incentive, the salesmen spiced their sales pitch with various studies regarding the positive and advantageous effect of Yellow Page advertising. (2SR 12) The representatives of AFM relied on the advice of the Southern Bell salesmen and purchased $500 per month of Yellow Page advertising for Dade County alone. It is this county where the company did the majority of its business. (2SR 13)

The company, whose headquarters and offices were originally located in Dade County, eventually moved to Hallandale, Florida, and, on July 28, 1980 to a facility in Hollywood, Florida. (2SR 14) Prior to the Hollywood move, AFM contacted Southern Bell in order to arrange for telephone service. (2SR 14) 14) Since the Dade County Yellow Pages, which could not be changed once published, advertised the Hallandale number of 944-0981, AFM for obvious reasons was desirous of retaining this number despite the change in location to Hollywood. Southern Bell, however, advised the company that the short (approximately 5-6 miles) change of address to Hollywood necessitated extra milage costs if the

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944-0981 number was to be retained. (2SR 17) The extra costs were prohibitive and AFM sought alternatives. (2SR 17) Southern Bell advised AFM at or about the time they purchased their advertising for 1980, that they would have a "referral of calls" for a minimum of one year until the phone number was out of the Yellow Pages. (2SR 17) The referral of call system was apparently a simple procedure whereby a customer who called the old Hallandale/Dade County number would be referred by a recording to the new Hollywood number. (2SR 18) The reference of calls service was to be provided by Southern Bell free of charge. (2SR 61) Despite AFM's specific request that the old number be disconnected and the referral system be operational as of July 28, 1980, due to error the system was not operational until July 30, 1980. (R.5-96) After this initial failure in the system, AFM filed a complaint with the Public Service Commission and an investigation was conducted. (App.1) Blind copies of the complaint and the results of the investigation were forwarded to a Southern Bell Vice President. (R5 96-97)

The referral system remained operational until November 21, 1980. (2SR 67) On that day, or shortly thereafter, an AFM customer in need of a repairman attempted to reach the company from a Dade County address. The customer was unable to reach AFM through the Dade number. After several attempts, contact was established through the Broward number and as a result AFM learned that the referral system at its Dade number was not operational. (R.6-76;129-130) AFM contacted Southern Bell and

they were subsequently informed that the service had been disconnected. (R.6-76) The system was restored on December 8 of the same year. (R.5-103) The interruption in the referral system occurred when Southern Bell routinely assigned AFM's number to a new customer. At that point, the operator was unable to intercept the calls and there could be no referral. Again, AFM complained to the PSC and a second investigation was conducted. (App.2)

Despite numerous assurances to the contrary, (2 SR 21,24) the system again failed after another four months of operation on April 3, 1981 when Southern Bell inexplicably again assigned AFM's Dade County number to a new customer. (R.5-108) The system remained out of operation and AFM received no Dade County calls through this referral system up to and including July 2, 1981. Once again, it was not Southern Bell who recognized the problem and initiated the attempted process of reinstatement, rather AFM learned of the problem after a customer attempted to reach them. (R.25) Again AFM informed Southern Bell and further registered a third complaint with the Public Service Commission. (App.3-4) (R.24-25) A referral system was reinstated on July 3, 1981, but it was quite different from that originally agreed to.[1] Because the individual who had been

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[1]The statement in the 11th Circuit's opinion that "This error was not discovered until June, 1981. As soon as Southern Bell was notified of the mistake, the reference of calls was established" (p.4945) is simply incorrect. There was no evidence Southern Bell ever restored the original service for the old 944 number.

reassigned the number by Southern Bell refused to give it up, Southern Bell employed a special operator who would intercept all calls to the 944-0981 number rather than using a tape recording. The operator would question the caller as to who he was attempting to reach and then issue that specific number. (2SR 25-26) This system was unsatisfactory in the minds of AFM's officers for the simple reason that it somewhat alienated potential customers who had a plethora of competitors to choose from. (2SR 26)

Around the same period of time, specifically July 23, 1981, the principles of AFM made a business decision, on a name identification basis, to reincorporate and conduct operations under the name of AFM BUSINESS MACHINES, INC. AFM Corp. was ultimately dissolved by the State of Florida on December 31, 1981. The principles essentially conducted business from the date of the second incorporation, July 23, 1981, under the name of the successor corporation. AFM Corp., plaintiff herein, ultimately filed its final income tax return in September, 1981. (2SR 40-45) Notwithstanding the name change, the day-to-day business of the corporations remained essentially identical before and after July 23, 1981. (R.6 74-75)

In September, 1981, the 1981-1982 edition of the Yellow Pages was issued. Despite renewed guarantees from Southern Bell salesmen that the problem with the reference of calls would be resolved because the new Hollywood-Dade number

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would be reflected in the new edition, the old 944 exchange number regained new life via erroneous Yellow Page ads in the name of AFM Corp. (2SR 27-28) Suit was then filed on October 15, 1981. AFM's principles could not obtain a satisfactory explanation as to why the phone problems were not resolved. (2SR 28) Incredibly, even after the filing of the lawsuit and the numerous communications between the parties, erroneous Yellow Page ads were also printed in the 1982-1983 directories, 1983-1984 directories and the 1984-1985 directories. In other words, four years after suit was filed, the erroneous 944 number was still listed in the Dade Yellow Pages under the name AFM Corp. (2SR 28-36; R.6 26-37) As late as two weeks before trial, March 6, 1985, an individual attempting to do business with AFM through the Yellow Page reference would have been directed to the 944 number and, upon calling that number, would receive not the referral of calls originally promised, but the simple message that the number was no longer in use. (2SR 38)

Testimony at trial indicated not only that Southern Bell had no procedure designed to prevent employees from reassigning business clients[2] Yellow Page numbers which were

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[2]Southern Bell's evidence, produced a scant two weeks before trial and after four years of litigation that there was a procedure, is irrelevant in light of this contradictory evidence produced by Southern Bell some two years earlier and read into the record at trial because as stated previously the evidence is to be viewed in the light most favorable to AFM.

operating via the reference of calls system, but additionally that there was no procedure of notification to these clients prior to or following any termination.[3] (R.6 62-63) Testimony further indicated that the lack of set procedures was in accordance with the "tariff" or rules or regulations filed with the state. (R.6-62) The witness, Sue Gibbs, who was produced by Southern Bell as the person with "the most knowledge concerning why the reference of calls system was terminated", indicated that the old number from which calls were referred would simply be placed in a pool to be eventually reassigned according to how fast the demand for the new number was. Because the area in which AFM moved from (Hallandale) was a high-growth area, the old 944 number was predictably retrieved and reassigned relatively quickly on not one but two occasions. (R.6-60) In essence, in the words of this witness and despite Southern Bell's representations to AFM to the contrary, the length of time the "reference of calls" was in service was dependent not on the needs or priorities of the customers, but the "needs of the telephone number." (R.6-59)

The aforementioned testimony was particularly surprising in light of Southern Bell's admission at trial through

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[3]The 11th Circuit's assertion that "AFM did not seek damages for the first disconnection" is not entirely accurate. There was simply not enough data to quantify the amount of lost profits for such a short period of time and thus the question of lost profits for the initial breakdown was not submitted to the jury.

