IN THE

SUPREME COURT OF FLORIDA

CASE NO. 69,202

AFM CORPORATION, a Florida corporation,

Plaintiff-Appellee,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, a New York corporation,

Defendant-Appellant.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANT'S INITIAL BRIEF

SHUTTS & BOWEN
Karen H. Curtis, P.A.
Stephen B. Gillman, Esquire
100 Chopin Plaza - Miami Center
1500 Edward Ball Building
Miami, Florida 33131
(305) 358-6300

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

This case is before this Court on certification from the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). That appeal followed a final judgment pursuant to a jury verdict for $21,000 in compensatory and $100,000 in punitive damages, reduced by setoff to $117,258.50, in the United States District Court for the Southern District of Florida. Southern Bell Telephone and Telegraph Company ("Southern Bell") was defendant in the trial court and appellant in the Eleventh Circuit. AFM Corporation ("AFM") was plaintiff and appellee, respectively, in those courts. The parties have agreed that for purposes of this proceeding Southern Bell is to be deemed the "moving party" pursuant to Rule 9.150(a), Fla.R.App.P. Citations to the record are to that before the Eleventh Circuit, by volume and page number. Unless otherwise indicated, all emphasis herein is supplied.

I. THE FACTS

Southern Bell accepts the facts recited by the Eleventh Circuit, with one minor correction and one addition. For the convenience of the Court, the Eleventh Circuit's statement of facts is quoted below, and the full text of that opinion is found as Appendix "A" to this brief.

> AFM Corporation (AFM) was 1/ [Court's footnote 1: "1. In July, 1981, AFM executives decided to abandon AFM and form a new corporation with a different name that carried on the same business. This decision to change the corporation's name was not in any way caused by the alleged negligence of Southern Bell."] a Florida corporation specializing in the sale and servicing of copy machines and related business equipment. Prior to August 1, 1980, AFM's business office was located in Hallandale, Florida which is in southern Broward County near the Dade County line. AFM's principle [sic] form of advertising was through space purchased in the yellow pages published by

Southern Bell Telephone and Telegraph Company (Southern Bell). AFM advertised in the Miami yellow pages because of its business dealings in Dade County.

In March, 1980, AFM and Southern Bell entered into an agreement for the inclusion of AFM's advertisement in the 1980-81 yellow pages. At the time of this contract, AFM executives were considering moving their office from Hallandale, Florida to Hollywood, Florida. They were told by Southern Bell employees that such a move would result in significantly higher toll charges for AFM's Dade County phone number.2/ [Court's footnote 2: "2. Previously, AFM's Miami customers could call a Dade County number and the call would be automatically transferred to the Hallandale office without incurring long distance charges."] AFM sought alternatives and Southern Bell advised that a referral call service could be inaugurated whereby callers who phoned AFM's old number would be referred to the new Hollywood number by a taped voice. By employing this method, AFM could avoid using the old phone number and not incur the additional costs. The parties agreed that if AFM moved and changed its phone number, Southern Bell would provide this referral service.

In late July, 1980, AFM moved its office to Hollywood and was given a new phone number by Southern Bell. At that time, Southern Bell set up the referral system so that customers who called AFM's old Dade County number would be told of the new number. In September, 1980, the yellow pages were distributed carrying AFM's advertisement but listing AFM's incorrect 1/ old phone number.

On November 21, 1980, Southern Bell mistakenly assigned AFM's old Dade County phone number to a new customer which resulted in the premature disconnection of the referral system. AFM discovered the mistake and notified Southern Bell of the problem. Immediately thereafter,

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1/ The number listed in the September 1980 Yellow Pages was not "AFM's incorrect old phone number". It was instead the correct former phone number, but due to AFM's move, it was not AFM's current phone number (2SR-17-18, 37, 54-58; R5-96; 1SR2-9).

> Southern Bell reconnected the old number thereby reinstating the reference. In April, 1981, however, the reference was again disconnected by mistake. This error was not discovered until June, 1981. As soon as Southern Bell was notified of the mistake the reference of calls was reestablished.[2/]
>
> AFM filed an action in a Florida state court against Southern Bell alleging both negligence and breach of contract. The case was removed to the United States District Court for the Southern District of Florida on January 11, 1982. At the trial, AFM introduced evidence that Southern Bell had agreed to provide the referral system and that the system had been prematurely disconnected between April and June, 1981.[3/] [Court's footnote 3: "3. AFM did not seek damages for the first disconnection of the referral of calls system."]. AFM's sole expert evidence of damages was presented by Dr. Frederick Landsea who testified that AFM lost $21,800.00 in lost profits because of Southern Bell's failure to properly maintain the referral calls.[3/] At the close of the evidence, AFM's counsel withdrew all of the contract claims and elected to proceed solely in tort. After the jury returned a verdict in favor of AFM for both compensatory and punitive damages, Southern Bell filed a motion for judgment notwithstanding the verdict or in the alternative a motion for a new trial. These motions were denied by the district court on July 29, 1985 and Southern Bell filed a timely appeal.

One fact not mentioned in the Eleventh Circuit's statement has significance: that Southern Bell had procedures and several operational

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2/ The fact that these were "mistakes", and nothing more sinister, is buttressed by the results of an investigation undertaken by Southern Bell after AFM filed a complaint about the disconnections with the Florida Public Service Commission. That investigation could uncover no reason for the premature reassignment of AFM's old number except human error (R5-92-93, 97).

3/ As detailed in Point I.B., infra, this "expert" testimony was riddled with inconsistencies, devoid of factual support, and contradictory of Florida law.

units whose responsibilities included preventing referenced numbers from being assigned. Aside from the technical operations, the principal units were the Business, Assignment and Dial Offices (ISR2-5-7). The Business Office's responsibilities included obtaining and recording the correct information to generate a service order form, with a new Dade County telephone number for AFM and a reference for the life of the 1980-81 Miami directory (ISR2-4-9). The Assignment Office was responsible for correctly inputting this information into Southern Bell's computers. The Dial Office's responsibilities included not reassigning the referenced number during the relevant period (Id.).

Each of these Offices had procedures to prevent unauthorized reassignments (R6-111; ISR2-4-9), primarily the training of personnel and supervision of the work to verify the accuracy of the data input into the computer (ISR2-1-9). These routines were followed regardless of whether the subscriber was a business or residential customer; there were no "special" procedures for business subscribers (R6-61-62; ISR2-18-22).[4/]

4/ AFM argued that Southern Bell had no procedures to prevent reassignment of referenced numbers for business clients. The evidence was contrary, however, as Southern Bell did have such procedures, which were the same for both business and residential customers (R6-61-62; ISR2-18-22). That there was no distinct set of procedures for business customers hardly equates to the absence of any procedures for such customers.

1. Can a plaintiff suing exclusively in tort recover lost profits?

2. Can negligent or willful breach of a contract alone constitute an independent tort?

3. Can such a tort be the basis of an award of punitive damages if the other criteria for awarding punitive damages are met?

Because this Court was expressly invited to consider the "problems posed by the entire case" (Appendix "A" at p. 4946), we shall touch briefly on several issues subsidiary to the certified questions -- chiefly, the sufficiency of the evidence to establish lost profits and punitive damages, and the related impropriety of certain arguments made by AFM in closing, all of which are determined, in whole or in part, by Florida law. The remaining issues originally appealed by Southern Bell concern federal practice or rules and will be left to the Eleventh Circuit to decide when this certification process has ended.

SUMMARY OF ARGUMENT

Lost profits may not be assessed where the claim is purely one in tort, as they are a contract remedy available only for breach of contract or, in some instances, for torts arising from or also constituting a breach of contract. Having relinquished any entitlement to contract relief, AFM may not seek lost profits for its negligence claim. Assuming that remedy was available, however, the proof of lost profits was insufficient as a matter of law in that: (1) there was no reasonable certainty that Southern Bell's behavior in fact caused any loss in profits,

as the affected sales actually increased rather than decreased during the alleged period of damage, while sales in an unaffected area, in contrast, decreased; (2) there was no reasonable certainty as to the amount of the claimed lost profits; (3) there was no evidence that AFM had earned profits for a reasonable time prior to the alleged injury; and (4) there was no evidence as to net profits, rather than gross receipts or gross profits, due to lack of the requisite proof of expenses of AFM and the failure to deduct officer's salaries from receipts.

A negligent, even a flagrant and oppressive, breach of contract can never be an independent tort. To have an independent tort, both the actions of defendant and the damages sustained by plaintiff as to any tort must be different than and separate from those as to any breach of contract.

Consequently, no matter how outrageous the breach, a contract claim, without more, cannot support punitive damages. The necessary malice, moral turpitude, wantonness, willfulness or reckless indifference to the rights of others is, in any event, absent here. Punitive damages are additionally precluded because: (1) there were no proper compensatory damages awarded and none separate from the contract; (2) irrelevant and highly prejudicial evidence of subsequent Yellow Page errors tainted the punitive award.

Finally, improper remarks made by AFM's counsel in summation infected the proceedings, entitling Southern Bell to a new trial.

