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IN THE SUPREME COURT OF FLORIDA

ETHAN ALLEN INC.,

Appellant,

v.

GEORGETOWN MANOR, INC.,

Appellee.

Case No. 81,872

On Certification from the United States Court of Appeals
for the Eleventh Circuit

INITIAL BRIEF OF APPELLANT ETHAN ALLEN INC.

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INTRODUCTION

This case involves a question of Florida law certified to this Court by the United States Court of Appeals for the Eleventh Circuit. That question, as phrased by the Eleventh Circuit, is:

> Under Florida law, in a tortious interference with business relationships tort action, may a plaintiff recover damages for the loss of goodwill based upon future sales to past customers with whom the plaintiff has no understanding that they will continue to do business with the plaintiff, or is the plaintiff's recovery of damages limited to harm done to existing business relationships pursuant to which the plaintiff has legal rights, as discussed in *Landry v. Hornstein*, 462 So.2d 844, 846 (Fla. 3d D.C.A. 1985); *Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc.*, 459 So.2d 335, 336 (Fla. 5th D.C.A. 1984); *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So.2d 303, 306 (Fla. 5th D.C.A. 1980); and *Lake Gateway Motor Inn v. Matt's Sunshine Gift Shops, Inc.*, 361 So.2d 769, 771-72 (Fla. 4th D.C.A. 1978)?

App. 13. As the Eleventh Circuit's own question indicates, this issue has been addressed by the appellate courts of this State on numerous occasions, and has been answered the same way each time. Unless this Court desires to use this case to eliminate a longstanding element of the State's law of tortious interference, the certified question permits only one answer: Under Florida's tortious interference law, the plaintiff's recovery is limited to harm done to existing business relationships pursuant to which the plaintiff has "legal rights" -- *i.e.*, relationships that, although not necessarily embodied in enforceable contracts, have solidified into concrete agreements or understandings.

STATEMENT OF THE CASE AND FACTS

1. Background

This case stems from a dispute between Ethan Allen Inc., a furniture manufacturer, and one of its former distributors in southern Florida, Georgetown Manor, Inc. The dispute concerned Georgetown's debt to Ethan Allen for previously delivered furniture and the eventual termination of the parties' relationship.

In 1983, Georgetown's long-time owners decided to sell Georgetown to George Levin. R32-161-63.[1] With Ethan Allen's agreement, Georgetown remained an Ethan Allen distributor after Levin bought the company. *Id.* at 175-176.

Within a year after Levin's purchase, Georgetown's outstanding debt to Ethan Allen for previously delivered furniture increased considerably. By June 1984, the debt had risen to over $1.1 million, with more than $100,000 over 90 days past due. 1SR-8, 11. Several times between June and November 1984, Margaret Lupton, Ethan Allen's director of corporate credit services, wrote or called Georgetown to express Ethan Allen's concern over Georgetown's rising debt and warned that Ethan Allen might be forced to impose a credit hold -- *i.e.*, suspend delivery of furniture on credit -- if the debt was not reduced. *Id.* at 11-13.

Despite Lupton's warnings, Georgetown's debt continued to rise even higher. By December 3, 1984, the debt totalled nearly $1.85 million, with over $650,000 more than 61 days past due. R70-19-20.

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[1] Citations to the record follow the form required by the Eleventh Circuit.

On December 4, based on the recommendations of Lupton and her supervisor, Ethan Allen placed a credit hold on Georgetown's account, halting all further shipments of merchandise until a plan could be worked out for payment of Georgetown's outstanding debt. *Id.* at 20-21; 1SR-27. It is undisputed that the terms of the dealership agreement permitted Ethan Allen to impose the credit hold and cease shipments to Georgetown. R36-178-79; R35-5-6.

Over the next month, Ethan Allen and Georgetown attempted to negotiate a solution to Georgetown's debt problem and the credit hold. When the parties could not reach a mutually agreeable solution,[2] Levin informed Ethan Allen that he was converting Georgetown's five Ethan Allen galleries to Thomasville Furniture Industries, Inc., outlets. App. 3.

Levin formed a new corporation, Thomasville Showcase Interiors (ToSI) to operate the new Thomasville galleries at the old Georgetown locations. App. 3. Georgetown issued a press release on January 11, 1985 announcing the conversion of its stores from Ethan Allen to Thomasville and stating that "Thomasville offers the best opportunities for our company as we look into the future." *Id.* Georgetown also publicized the conversion in industry

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[2] Ethan Allen wanted Georgetown to reduce its outstanding debt, provide interim financial statements, and provide security for the remaining debt before it would resume shipping furniture to Georgetown. R70-28-29. Levin, however, refused to pay down Georgetown's debt unless Ethan Allen agreed to provide him a fixed line of credit and released the credit hold first. R33-53-54, 63-64; R34-63-64, 195-196. Levin also wanted Ethan Allen to ship c.o.d. (cash on delivery) the furniture that customers had already ordered from Georgetown. R33-70-71; R70-53. Ethan Allen, however, refused to ship any furniture until Georgetown reduced its outstanding debt. R70-54, 69; R49-47-51.

newspapers (R49-38, R70-82) and in a letter to its previous customers. R33-199-201; R70-83; R34-93, 214, 242.

Ethan Allen was concerned that Georgetown's conversion to Thomasville would make consumers think that Ethan Allen had abandoned the southern Florida market. R70-117.[3] On February 3, 1985, Ethan Allen placed a one-day ad in several South Florida newspapers explaining why it had ceased shipping furniture to Georgetown. App. 3. The ad also informed readers that new dealers, Bob and Brenda Stacy, would be opening an Ethan Allen gallery in the area and that customers with unfilled orders at Georgetown could obtain their furniture from the Stacys. App. 3-4; R70-112-113; 3SR-7, 19. The ad stated:

> Dear Valued Customer:
>
> Ethan Allen recently announced a major change in the distribution in the Miami [or General Pompano] Area. Since this change affects you, our valued customer, I would like to explain the situation directly.
>
> For about 20 years, Ethan Allen enjoyed a wonderful relationship with the Blau family who operated the Georgetown Manor stores in the Miami area.
>
> Because of family illness, the business was sold to a new group. Financial problems developed and our bills were not paid. The debt rose to a high level and we could no longer deliver merchandise to them until the debt was reduced. Reluctantly, we then had to discontinue distribution of Ethan Allen by Georgetown completely. We, therefore, are presently opening new Ethan Allen galleries in this area to serve our many customers of long standing.
>
> One of our fine dealer families in the area, Bob and Brenda Stacy, have established an Ethan Allen office in

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[3] Some customers who had not received their furniture from Georgetown were under the impression that Ethan Allen was going out of business. R-136-25.

our present Ethan Allen Contemporary Gallery at 5070 N. Federal Highway, Lighthouse Point (Pompano). The phone number is 305-421-5300. This Gallery will soon become an Ethan Allen American Traditional Gallery. The Stacys will be opening other Ethan Allen Galleries very shortly to serve you.

Many Ethan Allen customers have unfilled orders with Georgetown Manor. We and the Stacys are very anxious to effect deliveries of these orders and can handle them very expeditiously.

Please contact Stacy's Service Center in Pompano and they will handle your inquiries and orders. Again, the number is 305-421-5300.

The new galleries will be called Ethan Allen Carriage House and will continue to bring you our beautiful furniture and professional services.

We are sorry about this disruption as we took great pains to avoid it.

We look forward to serving you again.

Nathan S. Ancell /s
Nathan S. Ancell
Chairman of the Board
Ethan Allen Inc.
Danbury, CT 06811

App. 3-4.