their employees that there is a high potential for harm should Yellow Page numbers be reassigned without notification and that the company should have procedures to ensure that it does not happen on repeated occasions. (1 SR 2 29-30) This testimony by the Southern Bell representative was confirmed by the plaintiff's two principles who stated that in their opinion termination of the referral system without notice had a "devastating effect on their business." (R.6-78; 2SR 22)

This effect was quantified via the testimony of AFM's damage expert who stated that it was his opinion that the plaintiff corporation lost both sales and profits as a result of the April, May and June, 1981 failure of the referral system. (R.4-7) As stated, he further admitted that there was insufficient data, because of the small time period involved, to establish or quantify the amount of loss which may have occurred due to the November, December, 1980 failure. (SR13-14)

This witness, William Landsea, Doctor of Finance, based his opinion regarding the second failure on a pattern study of AFM Corp.'s sales in Broward versus Dade Counties for the three-month period of April, May and June for the years 1976 through 1981. The evidence indicated for that particular three-month period that sales in both counties steadily increased from 1976 through 1980. However, in 1981, the year of the failure, Dade sales showed an inconsistent drop while Broward sales increased over the prior year. (R.4-8-11)

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Dr. Landsea reasoned that because the Dade and Broward economies are closely tied (2SR 11) and because there was no other variables other than the termination of the reference system, that the sudden drop or loss of sales was due to the cut-off. (2SR 11-12) Using this analysis, Dr. Landsea arrived at the figure of approximately $70,000 as representative of the gross profits lost due to the lack of phone communication. (R.4-14) After adjusting for expenses, Dr. Landsea arrived at a bottom line figure of $21,800 in lost profits for the April, May and June, 1981 period. (R.4-15)

The defendant attempted to counter this testimony with that of Stanley Cohen, CPA. As opposed to the five year compilation of April, May and June statistics performed by the plaintiff's expert, Cohen simply compared on a month-to-month basis the sales in Dade and Broward County for the three months prior to the April, 1981 cut-off and the three months of the cut-off. Based on the short-term analysis, he concluded that there could be no correlation between the reference cut-off, i.e., Yellow Page advertising and sales in Dade County. (1 SR 2-30-38) The case was ultimately submitted to the jury on the aforementioned evidence and a verdict for compensatory and punitive damages was returned.

SUMMARY OF THE ARGUMENT

The facts of the instant case, while unusual, do not raise any issues of law which are not already firmly established

in the court of this state. This was recognized by the trial Judge whose rulings were in accordance with precedent and whose judgment should be affirmed in all respects following instruction or guidance to the Eleventh Circuit by this court.

As the trial Judge recognized, the instant cause of action arises in tort. There was simply no consideration flowing to Southern Bell which was exchanged in return for the reference of calls service. The defendant, in fact, was in complete accord with this reality up to and including the initial trial stages until it became clear that the punitive damages claim would be submitted to the jury.

As a result of the tortious actions of Southern Bell, the plaintiff suffered damages in the form of lost profits which were properly proved. The defendant's argument that AFM's proof of lost profits was totally speculative both as to causation and amount trangresses reason and ignores the standard of proof. There was sufficient competent evidence when viewed in the light most favorable to the plaintiff that AFM suffered lost profits as a result of the negligence of the defendant. This loss of profits was foreseeable and naturally and proximately flowed from the tortious acts of Southern Bell. While the amount of these profits was not proven to the certainty which would satisfy the defendant, the jury reasonably concluded, in light of the nature of the case, that the plaintiff suffered the proximate damages

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awarded. The net compensatory figure awarded includes a proper allowance for all expenses which would have been generated in the accumulation of those profits.

Again when viewed in the light most favorable to the plaintiff, it is clear that the award of punitive damages was justified. A jury reasonably concluded, based upon the evidence, that not only did Southern Bell know of the great potential for harm to the plaintiff which would undoubtedly occur due to the lack of reasonable care, but following the occurrence of that harm on one occasion, the defendant failed to implement a preventative procedure. In light of the foreseeable nature of the damage, in light of the defendant's knowledge of the occurrence of that damage on a previous occasion and in light of their subsequent disregard of the obvious potential for the reoccurrence of that harm, it is clear that punitive damages were properly awarded. Finally, if one assumes that the plaintiff's closing remarks were improper, the defendant failed to demonstrate that level of prejudice which would warrant reversal and new trial.

ARGUMENT I.

THE INSTANT CAUSE OF ACTION CONSTITUTES AN INDEPENDENT TORT OF NEGLIGENCE FOR WHICH LOST PROFITS ARE RECOVERABLE.

a. The Instant Cause of Action Is One In Tort.

Once it became apparent at trial that the issue of punitive damages would be submitted to the jury, the defendant

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Southern Bell began to vehemently argue that the instant cause arises in contract as opposed to tort. The delusion continues on appeal. Despite the position taken in its initial answer and subsequent interrogatories that there was no consideration and/or a failure of consideration to support any contract or other contract obligation with respect to the provision of the reference of calls system (R.200) and (R.5 90) and that "the undisputed evidence was that the Yellow Page and call reference operations were totally separate and distinct from one another", (Bf.App.45) Southern Bell hinges its entire position on appeal on the assertion that "it is undeniable that the source of that duty is in contract -- Southern Bell agreed to provide service, and that agreement is a contract. AFM's claim, whatever it is called, is still one for breach of contract." (Bf.App.33)

In support of this assertion, Southern Bell points to an answer by a lay witness to an interrogatory submitted by Southern Bell that the agreement for the reference of calls was contained within the contract for the Yellow Page listings. (2SR 54-55) Not only was this evidence properly objected to and excluded on the basis that it constituted a legal conclusion by a lay witness, but even assuming its admissibility, the factual assertion therein is directly contrary to Southern Bell's assertion on appeal that the undisputed evidence that the Yellow Page and reference of calls system were totally separate and distinct

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from another.[4] (Bf.So.Bell 45) Certinly the simple statement by a lay witness that Southern Bell "agreed" to provide a service "does not a contract make." It is undisputed in fact that Southern Bell provided the reference of calls service free of charge. (2SR 60-61)

It is elementary that not all "promises" are contractual. See Ball v. Yates, 29 So2d 729 (Fla. 1946) cert.den. 332 US 774. To be enforceable, the promise must be accompanied by some other factor. This factor is, of course, consideration. The Restatement of Contracts 2d, §71 entitled "Requirements of Exchange, Types of Exchange" defines consideration as follows:

> 1. To constitute consideration, a performance of a return promise must be bargained for.
>
> 2. A performance or return of promise is bargained for it is sought by the promisor in exchange for his promise and is given by the promisee for exchange for that promise.
>
> 3. The performance may consist of (a) an act other than a promise, or (b) a forebearance, or (c) the creation, modification, or destruction of a legal relation...

Consideration is lacking with regard to the provision of the reference of calls system. This was recognized by

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[4]The standard contract for Yellow Page advertising (Pl.Ex.1 attached hereto as App.5-6), provides at paragraph 7 "The telephone company will not be bound by any agreement not expressed herein..." This contract does not on its face provide in any way for reference of calls service.