ARGUMENT

I. A PLAINTIFF SUING EXCLUSIVELY IN TORT MAY NOT RECOVER LOST PROFITS.

A. The Certified Question

The sole element of compensatory damages submitted to the jury was AFM's claimed loss of profits, allegedly resulting from the second breakdown of the call reference from April through June, 1981. Although this suit had initially contained both contract and tort theories, AFM withdrew its contract claims at the charge conference, electing to proceed exclusively in tort on its negligence claims (R2-128; ISR2-95). Further, AFM announced that it was not basing its tort theory on any duty arising out of any agreement between the parties (Id.; R6-164-165, 167). That election precludes any recovery of lost profits, as they are a contractual remedy. See Sprayberry v. Sheffield Auto and Truck Service, Inc., 422 So.2d 1073, 1075 (Fla. 1st DCA 1982), pet. for rev. dismissed, 427 So.2d 738 (Fla. 1983); Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., 412 So.2d 940, 941 (Fla. 3d DCA 1982); Ashland Oil, Inc. v. Pickard, 269 So.2d 714, 723 (Fla. 3d DCA 1972), cert. denied, 285 So.2d 18 (Fla. 1973).

In Greater Coral Springs Realty, plaintiff sought damages for breach of contract and for fraud and deceit stemming from the representation and assurance of defendant's employee that plaintiff would be awarded the next available Century 21 franchise, as well as an exclusive in the Coral Springs area. 412 So.2d at 940. After a bench trial, the court found no evidence to support breach of contract, but awarded nominal along with punitive damages for fraud. The lone question on

appeal was whether the trial court should have awarded compensatory damages in the form of lost profits as to the fraud. Answering in the negative, the court held:

> A party may not recover contract damages in a tort action. Thus an award of lost profits, the equivalent of the performance of the bargain, was clearly not warranted under the facts of this case since the parties never reached an agreement.

Id. at 941. In reliance upon Professor McCormick, the court ruled that "[f]ailure to establish the contract" precluded recovery of the "benefit of the bargain", limiting plaintiff to "tort remedies", id., for the fraud:

> In tort actions, the measure of damages seeks to restore the victim to the position he would be in had the wrong not been committed. In actions for breach of contract, the aim is not the mere restoration to a former position as in tort, but is the awarding of a sum which is equivalent to the performance of the bargain; the attempt is to place the plaintiff in the position he would be in if the contract had been fulfilled. McCormick, Damages, § 317, pp. 560-561 (1935).

Similarly, in Sprayberry, the Second District struck an award of lost profits in a fraud case, finding that because there was "no breach of contract claimed, the issue of lost profits should never have gone to the jury." 422 So.2d at 1075. Citing Greater Coral Springs Realty, the court held that ordinarily, contractual damages such as lost profits may not be recovered in a tort action.[5/] Id. See also

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5/ This maxim is recognized throughout the spectrum of contract versus tort claims, and is, for example, reflected in the general rule in products liability cases that economic losses, such as lost profits and repair costs, are not recoverable against a non-performing seller under tort theories of negligence or strict liability because the buyer's rights are limited to warranty law. See, e.g., Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (9th Cir. 1984); (Footnote continued on next page.)

Woroner Productions, Inc. v. Tourist Development Authority, 256 So.2d 38, 39 (Fla. 3d DCA 1971), cert. denied, 261 So.2d 843 (Fla. 1972).

The Eleventh Circuit recognized this line of authority, but found a conflict in Safeco Title Insurance Co. v. Reynolds, 452 So.2d 45 (Fla. 2d DCA 1984), and Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984). The conflict, however, is apparent, not actual, as both cases intermingle the contract and tort issues.

Safeco contained a claim for breach of a title insurance contract by failure to disclose an easement and parking agreement which damaged the value of plaintiffs' property, and a subsequently added second count for negligence in failing to make the required disclosures. 452 So. 2d at 47. Affirming the validity of the negligence claim, the Second District alluded to the "long-established general principle that injuries caused by the allegedly negligent performance of a contractual duty may be redressed through a tort action." Id. at 48. In such cases, not surprisingly, plaintiff may recover special damages "such as lost profits in cases of tort arising from a contractual setting" because "[d]amages for torts arising out of contracts are governed by the same rules as in the case of contract actions." Id. at 49.

(Footnote continuation from previous page.)
Twin Disc, Inc. v. Big Bud Tractor, Inc., 772 F.2d 1329, 1332-34 (7th Cir. 1985); Sanco, Inc. v. Ford Motor Co., 579 F.Supp. 893, 896-97 (S.D. Ind. 1984), aff'd, 771 F.2d 1081, 1084-86 (7th Cir. 1985); Consolidated Edison Co. of New York, Inc. v. Westinghouse Electric Corp., 567 F.Supp. 358, 365 (S.D.N.Y. 1983); Anglo Eastern Bulkships Ltd. v. Ameron, Inc., 556 F.Supp. 1198, 1204 (S.D.N.Y. 1982). Accord Crawford v. Gold Kist, Inc., 614 F.Supp. 682, 689 (M.D. Fla. 1985).

Douglass likewise encompassed both contract and tort claims, and the case went to the jury on both theories. 459 So.2d at 336. Plaintiff there complained of damages to its sod field following Douglass's treatment of the field with fertilizer and herbicide. The lost profits claim was that a separate company ceased doing business with plaintiff after delivery of bad sod to its job sites. Douglass maintained, and the appellate court held, that the claim for lost profits was too remote and speculative and that the evidence of such loss was insufficient. Id. at 336, 337. Again, because both contract and tort questions were presented, the court had no occasion to distinguish between them. The court's dictum, that "in both contract and tort actions, lost profits are recoverable only if their loss is proved with a reasonable degree of certainty", id. at 336, falls far short of a holding vel non that lost profits are awardable in a tort case undiluted by elements of breach of contract.6/

Thus, where the tort in question also amounts to a breach of contract (Safeco) or where the suit contains both contract and tort claims (Douglass), lost profits may be recovered incident to the contrac-

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6/ Both Douglass and a case upon which it relies, Taylor Imported Motors, Inc. v. Smiley, 143 So.2d 66 (Fla. 2d DCA 1962), exclude lost profits in a tort case because they are too remote -- not the natural, probable, proximate and direct consequence of the tortious act. To reach this conclusion, Taylor analogized to, and Douglass quoted, contract cases on lost profits as "some guide in determining what is remote." Taylor, supra, 143 So.2d at 68. In neither case, however, was the court called upon to determine whether, in fact, lost profits could be sought in an action based solely on tort, as these damages were held unrecoverable for a different reason - their remote and speculative nature. This determination would bar such damages under general principles of both contract and tort law, hence no distinction need be drawn.

tual liability. Absent some element of contract, however, the contract remedy of lost profits is unavailable. Where there is no claim for breach of contract (Sprayberry) or no proof to sustain the contract claim (Greater Coral Springs Realty), a claim sounding solely in tort cannot support an award of lost profits.

In this case, although a contract claim was originally brought, AFM not only jettisoned the claim itself but expressly disclaimed reliance on any duties arising from the contract, thus removing from the case all vestiges of contract theory. Having abandoned the contract during trial, AFM cannot sustain a recovery on that ground on appeal. See, e.g., Dunster v. Metropolitan Dade County, 791 F.2d 1516, 1518-1519 (11th Cir. 1986); Etablissements Neyrpic v. Elmer C. Gardner, Inc., 175 F.Supp. 352 (S.D. Tex. 1959).

The Eleventh Circuit's first question should be answered in the negative. The two cases directly on point have held, and correctly, that a plaintiff suing exclusively in tort may not recover lost profits. The alleged conflicting authorities do not involve actions purely in tort, but tort claims coupled with breach of contract issues. No Florida case of which Southern Bell's counsel is aware has ever squarely held that loss of profits may be sought in an action solely in tort, and this Court should not now depart from this well-defined path. Even if this Court should mark new frontiers and permit assessment of contract damages in this tort action, however, AFM's proof of lost profits fails for other reasons under Florida law.

B. Related Questions as to Lost Profits

1. The Evidence Was Insufficient to Prove that the Damages Claimed Had any Causal Connection to the Alleged Misconduct.

Florida law precludes recovery for alleged lost profits because AFM's evidence was insufficient, as a matter of law, to establish with reasonable certainty and by competent proof that any lost profits resulted from Southern Bell's failure to continuously provide the reference. See U.S. Home Corp. v. Suncoast Utilities, Inc., 454 So.2d 601, 605 (Fla. 2d DCA 1984); Florida Outdoor, Inc. v. Stewart, 318 So.2d 414, 415 (Fla. 2d DCA 1975), cert. denied, 333 So.2d 465 (Fla. 1976).

The general rule of long-standing in this state is that loss of profits damages are "too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss." New Amsterdam Casualty Co. v. Utility Battery Mfg. Co., 122 Fla. 718, 166 So. 856, 860 (Fla. 1935). So while there is no absolute prohibition to such recovery, the Florida rule reflects an awareness that "proof of anticipated profits contains an inherent element of conjecture." Aldon Industries, Inc. v. Don Myers & Associates, Inc., 517 F.2d 188, 191 (5th Cir. 1975). See also Royster Co. v. Union Carbide Corp., 737 F.2d 941 (11th Cir. 1984); National Papaya Co. v. Domain Industries, Inc., 592 F.2d 813, 818 (5th Cir. 1979).