2. Procedural History

Georgetown filed this action in the United States District Court for the Southern District of Florida in January 1985. App. 4; R-1-1. Georgetown's final amended complaint[4] alleged that Ethan Allen had tortiously interfered with Georgetown's "advantageous business relationship" with its "customers, past, present and

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[4] Georgetown's original complaint, filed before the ad was even published, sought damages and a preliminary injunction compelling Ethan Allen to supply Georgetown with furniture. App. 4. Over the next five years, Georgetown amended the complaint four times, and the district court dismissed or granted summary judgment against Georgetown on several of its claims. App. 4-5.

future" by publishing the February 3 advertisement. App. 5; R-17-631-8.[5] Georgetown alleged that the ad tortiously interfered with its relationship with customers who had existing orders with it for Ethan Allen furniture by causing them to cancel their orders and demand refunds, resulting in a loss of the profits that Georgetown allegedly would have made on those orders. R-17-631-7.[6] Georgetown also claimed that the ad interfered with its prospective "relationship" with 89,000 people who had shopped at Georgetown in the past and *might* have shopped there again in the future. R-17-631-8. It further alleged that the loss of future business from these people destroyed Georgetown's *entire* value as an ongoing business. *Id.* at 8-9; R51-51-52.[7]

In March 1990, the district court (the Honorable Kenneth L. Ryskamp of the Southern District of Florida) issued an order limiting Georgetown's tortious interference claim to customers with existing business relationships with Georgetown. *See* App. 5. In

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[5] The final amended complaint also contained a claim of conversion. App. 5. The district court directed a verdict in favor of Ethan Allen on this claim (*id.*) and the Eleventh Circuit affirmed, finding Georgetown's arguments "to be clearly without merit." App. 6 n.1.

[6] Georgetown made this claim despite the fact that customers had begun canceling their orders and demanding refunds *before* the ad ran, for the simple reason that Georgetown could not fill their orders after the credit hold. R70-89; R36-179-80; R34-211; R39-17-18.

[7] The complaint also alleged that Georgetown had an advantageous business relationship with "future customers" in general. *See* R17-631-8. At trial, however, Georgetown limited the scope of its asserted business relationship with potential future customers to only those customers who had shopped at Georgetown in the past and might do so again. *See, e.g.*, R34-78; R51-51-52; R63-19-25.

so doing, the Court rejected Georgetown's argument that it could recover damages for "interference" with respect to customers who might have bought from it in the future:

> A claim of tortious interference does *not* encompass lost profits from both existing and prospective business relationships, as Georgetown argues. *Smith v. Ocean State Bank*, 335 So.2d 641, 643 (Fla. 1st DCA 1976), on which Georgetown relies, does not stand for this proposition. Instead, the rule of *Smith* is that the existing business relationship subject to the allegedly tortious interference need not be evidenced by an enforceable contract.
>
> Thus, Georgetown incorrectly characterizes Florida common law regarding tortious interference. . . . To make a prima facie case of tortious interference, Georgetown must show interference with an *existing* contractual or business relationship, coupled with legal rights and damages. . . . While Georgetown may attempt to prove prospective lost profits without an established track record as a business, . . . it cannot look to prospective customers as the "yardstick" by which to do so.

R23-771-8-9 (emphases in original; citations omitted).

On the eve of trial, however, the trial judge (the Honorable Jacob Mishler of the United States District Court for the Eastern District of New York, sitting by designation), reversed Judge Ryskamp's ruling and held that Georgetown *could* recover damages for the loss of prospective customers who had no existing understanding or agreement with Georgetown about future purchases. R32-21.[8]

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[8] Judge Mishler apparently reasoned that although *liability* must be based on interference with an existing relationship, *damages* could be recovered not just for the loss of existing relationships, but also for the loss of prospective customers who had no agreement or understanding with the plaintiff. R32-18, 20-21, 27. As the discussion below (at pages 10-14 & n.11) shows, however, damages are recoverable only with respect to those relationships for which substantive protection from interference is provided by Florida law.

At the end of trial, a jury found that Ethan Allen had intentionally and maliciously interfered with Georgetown's business relationships by publishing the ad and that this interference proximately caused damage to Georgetown. App. 5. The jury then fixed the amount of damages for two categories: $285,000 for the loss of profits on customers' existing orders for furniture; and $7.38 million for the "loss of the value of Georgetown's business," which was based on the alleged loss of sales that Georgetown expected to make sometime in the future to past customers. *Id.*[9]

The United States Court of Appeals for the Eleventh Circuit affirmed the jury's award of $285,000 for lost profits on customers' existing orders with Georgetown for Ethan Allen furniture. App. 10-11. But with respect to the $7.38 million awarded for the alleged loss of value of Georgetown's business supposedly caused by the ad's impact on future sales, the Eleventh Circuit decided to certify a question of Florida law to this Court. Specifically, it has asked whether the interference tort in Florida permits recovery of damages based on potential future sales to past customers "with whom the plaintiff has no understanding" about future purchases, or whether instead the plaintiff's recovery is "limited to harm done to existing business relationships pursuant to which plaintiff has legal rights." App. 13. Although the

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[9] As the Eleventh Circuit noted, "the $7.38 million damage calculation [wa]s based on the testimony of Georgetown's experts who opined that a hypothetical investor would have paid up to $6,223,000 for Georgetown before the February 3, 1985 advertisement, but that Georgetown had no value after the publication of the advertisement." App. 11 n.4.

Eleventh Circuit acknowledged that the consistent precedents of the Florida district courts of appeal support the latter construction, it found these decisions "not . . . determinative" in the absence of "controlling precedent" of this Court. *Id.*[10]

SUMMARY OF ARGUMENT

Florida courts have repeatedly -- and consistently -- stated that a plaintiff alleging tortious interference with a business relationship must prove "the existence of a business relationship under which the plaintiff has legal rights," "an intentional and unjustified interference with that relationship by the defendant," and "damage to the plaintiff as a result of the breach of the business relationship." *Ethyl Corp. v. Balter*, 386 So. 2d 1220 (Fla. 3d DCA 1980), *review denied.*, 392 So. 2d 1371 (Fla.), *cert. denied*, 452 U.S. 955 (1981). *See also* cases cited at pages 12-13 n.13. Indeed, the Eleventh Circuit acknowledged the existence of this consistent authority in its certified question. App. 13. And although this Court has never specifically addressed the precise question at issue here, it has approved the lower courts' descriptions of the scope and elements of the tort. *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985) (per curiam).

This often-reiterated statement of the tort's elements itself provides a ready answer to the certified question: A plaintiff in a tortious interference action can recover damages only for interference with an *existing* business relationship under which the

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[10] The Eleventh Circuit subsequently denied Ethan Allen's petition for rehearing and suggestion for rehearing *en banc*.

plaintiff has legal rights. Moreover, Florida precedent confirms that this is the correct answer, as courts have rejected tortious interference claims where the plaintiff merely alleged harm to his future business prospects but failed to identify a particular person with whom he had a concrete agreement or understanding. Under that clear authority, Georgetown could not recover for interference with respect to its past customers because it was unable to identify any specific customers with whom it had any sort of agreement or understanding about future purchases.

These limitations on Florida's law of tortious interference are not only well-established, but also entirely sensible. Florida's law of tortious interference is designed to protect relationships that, while not necessarily cemented in a contract, have solidified into some concrete agreement between specific parties. The interference tort does not operate as a broad shield against the sort of reputational harm alleged by Georgetown. Protection against such harm is already provided by other torts such as defamation or trade label. Accordingly, transformation of the interference tort to protect commercial reputation or the mere possibility of future business is neither necessary nor warranted.