Southern Bell's trial counsel who stated as follows: "No consideration to us. There has been no consideration provided to Southern Bell." (R.6 174) There is nothing in the record on appeal which could in any way alter this assertion. Southern Bell's conclusory arguments on appeal that the relationship was contractual are unfounded. Quite simply, they have failed to point to any record evidence which could in any way be deemed to constitute legal consideration flowing to Southern Bell. Any argument that AFM's decision or forebearance in deciding not to pay the additional mileage for a foreign exchange number can somehow constitute the requisite consideration must fail.

While it is generally true that the detriment which will constitute consideration for a promise need not be an actual loss to the promisee, but may be something which he does that he is not legally bound to do, (See i.e., Mangus v. Present, 135 So2d 417 (Fla. 1961); Harbeson v. Mering, 2 So2d 286 (Fla. 1941), it is also equally true that the essence of the consideration is a legal detriment that has been bargained for and exchanged for the promise. See Restatement of Contracts, §71 and Fla.Jurisprudence 2d Contracts §52. It would defy reason for Southern Bell to assert that the free reference of calls system was provided in exchange for AFM's decision not to pay Southern Bell additional monies in the form of mileage. At oral argument before the Eleventh Circuit, Southern Bell attempted to argue for the first time that AFM's eventual loss constitutes consideration

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in the form of a "detrimental reliance". Not only was this argument never presented at trial, but it is clear under existing Florida law that the party seeking to invoke the doctrine of estopopel (Southern Bell) must show that he was misled by conduct of the other party (AFM). L.B. Price Mercantile Co. v. Gay, 44 So2d 87 (Fla. 1950); Hamilton v. Corcoran, 177 So2d 64 (2 DCA 1965).

The lower court's ruling that as a matter of law the cause of action is based in tort is proper. (1SR 2-90) Further, it is axiomatic that an action undertaken for the benefit of another, even gratitously, must be performed in accordance with an obligation to exercise reasonable care. See e.g. Banfield v. Adington, 140 So. 893 (1932); Fidelity & Casualty Co. of NY v. L.F.E. Corp. & J.E. Greiner Engineering Service, Inc., 382 So2d 363 at 367 (Fla. 2 DCA 1980); Kaufman v. A-1 Bus Lines, Inc., 416 So2d 863 (Fla. 3 DCA 1982); See generally Fla.Jurisprudence Negligence §13 and Restatement of Torts 2d §§323,324A (1965). The evidence clearly indicates here that Southern Bell agreed to provide the reference of calls service for the life of the dirctory, and as will be shown, that AFM relied on this promise in a foreseeable manner to their ultimate detriment.

However, even assuming for the sake of legal argument that the evidence could somehow be construed to support a finding that the promise to provide the reference of calls service was contractually based, it is submitted that Soutern Bell's breach

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of that promise would also give rise to an independent tort of negligence. With regard to the Eleventh Circuit's second certified question as to whether or not a negligent or wilful breach of contract alone could constitute an independent tort, it is urged that established Florida law dictates that the negligent performance of a contractual obligation can most certainly give rise to an independent cause of action for negligence. If the issue is reached, the second question posed by the Eleventh Circuit must be answered affirmatively. Southern Bell's position that "the unhesitating answer to the second question must be no," (Bf.So.Bell 25) ignores the distinction recognized in Florida between "misfeasance" or non-action and "nonfeasance" or negligent affirmative conduct.

This distinction arises from the general rule of tort law to the effect that one who acts is under a duty to exercise reasonable care to avoid physical harm to persons and property of others and this general duty or obligation would extend to parties in bargaining transactions such as sales and service as well to those who are not parties to bargaining transactions. Entering into a bargaining transaction, pursuant to which one party promises to do something, does not alter the fact that there was a pre-existing obligation to act with reasonable care to avoid harm. Prosser Selected Topics in the Law of Torts, at 655-667 (1984)

The distinction is further expressed by Prosser as follows:

> Where a physician has contracted to treat a family for a year, and refuses to attend when sent for, the cause of action has held to be breach of contract only, since the law recognizes no obligation upon a doctor to come when he is called for, in the absence of such a promise. But if he does attend, and renders his services negligently, he is liable even in the absence of a contract, because he is regarded as having assumed the duty, and he is required by law to exercise proper care as to everyone whom he treats, even though he does so gratitously. W. Prosser Law of Tort §92 4th.Ed. (1971) (ftnt. omitted)

The conflict referred to in the Eleventh Circuit's opinion wherein it compared Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co., 482 So2d 518 (3 DCA 1986) and SafeCo. Title Ins. Co. v. Reynolds, 452 So2d 45 (2 DCA 1984) dissolves in light of the aforementioned distinction which has long been recognized in Florida. (See Banfield v. Addington, supra, cited in Electronic System Corp., supra. In Electronic System Corp., supra, there was simply, like the doctor who fails to make the house call, a failure to perform at all. However, in SafeCo Title Ins. Co., supra, the evidence was clear that there was an attempt to affirmatively perform the promise and that the performance was negligent. In the latter case, while the duty breached may have sprung from a contractual promise, the duty sued on in the negligence action was not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. As stated previously, this duty exists independent of the contract. See Navajo Circle, Inc. v. Development Concepts Corp., 373 So2d 689 at 691 (Fla. 2 DCA 1979); Banfield v. Addington, supra; Robertson v.

Deak Perera, Inc., 396 So2d 749 (3 DCA 1981); Gallichio v. Corporate Group Service, Inc., 227 So2d 519 (3 DCA 1969); Rollins, Inc. v. Heller, 454 So2d 580 (3 DCA 1984); and Fla.Jur.2d. Negligence §88 wherein it is stated that "and the fact that an action would also lie in contract does not bar a suit in tort where the cause of action consists of something more than a mere omission to perform a contractual duty." For a similar factual case and result, see Helms v. Southwestern Bell Telephone Co., 794 F.2d 188 (5th.Cir. 1986).

The distinction between misfeasance and non-feasance was clearly expressed by the court in Splitt v. Deltona, 662 F.2d 1142 (5 Cir.1981) with reference to Griffith v. Shamrock Village, 94 So2d 854 (Fla. 1957) the primary case relied upon by plaintiff below. In Griffith, plaintiff "alleged gross negligence of the defendant in failing to deliver a phone message to plaintiff who was at the time a tenant of the defendant." Id. at 855.

> Defendant innkeeper may have contracted expressly or by implication to accept telephone calls and messages for its tenants, and if the tenants were not in, that a message would be placed in the tenant's box in the office. While defendant denied that it contracted, either orally or in writing, it is clear to us that it had assumed such a duty to plaintiff. 94 So2d 858. Failure to perform that duty may have constituted a breach of contract had the existence of a contract been proved. Such proof was unnecessary since the conduct of the innkeeper also constituted a negligent breach of the duty of the innkeeper arising from his relationship with his guests. Thus, if the defendant's act was sufficiently blameworthy, punitive damages could be awarded. 662 F2d at 1146. [Emphasis added]

Because in the instant case, Southern Bell undertook to

perform or provide the reference of call system and because the evidence justified a finding that they were negligent in so providing the service, a separate independent tort of negligence would be viable even assuming that the agreement to provide this service was contractually based. The Florida decisions on this issue are clear and there is simply no conflict.[5] The second certified question should be answered affirmatively.

b. A Plaintiff Suing Exclusively In Tort May Recover Lost Profits.