Consequently, it is basic Florida law that the loss of profits, as the "natural result of [the contract's] breach", must be established with "reasonable certainty" -- "such certainty as satisfies the mind of a prudent and impartial person." Twyman v. Roell, 123 Fla. 2, 166 So. 215, 217, 218 (Fla. 1936); A.O. Smith Harvestore Products, Inc. v.

Suber Cattle Co., 416 So.2d 1176, 1178 (Fla. 1st DCA 1982). Indeed, it has been frequently stated that it is the uncertainty as to cause of damage, rather than amount, which defeats recovery. E.g., Twyman, supra, 166 So. at 218; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

Measured against these well-established standards, AFM's evidence was clearly insufficient to show that its claimed damages "flowed as the natural and proximate result" of Southern Bell's conduct. Aldon Industries, supra, 517 F.2d at 191. There were three lay witnesses as to causation: two of AFM's officers and one independent witness. John Montague ("Montague") and Jerry Applebaum ("Applebaum"), AFM's President and Vice-President respectively (2SR-7, 38), opined that AFM's Dade County sales decreased while the call reference was not in effect and attributed the fall solely to the reference's absence (R6-104; 2SR-22).7/ Their opinions were belied, however, by AFM's own empirical data. Its compilation of invoices proved that Dade sales were actually increasing from April through June when no reference of calls was provided: March - $20,539.00; April - $42,001.00; May - $38,947.48; June - $50,597.12 (R6-11). AFM's invoices proved conversely that Broward sales were drastically declining during this same period (R6-114-116). Both Montague and Applebaum conceded that the Broward decrease had nothing to do with the reference of calls problem (R6-114;

7/ On cross examination, however, Montague receded from even this statement of causation, admitting that the purported decrease in Dade County sales could have been caused in part by other factors, which he further conceded he could not quantify (R6-105).

2SR-66). In fact, they acknowledged that they had no idea why the Broward sales fell (R6-114-115; SR-66).

The fact of increased sales after the alleged misconduct (plus the inadequacy of records introduced) in itself "raises serious doubt" that there was any causal effect whatever. Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 952 (5th Cir. 1975). Where plaintiff's earnings are greater while the alleged wrongful conduct occurs than when that conduct ceases, it is impossible to determine whether the conduct in fact caused injury. E.F.K. Collins Corp. v. S.M.M.G., Inc., 464 So.2d 214-215 (Fla. 3d DCA 1985). Under such circumstances, there can be no "reasonable basis in the evidence" for the lost profits award. Id. at 215.

The other witness, Paul Ranni ("Ranni"), testified that he was in the market to rent a copier for $100 a month but was unable to reach AFM after calling the number in the Yellow Pages (1SR1-7-11). This hardly constitutes proof of the loss of particular customers required by Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320, 324 (Fla. 1956). Indeed, there was no evidence that Ranni would have purchased anything from AFM, as he eventually rented an entirely different brand of copier because he liked the salesman (1SR1-7-11). Any inference that this sale was lost because of Southern Bell is impermissible speculation and conjecture:

> The burden...remains with the appellant to establish by clear and competent evidence the alleged temporary and permanent loss of patients, tracing such loss to the alleged breach of contract. Such evidence cannot be nebulous or speculative.

Augustine, supra, 91 So.2d at 324.

AFM's "expert" testimony fares no better. Dr. Frederick Landsea's ("Landsea's") analysis was superficial, and the linchpin of his theory -- parallel sales trends in Dade and Broward -- refuted by AFM's own evidence. His testimony was based upon a compilation of AFM's business invoices done by Montague and an AFM receptionist. Landsea neither tested it for accuracy (R6-84-98; R4-35) nor conducted any independent survey or samples (R4-35). Based upon a historical comparison of Dade and Broward sales, Landsea concluded that Dade and Broward sales moved in the same direction and in parallel, up or down together (R4-7-14, 36-37). Thus, according to Landsea, AFM's Dade County sales should have been $70,000 higher in the April-June 1981 months, and the "lower" sales were due entirely to the disconnection of the reference (R4-7-14).

The first problem with this "analysis", of course, is that the same compilation of sales upon which Landsea predicated his theory negates it. Broward and Dade sales were not parallel - Dade sales increased during April-June while Broward sales markedly decreased (R6-111, 114-116). Landsea offered no explanation to plug this gaping hole in his theory, and indeed, admitted that he had none (R4-36-42). The catastrophic sales results for Broward prove that other forces, distinct from the reference of calls, actually affected AFM's sales. Montague reluctantly admitted that other factors existed, but had no idea what their effect was. The existence of variables other than defendant's misconduct that reasonably could have caused the alleged losses is the reason the Fifth Circuit invalidated the lost profits in Aldon Industries,

supra, 517 F.2d at 193, because, where other variables exist, reasonable certainty cannot.[8/] See also Kenco Chemical and Mfg. Co., Inc. v. Railey, 286 So.2d 272, 274 (Fla. 1st DCA 1973), cert. denied, 294 So.2d 659 (Fla. 1974) (testimony that sales were substantially lower than had been estimated was inadequate to prove lost profits because (1) difference in revenue was not shown to have resulted from defendant's acts, (2) other circumstances, unrelated to defendant, could have affected sales for that period).

The second problem is that there was no evidentiary or logical basis for Landsea's use of April to June periods of prior years for comparison. Generally, it is the period immediately before the alleged injury that is relevant. Copper Liquor, supra, 506 F.2d at 954. AFM's own President confirmed that its business was not seasonal (R6-110), yet Landsea not only offered no explanation for his failure to utilize data from the months immediately preceding the cutoff, but conducted no studies or analyses to show comparability. Indeed, he did not even analyze the effect of the most obvious difference between 1981 and prior years: that in April-June 1981, AFM's location had changed and thus it was now further away from (and less convenient to) Dade County customers than before.

8/ Southern Bell's expert Stanley Cohen ("Cohen"), a certified public accountant with extensive experience in business valuation, including businesses involved in the sales and service of copy machines (1SR-31), conducted his own analysis of AFM's sales invoices (1SR-33). His conclusion, as is obvious, was that there was no cause and effect relationship between the reference of calls and AFM's sales (1SR-35); Dade sales actually increased while the reference was off, but Broward sales (which were never influenced by the call reference) dropped dramatically (1SR-35-38).

2. The Evidence Was Insufficient to Establish with Reasonable Certainty the Amount of Lost Profits.

To sustain an award of lost profits, not only the cause but also the amount of such damages must be proven with "reasonable certainty." Bluevack, Inc. v. Walter E. Heller & Co. of Florida, 331 So.2d 359, 361 (Fla. 3d DCA 1976); Sampley Enterprises, Inc. v. Laurilla, 404 So.2d 841, 842 (Fla. 5th DCA 1981); Beverage Canners, Inc. v. Cott Corp., 372 So.2d 954, 956 (Fla. 3d DCA 1979). The degree of certainty required is not one of precise measure but rather "one which may be established by sufficient and competent testimony." Mori v. Matsushita Electric Corp. of America, 380 So.2d 461, 465 (Fla. 3d DCA 1980).

The test is satisfied if there is a "reasonable basis in the evidence for computation of damages", even though the result may be only approximate, Sampley Enterprises, supra, 404 So.2d at 842, or the precise amount uncertain or difficult to prove, Clearwater Associates v. Hicks Laundry Equipment Corp., 433 So.2d 7, 8 (Fla. 2d DCA 1983). However, the evidence supporting an award of lost profits cannot be "based upon mere speculation or conjecture." Mori, supra, 380 So.2d at 465. Where, as here, the proof of lost profits is lacking in reasonable certainty, the award cannot stand. Beverage Canners, supra, 372 So.2d at 956; Aldon Industries, supra, 517 F.2d at 191, 193; Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983).

In Beverage Canners, the court warned of the "inherently speculative nature" of estimating lost profits, criticizing plaintiff's use of "figures in its calculations which encompass too many variables

and unforeseeable expenditures." 372 So.2d at 956. Among the specific errors noted were: failure to determine whether overhead costs would remain the same with the advent of a sizable expansion in the business; and failure to accurately convert another company's sales data (used for comparison) into numbers applicable to plaintiff. Under such circumstances, the court understandably found the expert witness testimony "patently conjectural, remote, and contingent on changing conditions and circumstances," not therefore warranting "serious consideration as proof of damages here." Id.

Similarly, in Royal Typewriter, supra, 719 F.2d at 1105, lost profits were not established with the requisite certainty. An analysis comparing what plaintiff actually earned with what it would have earned had it leased all its copiers in accordance with certain assumptions used in a sales presentation was held not to satisfy plaintiff's burden, there being no evidence that the business was ever operated in accordance with the assumptions. The analysis was further defective in that it did not account for the variable of technological innovation:

> A satisfactory analysis of lost profits cannot use figures which result in too many variables, specifically the effect of other advances in the art on the RBC-1's profitability.... The analysis used did not account for changes in the state of the art which would have affected profitability.

Id. After allowing for differences between plaintiff and the theoretical firm used in the analysis, the court concluded that "the hypothetical firm in this study was not sufficiently comparable to plaintiff's business operation." Id. at 1105-1106.