ARGUMENT

I. IT IS WELL ESTABLISHED UNDER FLORIDA LAW THAT THE INTERFERENCE TORT PROTECTS ONLY EXISTING BUSINESS RELATIONSHIPS UNDER WHICH THE PLAINTIFF HAS LEGAL RIGHTS

As stated above, Georgetown claimed that the ad interfered with its "business relationship" with two separate groups of people: (1) customers who had existing, unfilled orders for

furniture with Georgetown at the time the ad ran; and (2) people (allegedly numbering 89,000) who had shopped at Georgetown sometime in the past and who might have shopped there again sometime in the future, but who had no understanding with Georgetown about future purchases. There is no dispute here that Georgetown possessed a business relationship with the first group that was protected by the interference tort under Florida law; that group is not at issue here. The question before this Court is whether Georgetown possessed legally cognizable "business relationships" with the second group, and so could recover damages (allegedly amounting to $7.38 million) for the loss of those "relationships." Florida law makes clear that Georgetown may *not* recover damages for the loss of unidentified "prospective customers" with whom it had no agreement or understanding regarding future purchases.[11]

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[11] The Eleventh Circuit appears to cast this question as one concerning the scope of damages permitted under Florida law rather than as one involving the existence of liability. App. 11-12. But the question of damages is dependent on the question of liability: that is, damages are recoverable only with respect to those relationships that have been interfered with in violation of Florida's substantive tort law. Thus, the finding of liability with respect to customers who had existing orders for furniture entitled Georgetown to damages only for the harm caused by the interference with *those* relationships (*i.e.*, the $285,000 in lost profits for the pending orders). But Georgetown may recover damages for the alleged loss of future business from past customers only if it can establish liability with respect to such people.

We therefore think it is inaccurate to suggest that the question of damages is somehow distinct from the question of liability. Regardless of how the question is phrased, however, the inquiry for this Court remains the same: whether Georgetown had legally cognizable "business relationships" with its past customers regarding future purchases.

A. The Elements of Tortious Interference

The elements of Florida's law of tortious interference with a business relationship are well established: a plaintiff must prove "(1) the *existence* of a business relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with *that* relationship by the defendant and (3) damage to the plaintiff *as a result of the breach* of the business relationship." *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1223 (Fla. 3d DCA) (emphases added), *review denied*, 392 So. 2d 1371, *cert. denied*, 452 U.S. 955 (1981). These elements of the tort have been expressly approved by this Court. *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985) (per curiam).[12] And they have been repeatedly and consistently confirmed by *all* of Florida's district courts of appeal for nearly 30 years.[13]

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[12] The Court in *Tamiami* also mentioned a fourth element: "knowledge of the relationship on the part of the defendant." 463 So. 2d 1127. This element, though, may already have been implicit in the requirement of an "*intentional* and unjustified interference with the relationship by the defendant." *Id.* (emphasis added).

[13] *See, e.g., Harllee v. Professional Serv. Indus., Inc.*, 17 Fla. L. Weekly D2672 (Fla. 3d DCA Dec. 1, 1992); *Charles Wallace Co. v. Alternative Copier Concepts, Inc.*, 583 So. 2d 396, 397 (Fla. 2d DCA 1991); *MD Assocs. v. Friedman*, 556 So. 2d 1158 (Fla. 4th DCA 1990); *O.E. Smith's Sons, Inc. v. George*, 545 So. 2d 298, 299 (Fla. 1st DCA 1989); *Security Title Guarantee Corp. of Baltimore v. McDill Columbus Corp.*, 543 So. 2d 852, 854-55 (Fla. 2d DCA 1989); *Fort Lauderdale Riverwalk Properties, Inc. v. White*, 531 So. 2d 739, 740 (Fla. 4th DCA 1988), *cert. denied*, 541 So. 2d 1173 (Fla. 1989); *Register v. Pierce*, 530 So. 2d 990, 993 (Fla. 1st DCA), *cert. denied*, 537 So. 2d 569 (Fla. 1988); *Nowik v. Mazda Motors of Am. (East), Inc.*, 523 So. 2d 769, 771 (Fla. 1st DCA 1988); *McCurdy v. Collis*, 508 So. 2d 380, 382-83 (Fla. 1st DCA), *cert. denied*, 518 So. 2d 1274 (Fla. 1987); *Sloan v. Sax*, 505 So. 2d 526, 527-28 (Fla. 3d DCA 1987); *Southern Alliance Corp. v. City of Winter Haven*, 505 So. 2d 489, 496 (Fla. 2d DCA 1987); *Wagner v. Nottingham Assocs.*, 464 So. 2d 166, 168 n.2 (Fla. 3d DCA), *cert. denied*, 475 So. 2d 696

This longstanding statement of the tort's elements itself answers the question posited by the Eleventh Circuit.[14] A plaintiff must establish the *existence* of a business relationship with which the defendant interfered. Moreover, the plaintiff must show that the relationship was "breach[ed] by the other party to it," thereby causing damage to the plaintiff. Clearly, if there is no existing business relationship -- *i.e.*, some agreement or understanding with a specific party -- there can be no "breach." Thus, a plaintiff's mere unilateral expectation of unspecified future sales to some unidentifiable subset of its past customers cannot constitute a "business relationship" under Florida law.

(Fla. 1985); *Landry v. Hornstein*, 462 So. 2d 844, 846 (Fla. 3d DCA 1985); *Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc.*, 459 So. 2d 335, 336 (Fla. 5th DCA 1984); *Gerber v. Keyes Co.*, 443 So. 2d 199, 200 (Fla. 3d DCA 1983); *Water & Sewer Util. Constr., Inc. v. Mandarin Utils., Inc.*, 440 So. 2d 428, 430 (Fla. 1st DCA 1983); *Krieger v. Ocean Properties, Ltd.*, 387 So. 2d 1012, 1014 (Fla. 4th DCA 1980); *Insurance Field Servs., Inc. v. White & White Inspection and Audit Serv, Inc.*, 384 So. 2d 303, 306 (Fla. 5th DCA 1980); *Berenson v. World Jai-Alai, Inc.*, 374 So. 2d 35, 39-40 (Fla. 3d DCA 1979); *Nitzberg v. Zalesky*, 370 So. 2d 389, 390-91 (Fla. 3d DCA 1979); *Azar v. Lehigh Corp.*, 364 So. 2d 860, 862 (Fla. 2d DCA 1978); *Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*, 361 So. 2d 769, 771 (Fla. 4th DCA 1978), *cert. denied*, 368 So. 2d 1370 (Fla. 1979); *International Funding Corp. v. Krasner*, 360 So. 2d 1156, 1157 (Fla. 3d DCA 1978); *Sutton v. Stewart*, 358 So. 2d 119, 120 (Fla. 1st DCA 1978); *Serafino v. Palm Terrace Apartments, Inc.*, 343 So. 2d 851, 852 (Fla. 2d DCA 1976); *Smith v. Ocean State Bank*, 335 So. 2d 641, 644 (Fla. 1st DCA 1976); *Nichols v. MoAmCo Corp.*, 311 So. 2d 750, 752 (Fla. 2d DCA 1975); *Symon v. J. Rolfe Davis, Inc.*, 245 So. 2d 278, 280 (Fla. 4th DCA), *cert. denied*, 249 So. 2d 36 (Fla. 1971); *John B. Reid & Assocs., Inc. v. Jimenez*, 181 So. 2d 575, 577 (Fla. 3d DCA 1965).

[14] In fact, a prior panel of the Eleventh Circuit also adopted this statement of the tort's elements. *See Dwight v. Tobin*, 947 F.2d 455, 460 (11th Cir. 1991). Although *Dwight* was cited and discussed in Ethan Allen's briefs, the Eleventh Circuit's opinion did not mention that case.

B. The Florida Case Law

Beyond their statement of the elements of the interference tort, the actual holdings of the Florida cases confirm that Florida law limits recovery to interference with existing business relationships with specific people. In *Southern Alliance Corporation v. City of Winter Haven*, 505 So. 2d 489 (Fla. 2d DCA 1987), for example, the court affirmed the dismissal of a tortious interference claim by the owner of a lounge against city employees who had shut down the lounge. The plaintiff had claimed that the lounge "enjoyed an ongoing, advantageous business relationship with the community," and that the willful, malicious manner in which the defendants closed the lounge had a "detrimental effect" on the lounge's business. *Id.* at 496. The court concluded that the plaintiff had "failed to plead the existence of a business relationship" with particular customers, and that its allegation of an advantageous relationship "with the community" was insufficient under Florida law. *Id.*

Similarly, in *International Funding Corporation v. Krasner*, 360 So. 2d 1156 (Fla. 3d DCA 1978), the Krasners had sued International Funding (IFC) for defaulting on monthly payments it owed them. IFC counterclaimed for tortious interference with a business relationship, alleging (in a claim analogous to Georgetown's) that the Krasners had harmed its business by telling the Department of Insurance and a newspaper reporter that IFC had failed to make the payments and that IFC was in financial difficulty. The court affirmed the dismissal of the counterclaim, holding that IFC had

failed "to specifically aver the business relationships" with which the Krasners had interfered. *Id.* at 1157. *See also Lake Hosp. & Clinic, Inc. v. Silversmith*, 551 So. 2d 538, 545 (Fla. 4th DCA 1989) (plaintiff doctor could not recover against hospital for tortious interference because he failed to prove interference "with a particular doctor/doctor or doctor/patient relationship"), *cert. denied*, 563 So. 2d 634 (Fla. 1990).