The fundamental principle of the law of damages is that a person or entity injured by wrongful or negligent conduct or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's acts which give rise to the right of action. (See for example Hanna v. Martin, 249 So2d 585 (Fla. 1951); Chandler Leasing Division v. Florida/Vanderbilt Development Corp., 464 F2d 267; cert.den. 93 S.Ct. 527. Thus, it is the function of an award of damages to place an injured party in actual as distinguished from theoretical position financially equal to that which he would have occupied had his injuries not occurred. Renuart Lumber Yards v.

[5]In the 15 cases cited by Southern Bell on p.28-29 of its brief, the court refused to award punitive damages because an independent tort apart from breach of contract was either not alleged nor proved. To interpret this to mean that acts constituting a breach of contract can never constitute an independent tort is clearly erroneous.

Levine, 249 So2d 97 (Fla. 1951) With these general principles in mind, the courts of this state have generally held that recoverable damages occasioned by a tort include all damages which are a natural, proximate, probable or direct consequence of the act. (See for example, Mansfield v. Brigham, 107 So. 336 (Fla. 1926); FEC RR Co. v. Peters, 83 So. 559 (Fla. 1919) This general rule applies to so-called intangible economic damages or in the present case lost profits. Where it is shown that a loss of profits is the natural and probable consequence of the commission of a tortious act and the profits are shown with reasonable certainty, there may be a recovery therefor. Taylor Import Motors, Inc. v. Smiley, 143 So2d 66 (2 DCA 1962); Lucas Truck Service Co. v. Hargrove, 443 So2d 260 (1 DCA 1983); Douglas Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So2d 335 (5 DCA 1985); City of Lake Worth v. Nicholas, 416 So2d 886 (4 DCA 1982); SafeCo Title Insurance Co. v. Reynolds, 452 So2d 45 (2 DCA 1984); Fla.Jur.Prud. §76 Damages; 22 Am.Jur.2d §171 Damages. Some authorities have even held that the rule allowing for the recovery of lost profits is more liberal in tort than in contract actions. See 25 CJS Damages §44.

The defendant's arguments that "absent some element of contract... the contract remedy of lost profits is unavailable and that... a claim sounding solely in tort cannot support an award of lost profits" (App.Bf.10-11) is clearly erroneous and is not supported by the case law cited in its brief. The holdings

in these cases, which are listed on page 7 of appellant's brief, are not grounded on the propositions advanced by the defendant, but on the well-founded principle of "election of remedies" i.e., that a party must "elect" between alternative remedies where these remedies are repugnant or inconsistent. (See for example Encore, Inc. v. Olivetti Corp. of America, 326 So2d 161 (Fla. 1976).

For example, the remedies of rescission and damages are coexistent and inconsistent since the former is predicated upon a disavowal of the contract of sale while the latter is based upon its affirmance. The plaintiff must therefore elect between the two remedies and he is barred from recovery for both. (See Deemer v. Hallat Pontiac, Inc., 288 So2d 526 (Fla. 3 DCA 1974); Bliss & Laughlin Ind., Inc. v. Malley, 364 So2d 65 (4 DCA 1978)

An action for fraud in the inducement and an action for breach of contract, i.e., lost profits are not repugnant and thus could be joined in the same suit. The reasoning is obvious. Where A induces the agreement of B by fraud, as long as it remains wholly executory by both parties, it can hardly be said that B is under a legal duty. In an action by A on B's promise, all that B needs to do is to plead and prove the fact of fraud; and if A's own complaint had shown the fraud and absence of ratification, B could have successfully demurred. However, the

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remedy of rescission is not available if B continues with the contract and furthermore B is not precluded from bringing suit for damages for deceit and upon breach of the contract by B an action for that breach and, in an appropriate case, for lost profits. (See for example 37 CJS §63 Fraud.)

As was stated in Ashland Oil, Inc. v. Pickard, 269 So2d 714, 723 (Fla. 3 DCA 1972); cert.den. 285 So2d 18 (Fla. 1973):

> One who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud. When this happens and the defrauding party also refuses to perform the contract as it stands, he commits a second wrong, and a separate and distinct cause of action arises from the contract. [Emphasis added]

The remedies are distinct and the damages separate. Hence, in the cases relied upon by the appellant wherein no breach of contract was alleged (Sprayberry v. Sheffield Auto & Truck Service, 422 So2d 1073 (1 DCA 1982)) or proved (Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., 412 So2d 940 (Fla. 3 DCA 1982)), lost profits could not have been recovered as they could not have been proximately caused by a tortious fraudulent inducement which would have terminated, in a causal sense, upon the affirmation or performance of the contract.

To expand the reasoning illustrated above by taking the language from these two cases out of context is misleading. Florida case law reflects a long history of compensation for econo-

mic damages in tort cases. In fact the law of Florida indicates that the only restriction on the recovery of lost profits is not due to something inherent in lost profits, but is due only to the difficulty in certain cases of proving the loss. (See i.e., Fla.Jur.2d Damages §§76-80)

The availability of a cause of action in tort for economic damages due to personal injury is undeniable.[6] There is simply no reason for distinguishing a case wherein the loss to the plaintiff is solely an economic one and where the test of duty or remoteness usually associated with the law of negligence is satisfied.[7] The only legitimate objection to a recovery for economic damages to be sanctioned by the courts, the so-called "privity" requirement, is no longer binding in Florida. (A.R. Moyer, Inc. v. Graham, 285 So2d 397 (Fla. 1973)

The privity doctrine essentially provides that if the negligent performance of a contract to provide service resulted in purely economic harm, no cause of action existed unless the aggrieved party had a contractual relationship with the party pro-

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[6]See i.e., Florida Standard Jury Instruction 6.1-6.7 which permit recovery of economic damages in various forms, i.e., lost earnings, earning capacity, net accumulations.

[7]Florida does in fact award economic damages for a tortious interference with a business relationship. Florida Standard Jury Instsruction MI-7.

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viding the services. It was based on the principal that liability should be commensurate with the compensation for the risk and it reflected an unfounded fear of boundless exposure. (See generally A.R. Moyer, supra.)

To immunize the defendant's activities on the basis of this outmoted doctrine is patently unjust. It is inconsistent to inform the plaintiff that they were justified in relying on the defendant's representations and actions but that they should bear the economic risk when the representations are inaccurate and the performance negligent. Placing the economic risk on AFM is particularly unwarranted because Southern Bell knew the extent of the risk and they were in a superior position to manage the risk. To paraphrase this court in Moyer at 401 citing Brakangia v. Irving, 49 Cal.2d 647 (Cal. 1958), the power of Southern Bell to stop the phone system was tantamount to a power of economic life or death over the plaintiff. It is only just that such authority exercised in such a relationship, should carry commensurate legal responsibility.[8]

The Eleventh Circuit's first question should therefore be answered affirmatively. To bar an award of lost profits on the

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[8]Such a relationship may be voluntarily undertaken in Florida. See Barfield v. Addington, 149 So. 893 (Fla. 1932); Florida Southern Abstract & Title Co. v. Bjellos, 346 So2d 635 (2 DCA 1977).

basis of the absence of a claim for breach of contract, when those lost profits are the proximate result of the tortious acts and when they can be proven with reasonable certainty, would be a gross aberration and deviation from firmly established Florida law.