Likewise, in Aldon Industries, supra, 517 F.2d at 193, counterplaintiff's lost profits, allegedly due to defective carpeting

supplied by counterdefendant, were reversed as "too speculative and subject to conjecture." Counterplaintiff's "expert" testified to past market shares and past revenues, noting that market share and sales fell after delivery of the defective carpeting. To this lost gross sales, he then applied a ratio of gross profits to arrive at damages, without reduction of gross profits to net profits. Reversing the award, the court held:

> The problem is that one cannot determine to a reasonable certainty what part, if any, of this lost market share resulted from Aldon's wrongdoing. The variables which could explain or account for a significant portion of the market share loss are sufficiently numerous to place the damage award in the realm of speculation and conjecture.

Id. at 193. Particular defects noted by the court included: failure to account for variables such as increased competition and a change in the nature of the business; an erratic sales pattern reflecting significant ups and downs from year to year, the use of which to predict future sales was "but surmise"; and the expert's reliance on numerous assumptions, some of which were "supported by either no evidence or by the flimsiest of evidence." Id. at 193.

As is easily seen, AFM's evidence shared these flaws. Many variables affected AFM's potential profits, but few were analyzed by its expert. Landsea's testimony was virtually identical to that held deficient in Aldon Industries: the manipulation of past revenues to determine the "fact" that gross sales declined; the application of a gross percent factor to determine lost gross profits; and the failure to reduce that number to the "net profit" requisite under Florida law. Moreover, the gross margin figure used was not AFM's but that of another company, AFM

Business Machines, Inc. (R4-46), unsupported by proof of the comparability of the two entities.[9/]

3. No Evidence Was Introduced that AFM Had Obtained Profitability in the Past.

Because any determination of lost profits involves some degree of speculation, Florida courts have imposed certain absolute prerequisites to their recovery. A plaintiff must, at a minimum, present proof of past profitability. In Murciano v. Urroz, 455 So.2d 463, 464 (Fla. 3d DCA 1984), the court was compelled to reverse a jury award of lost profits, holding:

> It is axiomatic that to establish lost profits, a litigant must prove that his business has earned profits for a reasonable time anterior to the breach.

See also New Amsterdam Casualty, supra, 166 So. at 860-861; Alrodo Corp. v. Carl Scheffer-Klute GmbH & Co., 464 So.2d 1304 (Fla. 3d DCA 1985); E.F.K. Collins, supra, 464 So.2d at 215; Innkeepers International, Inc. v. McCoy Motels, Ltd., 324 So.2d 676, 679 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 106 (Fla. 1976).

Thus, proof of profits for a "reasonable time" before the breach is required to establish lost profits. Wash-Bowl, Inc. v. Wroton, 432 So.2d 766 (Fla. 2d DCA 1983); Welbilt Corp. v. All State Distributing Co., 199 So.2d 127 (Fla. 3d DCA 1967). Without it, as was held in A & P Bakery Supply & Equipment Co. v. Hawatmeh, 388 So.2d 1071, 1072 (Fla. 3d DCA 1980), a finding of lost profits descends to rank conjecture:

9/ The "net profits" issue is detailed in the next two subsections of this brief.

> Where a record of past profitability is unavailable to inform a jury's deliberations, any finding it might make regarding lost profits must be purely speculative. Since appellee cannot establish past profits, he cannot claim lost profits resulting from appellant's breach.

In the instant case, AFM failed to prove that it had ever earned any profits, much less done so for any prior period of time, reasonable or otherwise. Profitability, of course, is dependent upon both the income and expenses of the business, and plaintiff must present proof of both covering a reasonable time preceding the claim. New Amsterdam Casualty, supra, 166 So. at 860; Born v. Goldstein, 450 So.2d 262, 264 (Fla. 5th DCA), pet. for rev. dismissed, 458 So.2d 272 (Fla. 1984); American Motorcycle Institute, Inc. v. Mitchell, 380 So.2d 452, 453 (Fla. 5th DCA 1980); Welbilt Corp., supra, 199 So.2d at 128. Where it does not appear that plaintiff has ever made a profit from its business, and there is no evidence of actual profits before or losses after the act in question, it cannot be determined with any degree of certainty what profits were lost as a result of defendant's conduct. New Amsterdam Casualty, supra, 166 So. at 860.

The only financial evidence here, however, was as to sales, not profits: (1) AFM's compilations of total invoice revenues for the periods December 1979, April-June 1980, December 1980, and April-June 1981 for Dade and Broward counties (R-84-98; R4-35); and (2) Landsea's testimony as to AFM's total invoice revenues for April-June for 1976 through 1979. There was no evidence of AFM's costs or expenses during those periods or whether these revenues produced any profits. Evidence as to past revenues is totally inadequate, since revenues do not, under any theory, equate with profits. Thus where the evidence "only

pertains to gross receipts or fails to establish expenses with specificity," an award of loss profits will be reversed. Born, supra, 450 So.2d at 264. As held in E.T. Legg & Associates, Ltd. v. Shamrock Auto Rentals, Inc., 386 So.2d 1273 (Fla. 3d DCA 1980), pet. for rev. denied, 392 So.2d 1379 (Fla. 1981):

> As to the damages, the only evidence presented pertained to income or gross receipts, not profits, and testimony concerning expenses did not establish specific dollar amounts. The evidence was therefore inadequate to prove lost profits.

Id. at 1274. See also, Southern Bell Telephone and Telegraph Co. v. Kaminester, 400 So.2d 804, 807 (Fla. 3d DCA 1981); Augustine, supra, 91 So.2d at 324; Kenco Chemical, supra, 286 So.2d at 274; Itvenus, Inc. v. Poultry, Inc., 258 So.2d 478, 482 (Fla. 3d DCA 1972).

Furthermore, the evidence as to expenses, such as it was, did not even relate to AFM's own operations. Instead, Landsea extracted a gross margin calculation from the profit and loss statement of a different company, AFM Business Machines, Inc., for October to December 1981 (R 4-46), which, of course, was after AFM itself ceased doing business.[10/] Moreover, Landsea calculated these gross profits only for

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10/ Landsea opined, supposedly in reliance on AFM's invoice compilations, that gross sales for Dade County should have been $70,000 higher for April-June 1981 (R4-7-14). He then applied to that $70,000 in "lost" sales a gross margin of 30.4% to arrive at what he called a lost gross profit of $21,800.00 (R4-16-17). This percentage, however, was not derived from AFM's own profitability for any time frame but rather from that of the other company in another quarter some six months after the offending conduct. Moreover, this percentage did not take into account a variety of AFM's costs, including officer's salaries (R4-33-34), and it was, by Landsea's own admission, not a lost net profit figure (R4-32).

April-June 1981, making no attempt to relate the gross margin to any anterior periods for AFM. At a minimum, financial information showing revenues and expenses must come from relevant periods and utilize relevant records. See Copper Liquor, supra, 506 F.2d at 951-952.

Consequently, there is a dearth of evidence that AFM ever achieved anterior profits. Thus, AFM failed to meet its burden, and lost profits were unavailable as a matter of law.

4. No Evidence Was Introduced that this AFM Suffered any Loss of Net Profits.

a. No Evidence Was Presented as to AFM's Costs or Expenses During April-June 1981.

As discussed above, evidence of lost income or gross receipts is insufficient to entitle a plaintiff to lost profits damages. E.T. Legg, supra, 386 So.2d at 1274. Instead:

> The burden remains upon [him] to allege and prove the loss of net profits as distinguished from gross profits.

Augustine, supra, 91 So.2d at 324.

To meet this burden, there must be "substantial competent evidence of overhead, costs, or operating expenses which may be charged against the anticipated profits or gross revenues." Itvenus, supra, 258 So.2d at 482. See also, Tech Corp. v. Permutit Co., 321 So.2d 562, 563 (Fla. 4th DCA 1975) (proof of lost profits, including reasonable overhead, must be reasonably certain). Failure to deduct all includable expenses is reversible error:

> In this case plaintiff testified only as to annual gross incomes, omitting evidence as to the amount of operating expenses even though it was clear that such expenses existed. This omission requires reversal of the compensatory damage award.

American Motorcycle Institute, supra, 380 So.2d at 453.

As noted above, AFM failed to prove past expenses to show past profitability. It further failed to prove expenses or costs during the period of claimed damage in April, May and June 1981. Landsea's gross margin was derived solely from the profit and loss statement for AFM Business Machines, Inc. for the last quarter of 1981. He conducted no analyses and performed no calculations to establish that AFM Business Machine, Inc.'s margins were similar to AFM's or that this later time was related to AFM's anterior operations. There was accordingly no evidence at all as to AFM's own costs or expenses during any period, particularly April to June 1981.

b. The Only Evidence Related to Gross Profit Because Officer's Salaries Were Not Deducted.

To prove lost net profits, a plaintiff must reduce gross receipts by all expenses incurred in obtaining those receipts:

> In proving damages caused by lost net profits, ... a corporation, in arriving at the net loss, must deduct the expense of salaries paid to its officers.

Kaminester, 400 So.2d at 807; See also Innkeepers International, supra, 324 So.2d 676. The failure to do so renders the award fatally flawed:

> We hold that the failure to deduct the compensation of Dr. Kaminester in the computation of net profits, rendered the proof of damages inadequate as a matter of law, and that the court erred in not granting Southern Bell's motion for a new trial.

Kaminester, supra, 400 So.2d at 807.