Moreover, to establish the existence of a legally protected "business relationship," the plaintiff must not only identify the *particular* person with whom he enjoys the relationship, but must also show that the parties have reached a concrete agreement or understanding about their present or future business dealings. True, the relationship need not be "evidenced by an enforceable contract." *Tamiami Trail Tours, Inc.*, 463 So. 2d at 1127. Nevertheless, the relationship must be sufficiently definite that it gives rise to some "legal rights" between the parties -- *i.e.*, the relationship must have developed into a concrete agreement or understanding that would have been completed but for the defendant's interference. *See, e.g., Charles Wallace Co. v. Alternative Copier Concepts, Inc.*, 583 So. 2d 396, 397 (Fla. 2d DCA 1991) ("The business relationship does not have to be the product of an enforceable contract. Instead, an action for intentional interference with a business relationship or expectancy will lie if the parties' understanding would have been completed if the defendant had not interfered."); *Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*, 361 So. 2d 769, 771-72 (Fla. 4th

DCA 1978) ("[A] valid advantageous business relationship may exist without the presence of an actual enforceable contract. However, there must be some attendant legal rights.") (citations omitted), *cert. denied*, 368 So. 2d 1370 (Fla. 1979).[15]

Thus, Florida courts have rejected tortious interference claims where the plaintiff identified a particular party to the "relationship" but did not prove the existence of a definite agreement or understanding between the plaintiff and that party. In *Lake Gateway Motor Inn*, for example, the owner of a gift shop in a motel was negotiating the sale of his shop to a specific prospective buyer. The negotiations collapsed, however, when the motel contacted the buyer and offered to allow him to operate a gift shop in the motel if the buyer simply paid the motel directly instead of paying the shop owner. 361 So. 2d at 771. The shop owner then sued the motel for tortious interference. The court rejected the claim, holding that "[a] mere offer to sell a business which the buyer says he will consider, does not by itself give rise to legal rights which bind the buyer or anyone else with whom he deals." *Id.* at 772. The court noted that it "might be otherwise disposed" if the buyer had "*definitely arranged* to pay" the shop owner a fixed sum before the intervention of the motel; but since "there was no evidence of any such *agreement*," there could be no tortious interference. *Id.* at 771 (emphases added). *See also MD*

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[15] Accord *Register v. Pierce*, 530 So. 2d at 993; *Landry v. Hornstein*, 462 So. 2d at 846; *Krieger v. Ocean Properties, Ltd.*, 387 So. 2d at 1014; *Scussel v. Balter*, 386 So. 2d 1227, 1228 (Fla. 3d DCA 1980).

Assocs. v. Friedman, 556 So. 2d 1158, 1159 (Fla. 4th DCA 1990) (plaintiffs' written offer to buy home from seller "does not by itself give rise to sufficient legal rights to support a claim of intentional interference with a business relationship"); *Sullivan v. Economic Research Properties*, 455 So. 2d 630, 631-32 (Fla. 5th DCA 1984) (rejecting claim of tortious interference because company's offer to sell property, having been not timely accepted by plaintiff, did not give rise to legally protected relationship).[16]

Similarly, in *Water & Sewer Utility Construction, Inc. v. Mandarin Utilities, Inc.*, 440 So. 2d 428 (Fla. 1st DCA 1983), the plaintiff construction company sued the defendant for tortious interference after the defendant made derogatory statements about the plaintiff to three developers, including at least one who had expressed a desire to hire the plaintiff. *Id.* at 429-30. The court rejected the claim, holding that the plaintiff had failed to show that it had a business relationship with any of the developers "under which it had legal rights." *Id.* at 430. *See also Dwight v. Tobin*, 947 F.2d 455, 460 (11th Cir. 1991) (rejecting tortious interference claim despite existence of oral agreement between plaintiff and specific third party because the relationship did not give rise to any legal rights); *Register v. Pierce*, 530 So. 2d 990, 993 (Fla. 1st DCA) (same), *cert. denied*, 537 So. 2d 569 (Fla. 1988).

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[16] Compare *Landry v. Hornstein*, 462 So. 2d at 846-47 (finding evidence sufficient to establish business relationship where plaintiff's negotiations with specific prospective purchaser had progressed beyond mere offer stage to a *concrete understanding* that plaintiff would sell business and assign lease to purchaser).

As the Eleventh Circuit noted (App. 12-13), Georgetown cited *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980), to support its argument that Florida law permits recovery for "the loss of goodwill with past customers, even in the absence of present legal rights." In fact, however, *Insurance Field Services* is in complete accord with all of the other Florida cases that limit recovery to the loss of *existing* business relationships characterized by a concrete agreement between the parties.

In *Insurance Field Services*, the defendants, employees of the plaintiff insurance underwriting firm, set up their own firm while they were still employed by the plaintiff. The defendants successfully solicited the business of 16 of the plaintiff's existing clients, "all of which . . . had been transacting their business with [the plaintiff]" at the time of the solicitation, and acquired the services of all of the plaintiff's field agents. 384 So. 2d at 305-06.[17] Through these efforts, the defendants acquired business consisting of "between 300 to 400 work items which insurance company clients had previously submitted to [the plaintiff]." *Id.* at 306.

In finding a valid claim for tortious interference, the court relied on the fact that "economically advantageous business rela-

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[17] In fact, a defendant had told one of the plaintiff's customers that the plaintiff was going out of business in Florida, instructed the postman to transfer the plaintiff's mail to the defendant's new company, and directed all of "the successfully solicited field men to commence work immediately for [the defendants' new company] on those accounts of [the plaintiff's] customers who had authorized the change." *Insurance Field Servs.*, 384 So. 2d at 305.

tionships, *capable of ascertainment, existed* between [the plaintiff] and its numerous insurance company clients, *pursuant to which [the plaintiff] had legal rights.*" 384 So. 2d at 306 (emphases added). The plaintiff's relationships were with *specific* clients that currently employed the plaintiff on a continuing basis, had submitted specific work items to the plaintiff, and had not shown "any inclination to *terminate* using [the plaintiff's] services." *Id.* at 308 (emphasis added).

Thus, although the court recognized that a company's business depends on "the building of goodwill," the only goodwill for which damages were recoverable was that between the company and its *existing* clients who had specific agreements with the plaintiff. 384 So. 2d at 308.[18] This is obviously far different from Georgetown's claim of general "goodwill" that it had established with 89,000 people who had bought something from it at some point during the company's existence but who had no agreement or understanding with Georgetown about future business.