ARGUMENT II.

THE LOSS OF PROFITS AND THEIR AMOUNT WERE PROVEN TO A REASONABLE DEGREE OF CERTAINTY.

The vehemence with which Southern Bell attacks the jury's award of lost profits is perhaps only equalled by the paucity of reasoning which allegedly supports their conclusions. The accuracy of their argument ends with the recital of the applicable Florida law. As stated, lost profits of an established business are recoverable if the loss is the natural result of the wrong and the amount can be established with reasonable certainty. An inability to establish the amount of damages with absolute exactness will not defeat recovery. However, the case law does indicate that less uncertainty is tolerated with regard to the plaintiff's burden in showing that the lost profits flowed as the natural and proximate result of the defendant's wrongful conduct. The uncertainty which usually defeats recovery in such cases has reference to the cause of the damage rather than to the amount of it. See for example Twyman v. Roell, 166 So. 215 (Fla. 1936).

Relying on this relatively strict burden of proof with respect to causation, Southern Bell initially contends that the

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plaintiff AFM did not suffer lost profits in any amount as a result of the interruption in their phone service. This argument, in light of the appellate court's role to adopt all findings of fact made by the District Court that are not clearly erroneous; to make all credibility choices in favor of AFM; and where it is necessary to draw certain inferences in order to justify given findings of fact, that they should be drawn in favor of AFM unless the evidence presented at trial clearly will not warrant doing so, is downright absurd.

In support of their contention that there was damage, AFM introduced the following evidence:

a. The unique reliance of the plaintiff on Yellow Page advertising and the testimony of the plaintiff's employees that the Yellow Pages is "our lifeline"; (SR-6)

b. Representations by Southern Bell salesmen that as much as 80% to 90% of people purchasing equipment do so through the Yellow Pages; (2SR 11)

c. The numerous Yellow Page ads placed by the plaintiff; (2SR 12)

d. Southern Bell's representations regarding the positive effect of Yellow Page advertising; (2SR 12)

e. The extended three-month period, among other periods, that the phone was out; (R.5 108)

f. Southern Bell's admission at trial of the high potential for harm after the reassignment of the number without notice and their employee's further admissions that Southern Bell should have a system to prevent this occurrence; (R.6 62-63)

g. Testimony of plaintiff's principles that the termination had a devastating effect on their business; (R.6 78;SR.22)

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h. Testimony of plaintiff's principles that they noticed calls dropping off; (2SR 18)

i. Testimony of plaintiff's expert as to causation and amount; (R.4)

j. Testimony of at least one potential customer, Paul Ranni, that he attempted several times without success to reach the plaintiff in order to buy one of their products; (1SR 8-9)

k. The testimony of the individual who was assigned AFM's number for a period of time and who stated that he received calls meant for the plaintiff. (R.5 77)

The argument that there was no evidence upon which a jury could reasonably conclude that there was a loss of profits in any amount is in direct contravention of the representations and testimony of employees of Southern Bell that the Yellow Page advertising would enhance business. No other result was anticipated, foreseen or paid for.[9] (See J.A. Garcia v. Mountain State Telephone & Telegraph Co., 315 F2d 166 (10 Cir. 1963); Irish v. Mountain State Telephone & Telegraph Co., 500 Pac.2d 151 (Col.Ct.App. 1972); Gould v. Mountain State Telephone Co., 309 Pac.2d 802 (Ut. 1957); White v. Southwestern Bell Telephone Co., Inc., 651 SW2d 260 (Tx. 1983). Clearly, reasonable men could have concluded, based on the

[9]Incredibly, despite representations to the contrary by Southern Bell's own employees, the defendant's expert argued at trial that the Yellow Pages had no effect on profits. His credibility was shattered when plaintiff's counsel pointed out to the jury that the expert's CPA firm maintains one of the largest ads in the Yellow Pages. The expert's response was that the firm so advertised even though it did not produce any clients. (1SR2 38-39)

record evidence, that AFM did sustain damage in fact during the three-month period that their phone service was interrupted.

Southern Bell additionally contends that the damage award for lost profits must be reversed on the basis that the amount of those profits was not proven within the requisite degree of certainty. As stated previously, all that is ordinarily required in order that profits may be recovered is that there be some standard by reference to which the profits sought to be recovered may be estimated with a fair degree of accuracy. See Twyman, supra. There are two generally recognized methods of proving the amount of lost profits: (1) the before and after theory and (2) the yard stick test. (See G.M. Brod & Co., Inc. v. US Home Corp., 759 F.2d 1526 (11 Cir. 1985) Under the before and after theory where there is an established business, pre-existing profits may be used to evidence the amount of loss with reasonable certainty. In calculating the loss of profits, the normal increase in the business which might have been expected in light of past developments and existing conditions may be considered. As indicated previously, the plaintiff presented ample testimony that for the particular three-month period involved, sales in Dade County had steadily increased from 1976 through 1980.[10] However, in 1981, for

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[10]In contrast to the extended period of time which served as basis for plaintiff's calculations, the defendant simply performed a month-to-month analysis for the period of January-June 1981. Plaintiff's expert pointed out that such an analysis is inaccurate because the sales figure would fluctuate too greatly. Thus, he used a three-month period for a span of several years. (R.4 40-43)

the first time, Dade sales suddenly showed an inconsistent drop from the prior year. This, coupled with the testimony of plaintiff's expert that there were no other varibles other than the termination of the reference system to explain the sudden drop or loss of sales from prilor years was enough to satisfy the plaintiff's burden under the before and after test. Additionally, however, the plaintiff was able to verify its findings by way of an application of the "yard stick test" which essentially consists of a study of the profits of a business that is closely comparable to the plaintiff's. See G.M. Brod, supra, at 1538. Using this test, plaintiff was able to compare the plaintiff's operations in Dade as opposed to Broward County for the subject periods. A study of the Broward business for the same period of time from 1976 through 1980 indicated that the steady increase in income paralleled that of Dade County up to the time of the reference of calls termination. Once the calls were cut off, Dade sales suddenly showed an inconsistent drop while Broward sales increased over the prior year. (R.4-8-11) Because the evidence presented indicated that the Dade and Broward economies were closely tied and because the operations of the company in the two counties were virtually identical, other than the problems with the phone, it was reasonable to conclude, under the yard stick test, that the sudden drop or loss of sales was due to the cut-off. (2SR 11-12) (For cases in which a court sustained an award of lost profits calculateds by way of the before and after theory, see Southwestern Bell Telephone Co. v. Reeves, 578 SW2d 795

(1 DCA 1979); Butcher v. South Central Bell Telephone Co., 398 So2d 197 (La. 3 Cir. 1981); White v. Southwestern Bell Telephone Co., Inc., 651 SW2d 260 (Tx. 1983); Harbaugh v. Citizens Telephone Co., 157 NW 32 (Mich. 1916); Seagroatt Floral Co., Inc. v. NY Telephone Co., 429 NYSd 309 (S.Ct.App.Div. 3 Dept. 1980); J.A. Garcia v. Mountain State Telephone & Telegraph Co., supra; Irish v. Mountain State Telephone, supra.