Landsea admitted that he did not include officer's salaries in expenses and, therefore, made no deduction for them in arriving at his lost profit figure (R4-33-34). He further acknowledged that he did not

attempt to calculate a lost net profit (R4-32). To be sure, he testified as to his theory why salaries should not be included, but the theories of a witness do not surmount the clear mandate of Florida law that the deduction must be made. Consequently, the proof was inadequate as a matter of law.[11/]

II. A NEGLIGENT OR WILLFUL BREACH OF CONTRACT ALONE CANNOT CONSTITUTE AN INDEPENDENT TORT.

The Eleventh Circuit's second certified question, to be reached only if the first was answered affirmatively, was whether a "tortious" (negligent or willful) breach of contract could without more constitute an independent tort. While Southern Bell obviously believes that the first question will be answered "No" and that this second question thus need not be considered, the unhesitating answer to this second question must be "No". Moreover, the recent decree of this Court in Southern Bell Telephone & Telegraph Co. v. Hanft, 436 So.2d 40 (Fla. 1983), forestalls any valid tort claim under the facts of this case.

The Eleventh Circuit saw two conflicting cases on this question. The first, Electronic Security Systems Corp. v. Southern Bell Telephone and Telegraph Co., 482 So.2d 518 (Fla. 3d DCA 1986),

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11/ Indeed, the deficiencies in Landsea's testimony are sufficiently monstrous to preclude its admissibility as a matter of law. An expert's projection of profits must be supported by proven facts. Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 789 (11th Cir. 1983). Not only must the underlying facts or data form a sufficient basis for an expert's opinion, but those "underlying facts or data upon which the opinion is based must themselves be relevant." Husky Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983). Moreover, the opinion of an expert based on facts or inferences not supported by the evidence has no evidential value; and the opinion cannot constitute proof of the existence of the facts necessary to support the opinion. Autrey v. Carroll, 240 So.2d 474, 476 (Fla. 1970).

squarely considered the issue presented, and, in reliance on an unquestioned, solid line of precedent, decided it in the negative. The second, however, Safeco, supra, 452 So.2d 45, did not address the issue at all, and thus gives rise to no conflict. While there is no question but that a tort can, under some circumstances, grow out of or accompany a breach of contract, that is a far cry from a holding that a tort can consist in nothing more than a breach of contract, even a breach committed with "tortious" intent.

Plaintiff in Electronic Security sued Southern Bell for failure to place its advertisement in the Yellow Pages as contracted for, in three separate counts: (1) breach of contract; (2) negligence (claiming that Southern Bell "had breached a duty it owed to ESS by the omission of ESS's advertising"); and (3) intentional tort (claiming that Southern Bell had intentionally omitted ESS's advertising). Dismissal of both tort claims was affirmed, the court rejecting ESS's contention that the allegations stated a cause of action in tort:

> ESS's negligence count was based solely on the breach of contract claim. Since a breach of contract, alone, cannot constitute a cause of action in tort, the trial court properly dismissed the negligence count.... It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence.... ESS's intentional tort count likewise did not sufficiently state a cause of action. A breach of contract cannot be converted into a tort merely by allegations of malice....We find the trial court properly dismissed ESS's intentional tort complaint.

482 So.2d at 519.

Safeco, which the Eleventh Circuit viewed as conflicting, simply does not decide that issue. Indeed, to the extent that it speaks

of "torts arising out of contracts" and proof of "both a breach of contract and a breach of duty of care (negligence) owed pursuant to the same contract", id. at 49, it is fully consistent with the Electronic Security line. It thus recognizes contract and tort as separate, although one (contract) may give rise to the other (tort). Nowhere does Safeco suggest, however, that a contract claim without more is also simultaneously a tort claim.[12/] Rather, a tort claim may consist of a contract claim plus something more (tort = contract + x). There is no doubt under Florida law what the "x" in that equation must be: a separate and independent tort. Outrageousness, maliciousness, and all forms of evil intent in committing a breach of contract cannot suffice as "x" in the formula.

This Court has recently reaffirmed that long-standing principle. In Lewis v. Guthartz, 428 So.2d 222 (Fla. 1982), the Third District certified this question:

> Where the defendant flagrantly, unjustifiably, and oppressively breaches a contract, and attempts to conceal the breach by the criminal act of making false statements to the government, must the plaintiffs plead and prove that the defendant committed an independent tort against them in order to recover punitive damages?

Id. at 223. Answering unanimously in the affirmative, this Court invoked the "well-settled rule in Florida", dating back to the "seminal

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12/ Indeed, it has been held that an action in tort is inappropriate where the basis of the suit is a contract, either express or implied, Belford Trucking Co., Inc. v. Zagar, 243 So.2d 646, 648 (Fla. 4th DCA 1970), Rosen v. Marlin, 486 So.2d 623, 625 (Fla. 3d DCA 1986), or the claim is based on a breach of contract, Douglas v. Braman Porsche Audi, Inc., 451 So.2d 1038, 1039 (Fla. 3d DCA 1984).

case" of Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957), that punitive damages are not recoverable in a breach of contract action "absent an accompanying independent tort." Lewis, supra, 428 So.2d at 223. If an independent tort is a prerequisite to punitive damages, and a flagrant, unjustifiable, oppressive, even criminal breach of contract cannot sustain such damages, then the flagrant, unjustifiable, oppressive, even criminal breach is not itself an independent tort. As this Court put it:

> The fact that the trial court found that the landlord acted intentionally, willfully, and outrageously as to the breach of contract does not by itself create a tort where a tort otherwise does not exist.

Id. at 224. There must instead be a tort "distinguishable from or independent of [the] breach of contract." Id.[13/]

13/ The Third District, in Guthartz v. Lewis, 408 So.2d 600, 603 (Fla. 3d DCA), aff'd, 428 So.2d 222 (Fla. 1982), described Florida law in this area as a "long-standing and unbroken line of authority" ("No matter how unjustified was Guthartz's conduct, in the final analysis it constituted only a breach of contract; and no matter how unyielding and oppressive that breach may have been, an independent tort was neither alleged nor proved"). See, e.g., Fontainebleau Hotel Corp. v. Kaplan, 108 So.2d 503 (Fla. 3d DCA 1959)(willful and flagrant behavior in furtherance of a breach of agreement did not also constitute a tort); Masciarelli v. Maco Supply Corp., 224 So.2d 329 (Fla. 1969)(willful, malicious and harassing conduct surrounding the breach of contract, forcing plaintiff to lose his business and life savings, is not an independent tort); Henry Morrison Flagler Museum v. Lee, 268 So.2d 434, 437 (Fla. 4th DCA 1972)(punitive damages are not recoverable for breach of contract, irrespective of the motive of the party at fault and even where the breach is willful and flagrant); Country Club of Miami Corp. v. McDaniel, 310 So.2d 436 (Fla. 3d DCA 1975)(oppressive, malicious and wanton disregard of contractual obligations does not convert into independent tort separate and apart from breach of contract); B & J Holding Corp. v. Weiss, 353 So.2d 141, 143-144 (Fla. 3d DCA 1977)(plaintiffs failed to allege a willful, independent tort, separate and apart from the breach of contract, upon which punitive damages might be claimed); U Shop

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Both the acts and the damages comprising the tort must somehow be different than those amounting to breach of contract. For punitive damages to be recoverable in a breach of contract case, the breach of contract "must be attended by some additional wrongful conduct amounting to an independent tort." Hanft, supra, 436 So.2d at 42. Moreover, the "tort action must arise from conduct that is independent of the conduct which constitutes a breach of contract." Taylor v.

(Footnote continuation from previous page.)
Rite, Inc. v. Richard's Paint Mfg. Co., Inc., 369 So.2d 1033, 1034 (Fla. 4th DCA 1979) (trial court erred in awarding punitive damages in a breach of contract case, since the acts constituting the breach of contract did not also amount to a cause of action in tort); Greer v. Williams, 375 So.2d 333, 334 (Fla. 3d DCA 1979), cert. denied, 385 So.2d 762 (Fla. 1980) (punitive damages are only recoverable where the acts constituting a breach of contract also amount to a cause of action in tort, which must be separately pled and proved); Bill Branch Chevrolet, Inc. v. Redmond, 378 So.2d 319, 321 (Fla. 2d DCA 1980) (punitive damages may be awarded for breach of contract only when the breach also amounts to a cause of action in tort; because the facts did not constitute a tort but merely a breach of a sales contract, plaintiff was not entitled to punitive damages); Johnson v. Lasher Milling Co., Inc., 379 So.2d 1048, 1051 (Fla. 1st DCA), cert. denied, 388 So.2d 1141 (Fla. 1980); Ryan v. Wren, 413 So.2d 1223 (Fla. 2d DCA 1982)(allegation that breach of contract was "done in a willful and malicious manner" does not allege any tort surrounding the breach of contract, and does not amount to a tort independent of the contract); Schimmel v. Merrill Lynch Pierce Fenner & Smith, Inc., 464 So.2d 602, 605 (Fla. 3d DCA 1985) (punitive damages reversed where all that was proved was that plaintiff breached its contract by refusing to pay upon demand money owed, and not the commission of any tort distinguishable from or independent of this simple breach of contract); Capital Bank v. G & J Investments Corp., 468 So.2d 534, 535-536 (Fla. 3d DCA 1985) (determination that conversion does not lie leaves no independent tort and thus no basis for punitive damages because they are not recoverable in a breach of contract, action absent an accompanying independent tort); Rosa v. Florida Coast Bank, 484 So.2d 57, 58 (Fla. 4th DCA 1986)(actions did not amount to an independent tort separate from the breach of contract claim); Rosen, supra, 486 So.2d at 626 (punitive damages are not recoverable for breach of contract notwithstanding the oppressive nature of the breach).