Finally, as the Eleventh Circuit noted (App. 13), Georgetown also relied on the Restatement (Second) of Torts § 766B (1979) to support its argument that damages for the loss of potential future business from unidentified "past customers" are recoverable under Florida's interference tort. The Restatement (Second), of course,

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[18] That goodwill, moreover, was precisely measurable by the lost profits that the plaintiff would have derived from the lost clients' business (*Insurance Field Servs.*, 384 So. 2d at 306, 308), in marked contrast to Georgetown's claim that the harm to its "goodwill" with past customers caused it to lose the entire value of its business -- allegedly amounting to $7.38 million.

is not necessarily congruent with Florida law.[19] Moreover, the Restatement (Second) does not stand for the broad theory espoused by Georgetown. Section 766B describes a cause of action for interference with a "prospective *contractual* relation." Saying a contractual relation is "prospective," however, does not mean that the plaintiff need not identify a particular person with whom it enjoys the relationship or need not have reached an existing understanding with that person about future transactions; it simply means that the parties need not yet have cemented their agreement into a contract or begun performance of their obligations under that agreement. Thus, the contractual aspect of the relationship or the performance of the parties' obligations may be

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[19] This Court on occasion has adopted a specific section of one of the Restatements when that section accords with Florida law. *See, e.g., Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037, 1039 (Fla. 1982) (Restatement (First) of Contracts § 346(1)(a)). But the Court has also rejected sections of the Restatements when they are inconsistent with Florida law. *See, e.g., Horne v. Vic Potamkin Chevrolet, Inc.*, 533 So. 2d 261, 262-63 (Fla. 1988) (Restatement (Second) of Torts § 390); *Johnson v. Bathey*, 376 So. 2d 848, 849 (Fla. 1979) (Restatement (Second) of Torts § 339); *Concrete Constr., Inc. v. Petterson*, 216 So. 2d 221, 223 (Fla. 1968) (same) (stating: "Although we often cite the Restatement in such instances as appropriate, we have never adopted it in the sense of altering basic elements in a cause of action."). *See also Institutional & Supermarket Equip., Inc. v. C&S Refrigeration, Inc.*, 609 So. 2d 66, 68 (Fla. 4th DCA 1992) (rejecting Restatement of Security § 124); *Nagashima v. Busck*, 541 So. 2d 783, 784 (Fla. 4th DCA 1989) (rejecting Restatement (Second) of Torts § 525).

No Florida court has adopted Section 766B of the Restatement (Second) of Torts as a statement of Florida's law of tortious interference law. Rather, Florida courts have consistently relied on the statement of the tort's elements set forth at page 12, *supra*.

"prospective";[20] but the parties must already have reached some specific understanding in order for there to be a protected relationship. *See, e.g., Lake Gateway Motor Inn*, 361 So. 2d at 772.[21]

C. Application of Florida Law to Georgetown's Claim

Under the long line of Florida precedents discussed above, Georgetown clearly could not recover damages based on the alleged loss of business from past customers who *might* have shopped there again in the future. Although Georgetown claimed to have a "customer base" of 89,000 people who had purchased furniture from it in the past (*see, e.g.*, R34-78), it could not identify a single individual from among that multitude with whom it had even *discussed* future purchases. Indeed, Georgetown did not even show which of the 89,000 people who had shopped there before still resided in the area -- or were even alive, for that matter. At most, Georgetown had an expectation that *some* unspecified number of

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[20] *See* Section 766B, cmt. a ("This Section is concerned only with intentional interference with prospective contractual relations, not *yet* reduced to contract.") (emphasis added).

[21] Thus, the examples of protected relationships in comment c of Section 766B all involve situations in which the plaintiff has some concrete relationship with an identifiable third party, but the parties have either not finalized their agreement or are free to terminate the relationship at any time. For this reason, the comment states that "a contract terminable at will is closely analogous to the relationship covered by this section." These examples are far removed from the situation here, in which Georgetown could not identify a single person with whom it had any type of understanding about future purchases.

its past customers *might* buy *something* from it in the future.[22] Its assertion of a "relationship" with past customers is thus on no stronger footing than the lounge owner's claim of an advantageous business relationship with the community in *Southern Alliance Corporation*.

Moreover, even if Georgetown *had* specified particular past customers that it expected to buy from it in the future, it did not demonstrate that it had any agreement or understanding with such customers about future purchases. Clearly, when one buys something from a store, he does not thereby enter into an agreement to buy something again in the future. Georgetown's expectation that some past customers might buy something from it in the future thus does not establish the kind of specific, concrete business relationship that Florida law requires. Indeed, Georgetown had no more of a "business relationship" with its past customers regarding future purchases than it had with *any* potential future customers.

II. FLORIDA COURTS' LONGSTANDING CONSTRUCTION OF THE LAW OF TORTIOUS INTERFERENCE IS SENSIBLE AND OUGHT NOT BE CHANGED

The precedent discussed above makes it clear that the courts' well-established interpretation of Florida's law of tortious interference limits recovery to harm done to existing business relationships that have developed into concrete agreements or understandings. Indeed, the Eleventh Circuit's statement of the

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[22] Indeed, this expectation was sheer speculation, as any "relationships" that Georgetown might have had with past customers was based on those customers' previous purchases of *Ethan Allen* furniture. Georgetown could only hope that those customers would buy *Thomasville* furniture from it in the future.

certified question itself seems to recognize this by citing several of the cases discussed above. App. 13. Thus, Georgetown may recover for the alleged loss of potential future sales to unspecified past customers only if this Court were to abandon consistent and longstanding Florida precedent and effect a wholesale transformation of the interference tort in this case. There is no reason for the Court to take such a step.[23]

Florida's tort of interference with a business relationship is closely related to the tort of interference with a contract. In fact, the two torts "are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Smith v. Ocean State Bank*, 335 So. 2d 641, 642 (Fla. 1st DCA 1976).[24] The tort of interference with a business relationship developed out of a recognition that many business agreements are not embodied in enforceable contracts, but still deserve protection from interference by third parties. Thus, "'contracts which are

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[23] Indeed, if the Court has not considered it necessary to grant review in cases in which Florida courts have rejected claims even stronger than Georgetown's (*see, e.g., Register v. Pierce*, 530 So. 2d 990, 993 (Fla. 1st DCA), *cert. denied*, 537 So. 2d 569 (Fla. 1988); *Lake Gateway Motor Inn v. Matt's Sunshine Gift Shops, Inc.*, 361 So. 2d 769, 771-72 (Fla. 4th DCA 1978), *cert. denied*, 368 So. 2d 1370 (Fla. 1979)), there is no reason for it to effect such a profound change in Florida's law here.

[24] *See also Florida Tel. Corp. v. Essig*, 468 So. 2d 543, 544 (Fla. 5th DCA 1985) (noting overlap between elements for tort of interference with contract and elements for tort of interference with business relationship); *Sullivan v. Economic Research Properties*, 455 So. 2d 630, 631-32 (Fla. 5th DCA 1984) (same); *McDonald v. McGowan*, 402 So. 2d 1197, 1201 (Fla. 5th DCA) (same), *petition dismissed*, 411 So. 2d 380 (Fla. 1981).

voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality,'" or other technical defects "'can still afford a basis for a tort action when the defendant interferes with their performance.'" *United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668, 672 (Fla. 1979) (citation omitted).

Society's interest in protecting such noncontractual agreements, though, is the same as that motivating the protection of contracts: to provide security and predictability in business arrangements and to promote the fulfillment of commercial commitments. *See* Harper, *Interference with Contractual Relations*, 47 Nw. U. L. Rev. 873, 874 (1953). This interest is absent, however, where a person lacks a concrete business agreement or understanding and possesses only a unilateral expectation of future business from some unspecified persons -- however reasonable that expectation may be. In that situation, society's interest in free and robust competition prevails.

For the interference tort to protect the type of unilateral expectancy of future business at issue here, then, would require not merely an incremental expansion in the tort's scope, but a complete transformation of its nature and purpose. The tort would no longer bear any relation to the tort of interference with contract. Instead, it would become a sort of all-purpose cause of action utilized whenever a business claims that someone caused its profits to fall short of expectations.

Such a transformation of the interference tort might be desirable if there were no legal recourse where a business

competitor or other person causes the type of general reputational harm alleged here. But Florida law already provides a remedy for such harm. The tort of defamation or trade libel, for instance, permits a plaintiff to recover damages where the defendant intentionally and maliciously makes false statements about him that damage his reputation or "goodwill" and thereby deter consumers from doing business with him. *See, e.g., Kilgore Ace Hardware v. Newsome*, 352 So. 2d 918, 920 (Fla. 2d DCA 1977); *McIver v. Tallahassee Democrat, Inc.*, 489 So. 2d 793, 794 (Fla. 1st DCA 1986); *Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461, 1463-1464 (11th Cir. 1984). The purpose of this tort is not to protect a specific "relationship," but to prevent the more generalized harm caused by false statements of fact.