Despite the fact that the plaintiff used not one but two tests to arrive at his bottom line figure, the defendant predictably again urges this court to essentially "audit" the record and usurp the jury's function by reversing the totally reasonable compensatory award. In determining the reasonableness of the damages, it is significant to note that the plaintiff did not request damages for potentially significant profits from after market sales such as supplies, servicing and parts which would have been generated by the sale of new machines during the three-month period. Additionally, no damages were requested for the November-December breakdown.

On appeal the appellant argues that the award should be thrown out because the plaintiff failed to prove a history of profitability (i.e., net as opposed to gross profits) prior to the telephone breakdown, failed to deduct the expense of salaries paid to its officers and used an inaccurate gross profit margin. Southern Bell's argument in this regard ignores the general prin-

ciple that the plaintiff must reduce the gross receipts by only those expenses which are incurred in obtaining those receipts. This was the instruction given to the jury. (1SR 3-12)

With respect to the first argument regarding the lack of evidence of past net profits, it is submitted that if the defendant's arguments are accepted, it would mean that a new business venture or corporation, which like most goes through an initial period of loss, could never recover lost income even though the expenses which would have been incurred in realizing that income are less than the total amount of the income generated, when a particular portion of the operations of the corporation are suspended as a result of a tortious act, and when other expenses of other operations of the corporation are such that the corporation as a whole operates at a net loss. Certainly, the door to the courthouse is not open to only those plaintiffs which have operated at a net profit in the past. AFM's calculations of lost gross profits, based on evidence of past gross profits, reduced to net profits based on anticipated expenses for the three month period satisfies the reasonableness test.

Additionally, Southern Bell argues that officers' salaries must always be deducted in order to arrive at a lost profit figure. However, unlike the situation in Southern Bell Telephone & Telegraph Co. v. Kaminester, 400 So2d 804 (3 DCA 1981), it was proper in this case not to deduct the officers' salaries

because evidence demonstrated that the salaries would not have increased had any additional sales been made as a result of telephone contacts. (R.4 49-50) Finally, the use of the profit margin of a successor corporation identical in all respects except in name to the plaintiff and for the period immediately following the breakdown cannot be considered unreasonable.[11] The use of this margin which was lower and more conservative than the lowest margin calculated by defendant's expert (R.6 157-158) representing expenses which would have been incurred over the course of the three month period in generating the gross profits, in conjunction with the gross profits figure estimated from the prior history led to the computation of an entirely reasonable bottom line figure.

To disallow these damages because they have not reached the degree of absolute certainty the defendant insists upon would be to encourage similar tortious acts. The defendant ignores the principle that the law does not require impossibilities and does not require a higher degree of certainty than the nature of the case permits. In the present case, the jury returned its verdict following extensive cross-examination of plaintiff's expert on every single point raised on appeal, as well as rebuttal testimony from the defendant's expert and a jury charge as follows:

> In considering the issue of plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the

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[11] As the generally recognized "yard stick test" indicates, the use of a business which is comparable to the plaintiff is acceptable. (G.M. Brod, supra, at 1538) Also as was stated in New Amsterdam

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> evidende as full, just and reasonable compensation for all the plaintiff's damages. No more, no less. Damages must not be bsed on speculation because it is only actual damages...that are reasonable. (1SR3 10-11)

The verdict of the jury awarding compensatory damages to the plaintiff additionally passed the scrutiny of an experienced trial Judge on numerous post-trial motions. The procedural safeguards against the miscarriage of justice in damage awards have been satisfied and the award should stand.

ARGUMENT III.

THERE WAS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT THE AWARD OF PUNITIVE DAMAGES.

The standard for determining whether the evidence provides a legal basis for punitive damages in negligence cases is the same as that required to sustain a conviction for manslaughter. (White Construction Co. v. DuPont, 455 So2d 1026 (Fla. 1984) That is, the negligence

> must be of a gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness,

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Cas. Co. v. Utility Battery Manufacturing Co., 166 So. 856 (Fla. 1935):

> Proof of income and of the expenses of the business for a reasonable time anterior to the interruption charged, or facts of equivalent impact is usually required. [Emphasis supplied] 166 So at 860.

> or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. (White Construction, supra, quoting and reaffirming Carraway v. Revell, 116 So2d 16 (Fla. 1959)

It is not necessary to prove actual malice or intent to cause the particular injuries sustained; the requisite malice or evil intent may be inferred from the defendants having wilfully pursued a course of action in wanton disregard of the potential harm likely to result as a consequence of that wrongful conduct. Griffth v. Shamrock Village, Inc., 94 So2d 854 (Fla. 1957); Kirksey v. Jernigan, 45 So2d 188 (Fla. 1950); Johns-Mansville Sales Corp. v. Janssens, 463 So2d 242 (1 DCA 1984).

If an award of punitive damages may be supported under any view of the evidence taking all inferences most favorable to the plaintiff, a jury issue is made and whether to award such damages is rightly decided by the jury and not by the court. Johns-Mansville Sales Corp., supra, at 248. Clearly the record evidence when viewed in the light most favorable to plaintiff was such that the jury could have found that Southern Bell's actions were a wilful and wanton hazard as would raise the presumption of a conscious indifference to consequences for which punitive damages were an appropriate remedy.

The evidence indicates that Southern Bell, by way of its representatives, induced the plaintiff to purchase large amounts of advertising, (2SR 10-11) promising to implement a system of

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reference of calls for the life of the directory. (2SR 17) The company was aware of the extreme dependency of the plaintiff and similar competitors on the Yellow Page advertising (2SR 11) and indeed their sales pitch was based on this factor. (2SR 11) Despite their undeniable awareness of the extreme disruption which could result to these type businesses should the reference system cease to operate, (1SR2 29-30) the defendant simply threw the plaintiff's number into a pool to be assigned to another subscriber as soon as the demand for new numbers surpassed the supply. (R.6 60) Since the plaintiff was in a high-growth area, the system failed quickly and through good fortune and luck the plaintiff manages to discover the failure. (R.5 104) Again, assurances are made, the company's upper management is informed, but no changes are made. (2SR 21-24) Inevitably, another failure occurs and again the plaintiff is fortunate to inadvertently discover the failure. The reference system remains inoperable for the life of the corporation and the corresponding Yellow Page listings. (2SR 27-28) The effect on the business because of the failure is devastating, (R6. 78;2SR 22) but the plaintiff's pleas fall on deaf ears. Despite numerous contacts with the defendant and despite knowledge on the part of company management, the defendant simply ignores the plaintiff's problems. In fact, the evidence indicates that despite their awareness of the great potential of harm and despite their company's representations that the system is operable, there is simply no procedure designed to prevent the inevitable breakdown

and upon breakdown alert the customer. (R.6 62-63) Despite the three mistakes (App.1-4) and despite numerous communications between the parties, the plaintiff's problems simply fail to impress the defendant and the plaintiff continues to suffer problems with their phone system.