Kenco Chemical & Mfg. Corp., 465 So.2d 581, 589 (Fla. 1st DCA 1985). The analysis is thus in two steps:

> To prevail on his claim for punitive damages, [plaintiff] must show first, that the [defendant] perpetrated a tort; and second, that the alleged tortious conduct arose independently of the conduct which constitutes a breach of contract.

Id. at 590. Where the alleged tort is not independent but rather "arose from the same conduct which allegedly constitutes a breach of contract", punitive damages are not available. Id. at 590; Morcyl Distributing Co. v. Farrelly, 477 So.2d 617, 618 (Fla. 5th DCA 1985) (aside from acts constituting a breach of contract itself, court found insufficient evidence of intentional wrong or abuse to amount to independent tort; punitive damages reversed); Mobil Chemical Co. v. Hawkins, 440 So.2d 378, 381 (Fla. 1st DCA 1983), pet. for rev. denied, 449 So.2d 264 (Fla. 1984) (the representations creating the contract allegedly breached were the same representations as those plaintiff characterized as tortious misrepresentations, thus no pleading and proof of independent tort).

Likewise, the damages sought for the tort must be separate and apart from those sought for the contract. In Rolls v. Bliss & Nyitray, Inc., 408 So.2d 229 (Fla. 3d DCA 1981), dismissed, 415 So.2d 1359 (Fla. 1982), the compensatory damages for fraud "were identical to the measure of recovery sought in the separate count for breach of contract", that is, that "plaintiffs be compensated for the loss of their bargain...or...be put in the position they would have occupied had defendants not breached the contract." Id. at 237. This fact was fatal to the claim for punitive damages, mandating its reversal:

> Therefore, since plaintiffs failed to prove that they sustained compensatory damages based on a

> theory of fraud which were in any way separate or distinguishable from their compensatory damages based on the contract, we conclude that plaintiffs have failed to meet the strict pleading and proof requirements necessary to recover compensatory and punitive damages based on fraud, and that these damages must therefore be reversed.

See also Rosen, supra, 486 So.2d at 626 (where the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, neither compensatory nor punitive damages for the tort are recoverable).

It is the substance of the wrong, not the words used to describe it, which are determinative. If the claim is in fact one for contract breach, calling it a tort or claiming that it was malicious does not change its character. American International Land Corp. v. Hanna, 323 So.2d 567, 569 (Fla. 1975)("The general rule is that a breach of contract cannot be converted into a tort merely by allegations of malice"); Days v. Florida East Coast Railway Co., 165 So.2d 434, 436 (Fla. 3d DCA 1964)("If the defendant...breached its contract to employ the plaintiffs, this breach of contract may not be converted into a tort by an allegation that it was maliciously done"). As the Fifth District stated:

> Fulminating language in a complaint characterizing a contract breach as "willful, wanton, outrageous, malicious", ad nauseum does not establish an independent tort that will support a punitive damage action.

Jaimot v. Media Leasing Corp., 457 So.2d 529 (Fla. 5th DCA 1984). See also Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037, 1040 (Fla. 1982)(no punitive damages may be recovered for breach of contract, and the amount of damages flowing from a breach of contract is

not affected by the manner of the breach); Nicholas v. Miami Burglar Alarm Co., Inc., 339 So.2d 175 (Fla. 1976); Haendel v. Paterno, 388 So.2d 235 (Fla. 5th DCA 1980).

These truisms are most vividly brought to life in one of this Court's recent decisions much like the instant case. In Hanft, a doctor sought compensatory and punitive damages based on Southern Bell's having agreed to list him as a physician and specialist in the Yellow Pages and omitting his name from the listings for two consecutive years. 436 So.2d at 41. The complaint was in three counts, alleging that: (1) Southern Bell negligently breached its promise to list him in the 1973-1974 directory; (2) Southern Bell negligently omitted him from the lists again in 1974-1975; and (3) because he communicated with Southern Bell numerous times concerning his desire to be listed in the 1974-1975 Yellow Pages and was assured that the proper listing would be published, the second breach constituted gross negligence deserving of punitive damages. Importantly, Hanft, like AFM here, chose not to frame his claim as one in contract, but instead classified Southern Bell's conduct as the tort of negligence. That characterization, however, was held immaterial to the result, as was the claim that the conduct was intentional and malicious.

This Court noted first the necessity for "some additional wrongful conduct amounting to an independent tort." Id. at 42. Once that independent tort is established, punitive damages are analyzed under traditional tort theories -- "[w]illful, wanton, malicious, or outrageous misconduct must be shown." Id. This analysis controls, moreover, even where plaintiff denominates his action as one in tort. If

it is in actuality a contract claim, contract rules govern, no matter what label plaintiff has chosen:

> Although couched in terms of negligence, the first two counts of Dr. Hanft's complaint in essence stated a cause of action for breach of contract. In order to prevail on the claim, the plaintiff needed to prove, among other things, that the defendant failed to fulfill its promises to list Dr. Hanft in the Yellow Pages. It was immaterial to the breach of contract action whether the breach was committed intentionally, negligently, or because of circumstances entirely beyond the defendant's control. Although the complaint alleged that in failing to include Dr. Hanft's name the second time the defendant was grossly negligent, there was no evidence presented showing the manner or method of Southern Bell's employees' conduct causing the failure. There was no proof that the breach of contract was attended by some conduct amounting to an independent tort.

Id. at 42. Thus, punitive damages could not be asserted.

The parallels to AFM are obvious. AFM contends that Southern Bell failed to continuously provide the agreed-upon reference of call service, and that the second interruption of that service caused it damage. Although it frames the duty allegedly breached as one in negligence, it is undeniable that the source of that duty is in contract -- Southern Bell agreed to provide the service, and that agreement is a contract. AFM's claim, whatever it is called, is still one for breach of contract. As in Hanft, to prevail, AFM needed to prove that Southern Bell failed to live up to its promises regarding the call reference. If that was so, it was immaterial whether the breach of contract was intentional, negligent, or not within Southern Bell's control.[14/]

14/ The facts as recited by the Eleventh Circuit clearly recognize this
(Footnote continued on next page.)

This is a breach of contract, pure and simple; other than the acts constituting the breach, there was no proof of additional conduct (or damages) amounting to an independent tort. The "rationale for the rule, even in cases of willful and intentional breach," Taylor, supra, 465 So.2d at 589, was stated in Lewis, supra, 428 So.2d at 223:

> an unwillingness to introduce uncertainty and confusion into business transactions as well as the feeling that compensatory damages as substituted performance are an adequate remedy for an aggrieved party to a breached contract.

Stability both of the law and of commercial dealings requires that this Court again "reaffirm the rule and its underlying policy." Id. at 223.

III. A NEGLIGENT OR WILLFUL BREACH OF CONTRACT ALONE CANNOT BE THE BASIS OF AN AWARD OF PUNITIVE DAMAGES.

A. The Certified Question

The third question certified by the Eleventh Circuit was, assuming the answer to the second question was positive, can "such a tort" be the predicate for punitive damages "if the other criteria for awarding punitive damages are met." Again, because the answer to question two must be "No", question three need not be answered. More-

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agreement: "The parties agreed that if ARM moved and changed its phone number, Southern Bell would provide this referral service" (Appendix "A" at p. 4945). There was never any question, until late in the trial when ARM dropped the contract count, as to the contract foundation of ARM's claim. Indeed, throughout pre-trial proceedings, ARM asserted that the reference of call agreement was a part of the Yellow Page contract. For example, in response to an interrogatory, ARM stated: "the contract with Southern Bell for phone service and listing services in the directory that [sic] included the reference of calls service" (2SR-54). In a supplemental answer to the same interrogatory, ARM claimed that the reference agreement was reached along with the Yellow Page contract (2SR-57).

over, it has already been answered in part by the many cases discussed in Point II. Nearly all of the cases holding that a negligent or willful breach of contract is not an independent tort do so for the sole purpose of determining that punitive damages are not awardable. Even if an independent tort is found, however, that alone is not sufficient to sustain a punitive award. The "other criteria" for awarding such damages alluded to by the Eleventh Circuit must additionally be met, and in this case, they were not.

Florida law has long been that more than the commission of a tort is necessary to impose punitive damages. As this Court stated in Hanna, supra, 323 So.2d at 569 n.5 (Fla. 1975): "Even a tort action will not support punitive damages where the assertions of willfulness and malice are not supported by specific allegations regarding the malicious conduct." Simple negligence is not sufficient. See, e.g., U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1064 (Fla. 1983)(punitive damages cannot be assessed for mere negligence); Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950)(in an action arising out of the negligent breach of a contract, damages for mental pain and anguish unconnected with physical injury [traditionally measured by the same standard as for punitive damages] are not recoverable); Auto-Owners Insurance Co. v. Hooks, 463 So.2d 468, 473 (Fla. 1st DCA 1985).