The tort of defamation or trade libel -- and not the interference tort -- is clearly the appropriate recourse for the type of reputational harm alleged by Georgetown.[25] Indeed, this was precisely the holding of the Ninth Circuit in *Locricchio v. Legal Services Corporation*, 833 F.2d 1352 (9th Cir. 1987). In that case, the plaintiff had alleged that his former employer's derogatory statements about him had prevented prospective employers from hiring him. *Id.* at 1357-58. The court held that the plaintiff failed to establish tortious interference (under

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[25] Georgetown originally brought a trade libel claim in its Amended Complaint. R3-100-12-14. That claim was dismissed by the district court, however, because Georgetown failed to identify any false statements in the ad. R3-117-2. Georgetown included the claim again in its Second Amended Complaint, R3-122-15-18, but then dropped it from the Third Complaint, R5-203, and the Fourth (and final) Amended Complaint, R17-631.

California or Hawaii law) because he had not shown any specific, concrete relationship with a prospective employer. Instead, the court found, the plaintiff's claim of reputational harm was "more accurately redressed under [a] defamation action." *Id.* at 1358.

Given the availability of the defamation or trade libel tort for the type of harm alleged here, there is no reason for this Court to expand the interference tort beyond actual "relationships" to protect the mere expectation of future business. To do so would twist the tort beyond recognition and unnecessarily stifle competition.

CONCLUSION

For the reasons discussed above, the Court should reaffirm that Florida law does not permit a plaintiff in a tortious interference action to recover damages for the loss of potential future business from past customers with whom the plaintiff has no understanding about future transactions; rather, the plaintiff's recovery is limited to the loss of existing business relationships that have solidified into concrete understandings or agreements.

Respectfully submitted,

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September 3, 1993

INDEX TO APPENDIX

GEORGETOWN MANOR, INC., a Florida Corporation, Plaintiff–Counterclaim–Defendant–Appellee, Cross–Appellant,

George Levin, Plaintiff–Third Party Plaintiff–Third Party–Defendant,

Classic Motor Carriages, Inc., a Florida Corporation, Thomasville Showcase Interiors, Inc., a Florida Corporation, Furniture Industries of Florida, Inc., a Florida Corporation, Plaintiffs,

Joe Krau, Counterclaim–Defendant,

v.

ETHAN ALLEN, INC., a Delaware Corporation, Defendant–Counterclaim–Plaintiff–Third Party–Plaintiff–Appellant, Cross–Appellee,

Nathan Ancell, Defendant–Counterclaim–Plaintiff–Third Party–Plaintiff.

GEORGETOWN MANOR, INC., a Florida Corporation, Plaintiff–Counterclaim–Defendant–Appellant, Cross–Appellee,

George Levin, Plaintiff–Third Party–Defendant,

v.

ETHAN ALLEN, INC., a Delaware Corporation, Defendant–Counterclaim–Plaintiff–Third Party–Plaintiff–Appellee, Cross–Appellant,

Nathan Ancell, Defendant–Counterclaim–Plaintiff–Third Party–Plaintiff,

Joe Krau, Counterclaim–Defendant,

Classic Motor Carriages, Inc., a Florida Corporation, Thomasville Showcase Interiors, Inc., a Florida Corporation, Furniture Industries of Florida, Inc., a Florida Corporation, Third Party–Defendants.

Nos. 91–5343, 91–5600.

United States Court of Appeals, Eleventh Circuit.

May 28, 1993.

Furniture dealer brought action against furniture manufacturer following termination of dealership relationship, seeking damages allegedly caused by newspaper advertisement published by manufacturer following termination of dealership relationship. The United States District Court for the Southern District of Florida, No. 85–0052–CIV, Kenneth L. Ryskamp, J., entered judgment in favor of dealer, and manufacturer appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) evidence that customers canceled orders with furniture manufacturer's former dealer after manufacturer published newspaper advertisement warning customers of dealer's purported financial problems was sufficient to support finding that advertisement caused dealer's lost profits on existing orders, as required to support tortious interference with advantageous business relations claim under Florida law, but (2) question of whether loss of business' goodwill with past customers was recoverable under tortious interference cause of action under Florida law would be certified to Florida Supreme Court.

Affirmed in part and certified.

1. Federal Civil Procedure ⇐2173.1(1)

When instructing jury on fraud under Florida law, district court did not err in

refusing to specifically recite particular statutory badges of fraud factors, where instructions were otherwise sufficient on issue of intent. West's F.S.A. § 726.105(2).

2. Corporations ⇐1.4(1)

Under Florida law, person who caused alleged undercapitalization of corporation was not required to be considered alter ego of the corporation; undercapitalization was only one of the factors relevant to alter ego claim.

3. Federal Courts ⇐641

Party challenging sufficiency of the evidence on appeal must file timely motion for directed verdict at end of all evidence. Fed. Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

4. Federal Courts ⇐774

Party that agreed at charge conference to provide jury with three alternatives for calculating interest on undisputed principal amount of its account stated claim, including simple interest, could not challenge jury's award of simple interest on appeal.

5. Evidence ⇐269(1)

In furniture dealer's action against furniture manufacturer based on alleged advertisement placed by manufacturer in newspaper upon termination of dealership relationship, district court did not abuse its discretion in admitting, as nonhearsay, customer's testimony that he had demanded a refund of his deposit after seeing manufacturer's ad, where court gave limiting instruction that testimony could be considered only as evidence of verbal act of demanding refund. Fed.Rules Evid.Rules 403, 801(c), 28 U.S.C.A.

6. Federal Courts ⇐643

Furniture manufacturer waived its right to assert on appeal that its publication of newspaper advertisement concerning its former dealer was not actionable as tortious interference, based on its status as party to relationship allegedly interfered with and its privilege to publish truthful information, where manufacturer failed to assert either argument as ground for directed verdict at close of all evidence in action brought by dealer based on advertisement. U.S.C.A. Const.Amend. 1.

7. Torts ⇐10(1)

Under Florida law, plaintiff must prove the following elements to state valid tortious interference with advantageous business relations claim: existence of business relationship under which plaintiff has legal right; intentional and unjustified interference with relationship; and damage to plaintiff as result of tortious interference with that relationship.

8. Torts ⇐27

Evidence that customers canceled orders with furniture manufacturer's former dealer after manufacturer published newspaper advertisement warning customers of dealer's purported financial problems was sufficient to support finding that advertisement caused dealer's lost profits on existing orders, as required to support tortious interference with advantageous business relations claimant under Florida law, although dealership relationship had been terminated.

9. Federal Courts ⇐392

Question of whether loss of business' goodwill with past customers was recoverable under tortious interference with business relations' cause of action under Florida law

would be certified to Florida Supreme Court. West's F.S.A. Const. Art. 5, § 3(b)(6).

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this appeal involving a claim for tortious interference with a business relationship, we affirm the district court's rulings on several issues and certify to the Supreme Court of Florida one issue regarding damages recoverable under Florida law.

BACKGROUND

This appeal follows protracted litigation involving several claims and counterclaims between a furniture manufacturer, Ethan Allen, Inc. ("Ethan Allen"), and its former furniture dealer, Georgetown Manor, Inc. ("Georgetown"). The unraveling of the long-standing dealership relationship between Ethan Allen and Georgetown began in December, 1984, because of a dispute over Georgetown's credit for future furniture deliveries. On January 9, 1985, Georgetown informed Ethan Allen that it had decided to convert its five Ethan Allen galleries to Thomasville Furniture Industries, Inc. ("Thomasville") furniture outlets. Georgetown's owner, George Levin, formed a new corporation, Thomasville Showcase Interiors to operate the new Thomasville galleries at the old Georgetown locations. On January 11, 1985, Georgetown issued a press release announcing the conversion of its stores from Ethan Allen to Thomasville, stating that "Thomasville offers the best opportunities for our company as we look into the future." Georgetown also sent a letter to its past customers advising them of the conversion and announcing a conversion sale of the Ethan Allen furniture in stock.