This indifference is illustrated by the testimony of two witnesses, Raul Palma and Inez Gasson,[12] who were produced by Southern Bell as respectively the agent or representative with the most knowledge concerning the suit of AFM v. Southern Bell and the person who had knowledge as to how the number was reassigned. These witnesses whose depositions were read at trial by the plaintiff indicated the following:

1. They did not know what procedures were utilized by the company to prevent the assignment of a number to a new customer. (R.5 85)

2. They did not know whose job it was to make sure there was no reassignment. (R.5 87)

3. As a result of the investigation into the breakdown, they simply recommended a rate adjustment but took no preventative precautions despite the fact that blind copies of the PSC reports were sent to company vice presidents. (R.5 86)

4. Had no knowledge as to why the breakdowns occurred and again had no knowlede of the name of the supervisor or the person with the company in charge of procedures. (R.5 111

[12]Southern Bell strenuously objected to the introduction of these witnesses' testimony. The objections were frivilous and they were brushed aside by the court. (R.5 80-81)

A third witness, Gloria Adams, produced by Southern Bell as the person with the most knowledge concerning the Yellow Page errors, indicated not only that she was never made aware of the potential harm to customers which could result from incorrect Yellow Page errors, (R.6 39) but that she was also unable to find the cause for the errors in this specific case. (R.6 28-29)

Finally, Sue Gibbs, produced by Southern Bell as the person with the most knowledge concerning the applicable procedures, indicated quite clearly that there was no procedure for notification to a customer once the reference of calls was cut off and that additionally there was no procedure for preventing the cut-off (R.6 62-63) (App.7-8) for the promised period.

Unlike the situation in Southern Bell Telephone & Telegraph Co. v. Hamft, 436 So2d 40 (Fla. 1983), the evidence indicated that Southern Bell made no efforts whatsoever to insure that AFM's service would not be cut off a second time. Additionally, there was no evidence presented which would indicate that Southern Bell made any efforts whatsoever to rectify the incessant problems experienced by AFM with regard to their phone service. As in Griffth v. Shamrock Village, Inc., supra, the defendant's complete lack of response to AFM's demand for the promised service was the equivalent of a wilful and grossly unreason-able refusal to perform. This complete want of care was such as to constitute an intentional invasion of the plaintiff's rights. From such a

finding, the jury could easily have imputed malice to the defendant so as to support a verdict of punitive damages. Clearly the evidence supported an inference of knowledge by Southern Bell of the special danger to the plaintiff which would be presented in case of a reference of calls shut-off.

While mere indifference is generally not enough to support a punitive award, Southern Bell's actions in this case represented a conscious indifference to the rights or welfare of the plaintiff. The reason, of course, is that inspite of the initial problems and inspite of the admittedly foreseeable potentially disasterous consequences, Southern Bell simply chose not to act. It is not the plaintiff's contention that Southern Bell had a duty to provide each of its customers with perfect, faultless service and in the event that service fails, to insure each customer against any loss sustained, but that they had a duty not to damage the plaintiff by failing to carry out the agreement to intercept calls and refer them to the new number.

To summarize, the jury could reasonably infer from the evidence that Southern Bell's conduct amounted to a wanton disregard for the economic welfare of AFM and evinced a reckless indifference to the potential consequences of its deliberate business decision not to implement remedial procedures. When knowledge of this defendant is considered in light of this indifference and the lack of response to the needs and pleas of the plaintiff to which

it owed a responsibility of protecting its veritable lifeline, one cannot help but conclude that the defendant made an absolute conscious policy decision of inaction based on business considerations. This decision was arguably based on a pervasive sense of immunity induced by the anticipated effect of the limitation of liability provisions present in most of the applicable contracts.

The situation presented is different from those in the latest Florida cases on punitive damages. Unlike the situation presented in Chrysler Corp. v. Wolmer, 11 FLW 605 (Fla. 1986) and Gulf Power Co. v. Kaye, 11 FLW 1893 (1 DCA 1986) there was sufficient evidence in the instant cause to support the finding that Southern Bell had actual knowledge, based on prior incidents, of the danger posed to AFM by the inevitable cut-off. Thus their failure to implement procedures constituted a conscious indifference to the economic welfare of the plaintiff. Southern Bell exhibited just that kind of conduct which is sought to be forestalled by the imposition of a punitive award. Based on their actions in this case, it appears that only such an award will provide the impetus to Southern Bell to initiate preventative procedures. There was little Southern Bell could do at trial to refute the evidence outlined above.13 On appeal, however, they argued that

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13 On appeal, Southern Bell disputes the assertion that there was no procedure to prevent the cut-off. The jury properly inferred, from the testimony of defendant's own witnesses as well as the numerous mistakes, that such a procedure did not exist. Additionally, the defendant does not dispute the evidence that there was in fact no procedure for notification once the cut-off occurred.

because AFM lost "only money" (App.bf.21-22) because Southern Bell fixed the problems and "substantially performed the agreement" (App.bf.40), punitive damages are inappropriate.

Apparently if it were up to Southern Bell, punitive damages could never be awarded in even the most blantant and wilful fraud, conversion or theft cases because the plaintiff would have lost "only money". Fortunately in the instant case, because of shear chance, Southern Bell's conduct did not lead to ruination by way of irreparable loss. As in all punitive damage cases, the emphasis and justification for the award is determined in accordance with the "conduct" of the defendant. It is not necessary that a severe bodily injury result from this conduct. Similarly the fact that Southern Bell after PSC complaints restored the reference initially is irrelevant because they made no attempt to prevent a second inevitable cut-off.

The further conscious indifference of Southern Bell was demonstrated by the numerous Yellow Page errors which were properly admitted. In accordance with the general appellate rule the issue in examining the admissability of the aforementioned evidence is whether or not the trial Judge abused his discretion. The key is relevancy. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence, more probable or less probable than it would be without the evidence. Under the federal rules, evidence that is unfairly prejudicial is excludable, but the standard is a high one. Its probative value must be substantially outweighed by the danger of unfair prejudice. (Fed.R.Evd.403)

The trial court's ruling admitting the subsequent errors on the basis that it constituted evidence of a continuing course of conduct by the defendant was proper. (See Johns-Manville Sales Corp. v. Janssens, supra) It is generally accepted that evidence of a course of conduct or dealing followed by a person may be admitted to prove that he acted in accordance with it on a given occasion. (See for example 32 CJS §581) The claim of the plaintiff that the absolute lack of response exhibited by the defendant was tantamount to a conscious indifference to the plaintiff's consequences directly supported by this evidence.14

This evidence also serves to contradict Southern Bell's intention that there was a substantial performance. The testimony indicated that Southern Bell agreed to provide the service for the life of the directory. The evidence further indicated that following the second cut-off, the service was never restored. Because of the errors for the years 1981-1985, the service was needed, but again the evidence indicated that it was never restored. The subsequent errors demonstrated the complete lack of response to the plaintiff's demands regarding the telephone service and hence it was relevent and properly admitted.