Even gross negligence is not enough. U.S. Concrete Pipe, supra, 437 So.2d at 1064; White Construction Co., Inc. v. DuPont, 455 So.2d 1026, 1028 (Fla. 1984)("something more than gross negligence is needed to justify the imposition of punitive damages"); Ingram v. Pettit, 340 So.2d 922 (Fla. 1976)(standard is equivalent

to "culpable negligence" in criminal proceedings); Como Oil Co., Inc. v. O'Loughlin, 466 So.2d 1061, 1062 (Fla. 1985) (degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter; the required misconduct goes beyond gross negligence, and trial court erred in finding evidence of gross negligence sufficient to create a jury question on punitive damages); Smith v. Brantley, 455 So.2d 1063, 1064 (Fla. 2d DCA 1984), pet. for rev. denied, 462 So.2d 1107 (Fla. 1985) (gross negligence by itself is not enough to support a claim for punitive damages).

Moving further up the scale of increasing level of wrongdoing, not even an intentional tort will suffice standing alone. The "mere proof of any intentional tort does not ipso facto entitle the plaintiff to punitive damages...." Bryson v. Swank, 166 So.2d 833, 834 (Fla. 3d DCA 1964), cert. denied, 172 So.2d 596 (Fla. 1965); Walsh v. Alfidi, 448 So.2d 1084, 1086-1087 (Fla. 1st DCA 1984)(jury should not be instructed that punitive damages will be awarded if defendant is found guilty of fraud; rather, any fraudulent conduct found by jury must also be accompanied by malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others); Wrains v. Rose, 175 So.2d 75, 78 (Fla. 2d DCA 1965); See also, Hanna, supra, 323 So.2d 567 (intentional tort of fraud and deceit not a basis for punitive damages without specific allegations of willfulness and malice).

Public policy demands that punitive damages be imposed in only the most egregious circumstances:

> It has long been established that the availability of punitive damages is reserved to those

> kinds of cases where private injuries partake of public wrongs. [Footnote omitted]. The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly. Cases in this category may be likened, in general terms, to culpable negligence in criminal proceedings.

Ingram, supra, 340 So.2d at 923-924. Consequently, the standard for the propriety of punitive damages is as originally stated in Carraway v. Revell, 116 So.2d 16, 20 (Fla. 1959), and recently reaffirmed by this Court in White Construction, supra, 455 So.2d at 1029:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of 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, 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".

Because of the deterrent and restitutionary functions of such awards, they are akin to criminal proceedings and governed by similar public interest considerations:

> There is a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter. Both have, as a basic purpose, the punishment of the offender. The offender in a manslaughter action may be deprived of his liberty or property by the State while the offender in an action for that kind of negligence justifying the imposition of punitive damages is deprived of his property -- not as compensation to the injured party but as punishment -- ergo, both are punishment and partake of public wrongs, to a greater or less degree.

Carraway, supra, 116 So.2d at 20; White Construction, supra, 455 So.2d at 1028. Thus, "the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages." Carraway, id.; White Construction, id.

As was determined in Hanft, supra, 436 So.2d at 42, a two-step analysis must be followed:

> For punitive damages to be recoverable in a contract case, an intentional wrong, willful 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. Willful, wanton, malicious, or outrageous misconduct must be shown.

What kinds of conduct are sufficient to satisfy this standard? Gulf Power Co. v. Kay, 11 FLW 1893 (Fla. 1st DCA, Sept. 3, 1986), and Gerber Children's Centers, Inc. v. Harris, 484 So.2d 91 (Fla. 5th DCA 1986), furnish examples of conduct far more egregious than here which was not enough, as a matter of law. In Gulf Power, a judgment had been entered of $7 million compensatory damages against Gulf and co-defendant Felch and $4.2 million punitive damages against Gulf alone. Plaintiff sustained severe injuries while riding as a passenger in a vehicle being driven by Felch which collided with a power pole owned and maintained by Gulf. The basis for the punitive damages claim was that prior accidents had occurred at the same pole, and despite its awareness of these accidents and the danger to the traveling public caused by its location, Gulf "did nothing to correct or even mitigate the dangerous condition." 11 FLW at 1896. Reversing the punitive

damages, the court found this evidence insufficient to warrant submitting the issue to the jury.

Likewise, in Gerber Children's Centers, supra, 484 So.2d 91, a two year old child fell through a plate glass window at the center, suffering severe cuts and lacerations. The window, the bottom ledge of which was only one foot from the floor, had originally contained safety glass and had been covered by a protective screen of hardware cloth. Due to vandalism, the window was repeatedly broken and replaced. During this process, the metal around the protective screens became bent and the screen eventually was not replaced, but the original safety glass on the window was replaced with ordinary window glass. Although management was warned by various employees about the danger of the window and the necessity for extra-strength glass, at the time of the accident there was no screen for the window and no barriers in front of it. On appeal, Gerber challenged the sufficiency of the punitive damage award in light of White Construction. Agreeing with defendant, id. at 92, the court reversed the punitive assessment:

> We cannot distinguish White. Failure to insulate small children from access to a window with ordinary, as opposed to safety, glass cannot be more flagrant and reckless than knowingly operating an 80,000 pound loader at top speed with no brakes in an area where people are working.... The operative question, then, is whether we would sustain a manslaughter conviction in the instant case against the management agents of Gerber had Harris died from the cuts received in his fall. The answer is no.

The instant case, of course, does not involve anything so tragic as a $7 million personal injury or the callous disregard for the helplessness of small children. AFM lost money, at best, and nothing

more. It is the Hanft case again which teaches how to decide a punitive damage claim in such a case. In Hanft, plaintiff testified that despite repeated communications with Southern Bell, his name still did not appear in the Yellow Pages as promised and confirmed by Southern Bell employees. As here, "there was no evidence presented showing the manner or method of Southern Bell's employees' conduct causing the failure", 436 So.2d at 42, and "[n]one of the witnesses could explain precisely how Dr. Hanft's name was omitted from the Yellow Pages the second time," id. at 43. Although Southern Bell made special efforts to insure that his name would not again be omitted, it was. This was simply not enough, however, as a matter of law, to warrant punitive damages:

> That the efforts were ineffective and that the failure could not be explained are not enough to establish negligent conduct so gross as to justify the imputation of malice.

Id. at 43.

The same may be said here. Southern Bell had procedures in several departments designed, and employees who were trained and whose job it was, to prevent what occurred here -- the reassignment of AFM's old number to another subscriber, thus prematurely disconnecting the referral of calls placed to AFM's old number. A mistake nonetheless occurred somehow, and save for human error, no reason for its occurrence could be found. As the Eleventh Circuit noted, moreover, as soon as the problem was brought to Southern Bell's attention, in both instances, it was immediately corrected.

Hanft is directly applicable -- the conduct alleged simply fails to rise to the level of willful, wanton, malicious or outrageous mis-

behavior necessary to support punitive damages. Indeed, this case involves less wrongdoing than Hanft did. Here, unlike Hanft, there was not a total breach of contract and failure to do as promised. On the contrary, Southern Bell in fact established the agreed reference of call service, and maintained it in effect for nearly a year with only two interruptions (only one of which is the subject of this action, that in April-June 1981). After both interruptions, the service was again promptly reinstated once Southern Bell was apprised. This substantial performance of the agreement is yet another reason that punitive damages are inappropriate for what amounts to, at best, a partial breach of contract. We turn now to subsidiary defects in the assessment of punitive damages.

B. Related Questions as to Punitive Damages

1. AFM Failed to Prove that an Independent Tort Caused Damages Separate and Distinct from Contract Damages.

Under Florida law, even where an independent tort is committed with the requisite degree of misconduct, punitive damages are not recoverable unless this willful tort is the cause of specific damages separate and distinct from any compensatory damages based on a contract theory. Rolls, supra, 408 So.2d at 237; American Motorcycle Institute, supra, 380 So.2d at 453-54; Overseas Equipment Co., Inc. v. Aceros Arquitectonicos, 374 So.2d 537, 538-39 (Fla. 3d DCA 1979).

In the instant case, the only damages submitted were loss of profits. These are exclusively a contract remedy and, by necessity, attributable only to contract claims. See Greater Coral Springs Realty, supra, 412 So.2d at 941. AFM therefore failed to prove that any

independent tort caused damages separate and distinct from contract damages, and punitive damages are not sustainable as a matter of law. Royal Typewriter, supra, 719 F.2d at 1106.

2. Punitive Damages May Not Be Awarded Because the Award of Compensatory Damages Was Flawed.

Specifically electing not to request nominal damages, AFM submitted to the jury only its claim for lost profits. Because that award is fatally flawed and must be reversed, the punitive damage award is likewise flawed, as Florida law requires punitive damages to be supported by a proper award of compensatory damages. Lassitter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977); Martin v. United Security Services, Inc., 314 So.2d 765 (Fla. 1975); McLain v. Pensacola Coach Corp., 13 So.2d 221 (Fla. 1943); Buonopane v. Fritz, 477 So.2d 1030 (Fla. 4th DCA 1985); Adler v. Seligman of Florida, Inc., 438 So.2d 1063 (Fla. 4th DCA 1983); Raffa v. Dania Bank, 372 So.2d 1173 (Fla. 4th DCA 1979).