On January 24, 1985, Ethan Allen's chairman of the board, Nathan Ancell, sent a memo to other Ethan Allen dealers stating that Georgetown owed $1.6 million as of May, 1984, and that Georgetown had allowed the bills to mount without proper payment even though Ethan Allen had been willing to help Georgetown recover. In addition, on February 3, 1985, Ethan Allen placed a one-day advertisement in several South Florida newspapers, stating:

> Dear Valued Customer:
>
> Ethan Allen recently announced a major change in the distribution in the Miami [or General Pompano] Area. Since this change affects you, our valued customer, I would like to explain the situation directly.
>
> For about 20 years, Ethan Allen enjoyed a wonderful relationship with the Blau family who operated the Georgetown Manor stores in the Miami area.
>
> Because of family illness, the business was sold to a new group. Financial problems developed and our bills were not paid. The debt rose to a high level and we could no longer deliver merchandise to them until the debt was reduced. Reluctantly, we then had to discontinue distribution of Ethan Allen by Georgetown completely. We, therefore, are presently opening new Ethan Allen galleries in this area to serve our many customers of long standing.
>
> One of our fine dealer families in the area, Bob and Brenda Stacy, have established an Ethan Allen office in our present Ethan Allen Contemporary Gallery at 5070 N. Federal Highway, Lighthouse Point (Pompano). The phone number is 305–421–

5300. This Gallery will soon become an Ethan Allen American Traditional Gallery. The Stacys will be opening other Ethan Allen Galleries very shortly to serve you.

Many Ethan Allen customers have unfilled orders with Georgetown Manor. We and the Stacys are very anxious to effect deliveries of these orders and can handle them very expeditiously.

Please contact Stacy's Service Center in Pompano and they will handle your inquiries and orders. Again, the number is 305–421–5300.

The new galleries will be called Ethan Allen Carriage House and will continue to bring you our beautiful furniture and professional services.

We are sorry about this disruption as we took great pains to avoid it.

We look forward to serving you again.

Nathan S. Ancell /s

Nathan S. Ancell

Chairman of the Board

Ethan Allen Inc.

Danbury, CT 06811

PROCEDURAL HISTORY

On January 8, 1985, Georgetown filed an action against Ethan Allen seeking damages and a preliminary injunction compelling Ethan Allen to deliver furniture pursuant to the dealership relationship. During the next several months, Georgetown amended its complaint to include the following six claims against Ethan Allen: (1) intentional interference with the advantageous business relationship between Georgetown and Thomasville; (2) conversion of commissions which Georgetown would have earned on undelivered furniture; (3) breach of contract based on Ethan Allen's failure to provide Georgetown with an adequate period of time to terminate their relationship, and based on Ethan Allen's failure to arrange less burdensome payment terms for it as a dealer with satisfactory credit standing; (4) misrepresentation based on Ethan Allen's failure to provide adequate notice of termination and failure to arrange less burdensome payment terms; (5) trade libel and slander based on the publication of a January 24, 1985 dealer memorandum to all Ethan Allen dealers and the publication of a February 3, 1985 advertisement; and (6) violations of the Sherman and Clayton Acts based on Ethan Allen's alleged attempts to maintain market power and monopoly position as a furniture supplier in South Florida. Georgetown also added Levin as a plaintiff and Ancell as a party defendant in its amended complaint.

Ethan Allen answered Georgetown's complaints and asserted the following eight counterclaims against Georgetown, George Levin, and another company which Levin owns, Classic Motor Carriages, Inc. ("Classic Motor"); (1) an account stated claim for the amount that Georgetown owed Ethan Allen for previously delivered furniture; (2) misrepresentations based on Georgetown's representations that it had sufficient funds to make timely payments for the furniture being delivered; (3) fraudulent concealment of the fact that Georgetown did not have sufficient funds to pay for furniture being delivered; (4) fraudulent conveyance based on transfers of Georgetown's assets to Levin, Thomasville, Classic Motor, or others without adequate consideration and without regard to Georgetown's debts to Ethan Allen; (5) conspiracy to commit civil theft based on an alleged scheme to obtain Ethan Allen's furniture without paying for it; (6) civil theft; (7) conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO); and (8) violations of RICO.

On July 28, 1986, the district court dismissed all of Georgetown's claims except the

tortious interference claim. On April 13, 1987, the district court granted summary judgment against Georgetown on four new claims (breach of fiduciary duty, violation of the Connecticut Franchise Act, maintenance, and violation of Florida's Security of Communications Act) it raised in a third amended complaint. In addition, on October 24, 1988, the district court granted summary judgment against Georgetown on its renewed claim that Ethan Allen violated the Sherman and Clayton Acts. Georgetown filed its fourth and final amended complaint on November 6, 1989, dropping Levin and Ancell as parties and alleging only a tortious interference claim and a conversion claim against Georgetown. Georgetown's amended tortious interference claim alleged that "Ethan Allen wrongfully interfered with plaintiff Georgetown's customers, past, present, and future," as opposed to its earlier allegation of interference with its relationship with Thomasville. In an order denying Ethan Allen's motion for summary judgment, the district court limited the scope of proof on Georgetown's tortious interference claim to exclude prospective customers as a yardstick for lost profits. *Order Denying Motions for Summary Judgment* (March 30, 1990) (ruling that "Georgetown must show interference with an *existing* contractual or business relationship, coupled with legal rights and damages.") (emphasis in original).

Thus, the case proceeded to trial before a jury on Georgetown's conversion claim, Georgetown's tortious interference as limited in the March 30, 1990, order, and Ethan Allen's several counterclaims. At the close of Georgetown's case, the district court directed a verdict in favor of Ethan Allen on the conversion claim. At the close of the trial, on February 12, 1991, the district court entered an order dismissing Ethan Allen's civil theft, RICO, and two conspiracy counts without prejudice based on a stipulation between the parties.

The jury returned the following verdicts on the remaining claims and counterclaims: (1) on the tortious interference claim, the jury returned a special verdict finding that Ethan Allen had intentionally and maliciously interfered with Georgetown's business relationships with its customers and that this interference proximately caused damages to Georgetown in the compensatory amount of $285,000 for lost profits on existing contracts, and $7,380,000 for the "loss of the value of Georgetown's business, including goodwill"; (2) that Ethan Allen was privileged in placing the disputed advertisement because it sought to protect a legitimate economic interest, but that Ethan Allen had not "fairly and truthfully" represented to Georgetown's customers the reason for the termination of the dealership relationship; (3) on the interest due on the account stated claim (the amount was not disputed), the jury found that the parties had agreed that Georgetown would pay simple interest at the prime rate for the past due debt; (4) the jury found against Ethan Allen on its misrepresentation, fraudulent concealment, and fraudulent conveyance counterclaims.

Based on the jury's finding that it was privileged to place the disputed advertisement, Ethan Allen moved that Georgetown's tortious interference claim be dismissed. On February 27, 1991, the district court denied Ethan Allen's motion to dismiss the tortious interference claim based on its authority to harmonize the answers to the interrogatories and the jury's special verdict. In light of the instructions to the jury, the evidence, and other surrounding circumstances, the district court found that the jury's responses was a determination that "Ethan Allen did not exercise its privilege truthfully and in accordance with contemporary business standards" and concluded that its use of improp-

er means vitiates its privilege of protecting its economic interest.