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14 For example, Raul Palma, employed in the customer service department and produced by Southern Bell as the person with the most knowledge of the suit, testified that as a result of his investigation into the cut-off he simply recommended a rebate. Despite the fact that he handles Yellow Page disputes for the defendant, he took no affirmative action to ensure proper service. This, coupled with evidence of the subsequent errors, infers conscious indifference. (R.5 80-85)

ARGUMENT IV.

A NEGLIGENT OR WILFUL BREACH OF CONTRACT CAN SUPPORT A PUNITIVE AWARD.

As stated, the plaintiff's position is that the cause of action is in tort, but nevertheless because the Eleventh Circuit has invited a response, the undersigned would assert that even if there was a contractual relationship between the parties with regard to the reference of calls service, the defendant's action in this case constituted an independent tort for which punitive damages are recoverable. The Eleventh Circuit's question as phrased therefore would have to be answered in the negative unless it supposes the existence of an independent tort. As was stated in Southern Bell Telephone & Telegraph Co. v. Hamft, supra:

> In general, punitive damages may not be awarded in cases based upon breach of contract. In order for punitive damages to be recoverable in such a case, the breach of contract must be attended by some additional wrongful conduct amounting to an independent tort. For punitive damages to be recoverable in a contract case, intentional wrong, wilful or wanton misconduct, or culpable negligence, the extent of which amounts to an independent tort, must be shown. Once an independent tort is established, then the question of whether punitive damages are proper is decided under principles traditionally applicable to such question in tort cases. Wilful, wanton, malicious or outrageous misconduct must be shown. (Cites omitted) 436 So2d at 42. 15

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15 It is submitted that the latest Florida case, Jewelcor v. Southern Ornamentals, Inc., 11 FLW 2487, (4 DCA; 12/5/86) is in conflict with Hanft. Nevertheless it can be distinguished or affirmed on the basis that more than gross negligence is needed to sustain a punitive award. (White Construction Co. v. Dupont, 455 So2d 1026 (Fla. 1984)

When the plaintiff has the choice between two causes of action in contract or tort, and punitive damages are available, if he pursues the latter remedy because of the aggravated nature of the tort, there seems little to criticize in a rule which permits punitive damages in an action which could also constitute a breach of contract. Allowing such damages adds no advantage to the injured party nor puts the wrongdoer in any worse position.

Additionally the undersigned would assert that the tortious breach of duty will support an otherwise valid punitive damage award, even in the absence of financial loss for which compensatory damages would be appropriate. (See Nales v. State Farm Mutual Auto Ins. Co., 398 So2d 455 (2 DCA 1981); Elgin Federal Credit Union v. Curfran, 386 So2d 860 (1 DCA 1980); Lassiter v. International Union of Operating Engineers, 349 So2d 622 (Fla. 1977).

The justification for punitive damages in a case such as the present one must be found in a judicial policy for the suppression of irresponsible conduct by means of punishment. One cannot read the facts of this case without the feeling that the moderate punitive damages assessed and approved by the jury would have the salutary effect of inducing a more reasonable and responsible response from the defendant.

ARGUMENT V.

SOUTHERN BELL IS NOT ENTITLED TO A NEW TRIAL BASED ON THE CLOSING ARGUMENT OF THE PLAINTIFF.

The defendant's final argument reeks of desperation. Not only has Southern Bell failed to point out the exact passages complained of, but they have also failed to indicate that there was not a single objection during the course of the plaintiff's closing argument. As such, the court rejected the untimely motions of the defense counsel:

> The Court: Had the appropriate objection been made at the appropriate time, the court would have sustained the objection. (and instructed the jury) The court is going to deny the motion for mistrial with that understanding. (1SR2 160)

On rebuttal, defense counsel again failed to object but again moved for mistrial. The motion was denied because of the absence of a contemporaneous objection (1SR2 182).

It is well settled that unless the conduct is of the requisite inflammatory and prejudicial character, it must be tolerated absent a contemporaneous objection. (See Wasden v. Seaboard Coastline Railroad Co., 474 So2d 825 (2 DCA 1985); citing Metropolitan Dade County v. Dillon, 305 So2d 36 (3 DCA 1974); cert.den. 317 So2d 442. As the court pointed in Dillon:

> Counsel are accorded a wide latitude in making arguments to the jury, and unless their remarks are highly prejudicial and inflammatory, counsel's statement made to the jury during closing arguments will not serve as a basis for reversing a judgment. (Cites omitted) 305 so2d at 40.

Even assuming that the arguments could be considered improper, they were not so inflammatory as to warrant or mandate a new trial. There is simply no justifiable grounds to impugn the jury's verdict or to conclude that it did not base its verdict on the evidence adduced at trial. The defense counsel ignores the fact that the evidence and not the plaintiff's counsel demonstrated that Southern Bell was "uncaring and inefficient". (Def.bf.48) This was the gravamen of the plaintiff's case and to argue that this finding as well as the amount of the ultimate verdict were improper is nonsense. In Florida it is well settled that it is within the jury's discretion whether to award punitive damages and to determine their amount. Wackenhut v. Canty, 359 So2d 430 (Fla. 1976) Clearly there is nothing in the record to support an alteration of the punitive award and the verdict should be affirmed in all respects.

CONCLUSION

Plaintiff, AFM CORPORATION, requests that this court instruct the Eleventh Circuit that based on its review of the Florida law as applied to the facts of this case that the judgment should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF MAILING

WE CERTIFY that a copy of the above was mailed this 10 day of December, 1986, to KAREN H. CURTIS, P.A., STEPHEN B. GILLMAN, Esq., 1500 Edward Ball Building, 100 Chopin Plaza-Miami Center, Miami, Fl 33131.

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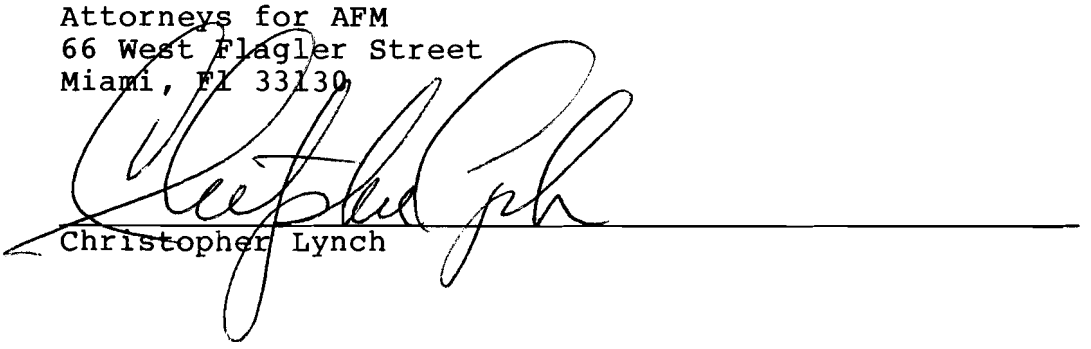

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