In Globe Security Systems Co. v. Mayor's Jewelers, Inc., 458 So.2d 828 (Fla. 3d DCA 1984), pet. for rev. denied, 476 So.2d 674 (Fla. 1985), a verdict awarding punitive damages was reversed for lack of compensatory or nominal damages beyond those attributable to the breach of contract. Similarly in Rolls, supra, 408 So.2d at 237, the court specifically held that compensatory damages recoverable under a contract theory (which, of course, is the case where lost profits are awarded) "may not be used as the underlying basis for an award of punitive damages under a separate tort count."

While the above cases alone require reversal of the punitive damage award, Tennant v. Vazquez, 389 So.2d 1183 (Fla. 2d DCA 1980),

is more compelling. There, as here, a jury returned a verdict of compensatory damages based solely upon alleged lost profits and also awarded punitive damages. The court reversed the compensatory damages because plaintiff failed to introduce proof of expenses (as against its gross profits) for a reasonable period of time before the alleged wrongdoing. Id. at 1183, 1184. Having reversed the compensatory award, the court was forced to reverse the punitive damage award as well: "There being no compensatory damages legally proved for [plaintiff], the punitive damages must also fall." Id. at 1184.

3. The Trial Court Committed Prejudicial Error In Admitting Evidence of Subsequent Yellow Page Errors.

AFM was permitted, over repeated objections, to introduce evidence that its 944-0981 Dade telephone number was included in Yellow Page directories after that number had been changed. One or two of these additional listings were included in the 1981-82, 1982-83, 1983-84 and 1984-85 directories (R6-19-24; 2SR-26-32).[15/] Acknowledging that AFM had ceased operations and been dissolved prior to these errors, the trial court ruled them inadmissible as to any compensatory claims, but admitted them on the issue of punitive damages (R6-20-22). This ruling was erroneous, improperly inviting the jury to assess punitive damages based upon the failure to correct the Yellow Page listings -- a matter wholly apart from the reference of calls (R6-29-37, 41-42; SR2-27-28).

15/ While the number was changed in 1980, it was too late to change the 1980-81 listings because the directory had already been published when the telephone number was changed. The first directory where the new number could, therefore, have appeared, was the 1981-82 directory distributed in September 1981. AFM made no claim that the 1980-81 directory was incorrect.

a. Punitive Damages May Not Be Based upon Conduct that Itself Cannot Be the Basis of Compensatory Damages.

Florida law forbids the award of punitive damages for the Yellow Page errors for two reasons: (1) they arose out of contract, and no independent tort could be shown; and (2) AFM suffered no compensatory damages as a result. The trial court expressly ruled that the Yellow Page errors could not, as a matter of law, support compensatory damages. That ruling absolutely bars their use as a predicate for punitive damages, since Florida law prohibits imposition of punitive damages unless there is an underlying award of compensatory damages. See McLain, supra, 13 So.2d 221; Rolls, supra, 408 So.2d 229.

There can be no serious debate that the directory errors, and not the reference of calls, were the critical evidence relied upon by AFM for punitive damages.16/ This permitted AFM to bootstrap an argument for punitive damages by combining the two separate and unrelated errors, in essence, obtaining a punitive damage award based upon the errors in the listings.

b. Subsequent Yellow Page Errors are Irrelevant to the Reference of Calls Service.

Admission of this highly prejudicial evidence was particularly devastating because it was entirely irrelevant. These errors took place months and then years after the reference of calls service, indeed, after AFM ceased doing business. Obviously, they have no possible relevance

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16/ Close to half the exhibits introduced by AFM and a substantial portion of its closing argument dealt exclusively with the Yellow Pages issue. Indeed, AFM introduced poster-board size enlargements of these errors (1SR2-156-157; 2SR-29-35).

to any material issue concerning the lapse in providing the call reference.

The only actionable claim was the reference of call disconnection in April-June 1981. The undisputed evidence was that the Yellow Page and call reference operations were totally separate and distinct from one another (R6-29-37, 41-42; SR2-27-28). Thus, Southern Bell's erroneous providing of additional listings[17/] for the dissolved corporation has nothing to do with whether the reference of calls service, years earlier, was properly provided or the degree of misconduct in failing to do so.

The only possible purpose in admitting this evidence was to show that on other occasions Southern Bell made errors: that if inadequate care was exercised on the Yellow Pages, it must also have occurred on the reference of calls. The failure to remove the few extra listings long after AFM ceased doing business certainly could not bear upon any other issue because it proves nothing about the reference service. The undue prejudice of this evidence of "propensity" is patent.

IV. SOUTHERN BELL IS ENTITLED TO A NEW TRIAL DUE TO INFLAMMATORY AND PREJUDICIAL ARGUMENTS MADE BY AFM IN CLOSING.

It is black-letter law that a party is entitled to a new trial where its opponent resorts to improper and prejudicial remarks to the

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17/ At all relevant times, the Yellow Pages properly carried accurate listings for AFM Business Machines, Inc. (including the correct Dade County telephone number). The erroneous listings were merely extra listings for the defunct AFM.

jury. Schreier v. Parker, 415 So.2d 794 (Fla. 3d DCA 1982); Kiefel v. Las Vegas Hacienda, Inc., 39 F.R.D. 592 (N.D. Ill. 1966). See also, Hillson v. Deeson, 383 So.2d 732, 733 (Fla. 3d DCA 1980) (assertions of counsel's personal belief in the justness of the cause and credibility of parties as witnesses, and counsel's personal knowledge of the facts in issue); Eastern Steamship Lines, Inc. v. Martial, 380 So.2d 1070, 1072 (Fla. 3d DCA), cert. denied, 388 So.2d 1115 (Fla. 1980) (remarks made solely to raise sympathy for plaintiff based upon a tragic, but irrelevant, event); Borden, Inc. v. Young, 479 So.2d 850, 851 (Fla. 3d DCA 1985), rev. denied, 488 So.2d 832 (Fla. 1986) (counsel's claimed personal knowledge of "nefarious activities" supposedly engaged in by large corporate defendant, characterized as "disgraceful display of unprofessional conduct").

Improper statements by AFM's counsel peppered the closing arguments. They included gratuitous statements, wholly outside the record, that Southern Bell was a New York or Georgia corporation. In a blatant appeal to regional prejudice, counsel urged the jury to send a message to New York or Atlanta (ISR2-156). Counsel further argued that Southern Bell is not regulated by competition and is inefficient (ISR2-151).

Next, AFM's counsel stated that Southern Bell and its counsel had "run him around" for four years during the pendency of the litigation (ISR2-149). This was nothing more than an attempt to unfairly prejudice Southern Bell and destroy the credibility of its counsel. Disparagement of opposing counsel was held to be improper argument justifying a new trial in Schreier, supra, 415 So.2d at 795 (citing

Metropolitan Dade County v. Dillon, 305 So.2d 36, 41 (Fla. 3d DCA 1975)(Barkdull, C.J. dissenting)), and in Kendall Skating Centers, Inc. v. Martin, 448 So.2d 1137 (Fla. 3d DCA 1984) (characterization of defendants as despicable and assertion that both they and their lawyers were liars).

To compound the impropriety, AFM's counsel continuously vouched for his own credibility. This went far beyond statements of counsel's beliefs and opinions about the evidence (ISR2-146-158). In the direct portion of his closing, counsel argued that damages should be assessed for the Yellow Page errors, stating that all Southern Bell had to do was ask him about the errors and he would have told them what they were (ISR2-157). There was, of course, no evidence to support this argument -- counsel was simply asking the jury to rely upon his own credibility. Southern Bell objected, and the trial court agreed with the impropriety of the argument, but nonetheless denied Southern Bell's motion for mistrial (ISR2-159-160).

In his rebuttal argument, AFM's counsel did exactly the same thing. Southern Bell argued in closing that the "reduced sales" claimed by AFM in 1981 were misleading because they were based upon only seven months of the twelve month year. AFM's counsel then told the jury that he had not sought damages for 1981's reduced revenues because he realized that he had made a mistake, and he would not argue anything to the jury that was not correct (ISR2-176-177). This was an effort not only to excuse a misleading cross-examination of Southern Bell's expert (ISR2-48-49, 68-69), but also to remind the jury that it should believe counsel.

The paucity of evidence supporting AFM's claims and the obvious disproportion (roughly five to one) of the punitive to the compensatory award demonstrate graphically that the jury was improperly swayed by AFM's attempts to paint Southern Bell as large, foreign, inefficient, and uncaring, victimizing a small struggling businessman and its "white knight" counsel. A new jury in a new trial must be allowed to consider the evidence unpolluted by counsel's gratuitous comments.

CONCLUSION

For the foregoing reasons, Southern Bell requests that all three certified questions be answered in the negative, and further that this Court consider the related issues of Florida law above presented.

Respectfully submitted,

SHUTTS & BOWEN
Attorneys for Appellant
100 Chopin Plaza - Miami Center
1500 Edward Ball Building
Miami, Florida 33131
(305) 358-6300

By: Karen H. Curtis
Karen H. Curtis, P.A.
Stephen B. Gillman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been mailed this 20th day of October, 1986, to CHRISTOPHER LYNCH, ESQUIRE, Adams, Hunter, Angones, Adams & McClure, 9th Floor, 66 West Flagler Street, Miami, Florida 33130.

Karen H. Curtis
Of Counsel

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