ISSUES AND CONTENTIONS

Ethan Allen raises the following claims of error: (1) the district court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or new trial because Georgetown could not, as a matter of law, establish that the advertisement caused the alleged loss of profits on existing orders, or establish a protected interest in potential future sales to past customers, or state a valid tortious interference claim for alleged interference with business relationships in which Ethan Allen was a party; (2) the district court erred in failing to dismiss Georgetown's tortious interference claim based on its common law privileges of competition and the protection of its legitimate economic interest, and its privilege to publish truthful information under the First Amendment; (3) the district court erred in refusing to grant a new trial based on its admission of prejudicial hearsay; (4) insufficiency of the evidence to support the jury's award of damages for alleged loss of profits on existing furniture orders, and alleged loss of value of Georgetown's business, including goodwill; (5) insufficiency of the evidence to support the jury's finding that Georgetown agreed to pay only simple interest on its outstanding indebtedness for the account stated claim; (6) the district court erred in refusing to instruct the jury on "badges of fraud" factors to consider in determining Georgetown's intent for purposes of the fraudulent conveyance counterclaim; and (7) the district court erred in refusing to instruct the jury that under capitalization is relevant for purposes of Ethan Allen's alter ego theory of fraudulent conveyance.

Georgetown responds that it did establish that Ethan Allen's placement of the advertisement caused the alleged loss of profits on existing orders, and did establish a protected interest in potential future sales to past customers under Florida law. Georgetown contends that Ethan Allen's other claims of error are waived based on its failure to present the issues in a timely fashion for a ruling in the district court. Alternatively, Georgetown contends that the evidence was sufficient to support the jury's award of damages, and sufficient to support the finding that Georgetown was obligated to pay only simple interest on the account stated claim. In addition, Georgetown contends that the district court did not abuse its discretion in failing to give Ethan Allen's proposed jury instructions where the actual instructions adequately covered the relevant law on Ethan Allen's fraudulent conveyance claim.[1]

DISCUSSION

(i) Jury Instructions

We find no reversible error in the district court's denial of Ethan Allen's motion for a

1. Georgetown also contends that the district court abused its discretion in denying its motion to amend the claim of tortious interference pursuant to rule 15(b), to include other alleged wrongful acts of Ethan Allen that interfered with its business relationships. The district court denied Georgetown's mid-trial motion to amend its theory on the tortious interference claim based on a finding that Georgetown failed to articulate the proposed new theory in its fourth amended complaint, and also failed to develop the theory during its examination of previous witnesses. The district court noted the likelihood of confusion to jurors and prejudice to the defendant if it allowed Georgetown to amend its theory of tortious interference at that date. We find Georgetown's arguments that the district court abused its discretion in denying Georgetown's motion to amend to be clearly without merit and warranting no further discussion. We also find Georgetown's arguments that the district court erred in entering judgment on Georgetown's illegal wiretapping and conversion claims to be clearly without merit and warrant no discussion.

new trial on its fraudulent conveyance counterclaim based on the district court's refusal to identify "badges of fraud" on the issue of intent, and refusal to instruct the jury that under-capitalization as relevant to its theory that Levin was the alter ego of Georgetown and the other counter-defendants. We note that a district court has "broad discretion in formulating a jury charge." *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.), *cert. denied*, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989). "In reviewing the adequacy of a jury instruction, the appellate court must examine the entire charge and determine whether, taken as a whole, the issues and law presented to the jury were adequate." *United States v. Bizzard*, 674 F.2d 1382, 1389 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S.Ct. 305, 74 L.Ed.2d 286 (1982). Contrary to Georgetown's argument, Ethan Allen did preserve this claim of error for appellate review based on its objections to the proposed charge during the charge conference. *See Mark Seitman & Associates, Inc. v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1530 (11th Cir.1988) (holding that the right to appellate review of jury instructions for error is not barred where a party apprises the trial court of its objections during the charge conference).

[1] On the badges of fraud claim, Ethan Allen based its proposed charge on the codification of the "badges of fraud" in Fla.Stat. Ann. § 726.105(2) which lists factors that "may" be considered along with other factors in determining intent. *See* Fla.Stat.Ann. § 726.105(2) (1988). Ethan Allen expressly conceded at the charge conference that the badges of fraud factors are relevant only if a transfer is made without receiving a reasonably equivalent value in exchange for the transfer. Because Ethan Allen relied on section 726.105(2) which provided that consideration "may" be given to the badges of fraud factors, we hold that the district court did not err in refusing to specifically recite the particular badges of fraud factors in the jury instructions, which we find otherwise sufficient on the issue of intent. *See Bizzard*, 674 F.2d at 1389 (holding that "the mere failure to recite the jury instructions in the precise language requested by defendant is not error where, as here, the instructions are otherwise sufficient").[2] Moreover, in light of the undisputed jury finding that Georgetown did receive reasonably equivalent value in exchange for the disputed transfers, Ethan Allen cannot be heard to complain since it conceded at the charge conference that the badges of fraud factors are relevant only if the disputed transfers were made without Georgetown receiving a reasonably equivalent value.

[2] We also find no error in the district court's refusal to give Ethan Allen's proposed charge on under-capitalization as relevant to its alter ego theory of fraudulent conveyance. Ethan Allen's proposed jury instruction on under-capitalization did not merely state that under-capitalization is relevant to an alter ego claim. Rather, it would have charged the jury that "if a company has been under-capitalized and as a result prevents creditors from being able to collect their debts, the person who caused the under-capitalization is considered to be the al-

2. In addition to the special interrogatory on the issue of intent to hinder or delay Ethan Allen in collecting the indebtedness, the district court cautioned the jury that "you must determine when the transfer was made, at that time what was the condition of Georgetown, what was the extent of the indebtedness, the amount, and whether at the time the transfers were made in light of Georgetown's financial condition and Ethan Allen's indebtedness, did it hinder or delay Ethan Allen in collecting that indebtedness?"

ter ego of the company and thus personally liable for its debts." Because under-capitalization is only one of the factors relevant to an alter ego claim, we hold that the district court properly refused to charge the jury that the person who caused the under-capitalization of a corporation must be considered the alter ego of the company. In addition, we find no error in the district court's actual charge to the jury on Ethan Allen's alter ego theory because it adequately summarizes the factual controversies under the applicable law. *See Bizzard*, 674 F.2d at 1389. Accordingly, we hold the district court did not err in denying Ethan Allen's motion for a new trial based on its refusal to give requested jury instructions.

(ii) Interest on Account Stated Claim

[3, 4] As to Ethan Allen's challenge of the jury's award of only simple interest on Georgetown's outstanding indebtedness, we find that Ethan Allen waived its right to challenge the jury's finding as not supported with sufficient evidence. A party challenging sufficiency of the evidence on appeal must file a timely motion for a directed verdict at the end of all the evidence. Fed.R.Civ.P. 50(b); *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1437–38 (11th Cir.1983), superseded by statute in part on other grounds as stated in *Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir.1989). Ethan Allen failed to move for a directed verdict on the issue of simple interest at the end of all the evidence. Thus, we would ordinarily review the district court's submission of the issue to the jury under the plain error standard to determine whether *any* evidence supported submission of the issue. *Coker*, 709 F.2d at 1437 (applying the plain error standard of review where the objecting party failed to make a timely objection).

In this case, however, Ethan Allen agreed to submit the question of how interest was to be calculated on the undisputed principal amount of its account stated claim. At the charge conference, the parties agreed to provide the jury with three alternatives, including one calculated with simple interest. In addition, Ethan Allen suggested submitting a fourth alternative of the statutory rate in case the jury could not agree on one of the other three alternatives. Ethan Allen cannot now complain that the jury elected one of those three alternatives because "[i]t is a 'cardinal rule' of appellate procedure 'that a party may not challenge as error a ruling or other trial proceeding invited by that party.'" *Charter Co. v. United States*, 971 F.2d 1576, 1582 (Johnson, J., concurring in part and dissenting in part) (quoting *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n. 4 (11th Cir.1985) and citing additional cases). Accordingly, we hold that the district court did not err in denying Ethan Allen's motion for a new trial on the question of simple interest for its account stated claim.

(iii) Hearsay

[5] We also reject Ethan Allen's contention that the district court erred in denying its motion for a new trial based on the alleged admission of prejudicial hearsay. The claim concerns the district court's admission of the testimony of two Georgetown witnesses about statements that customers made about the reason for their demand for a refund of their deposits on existing orders. The district court struck the testimony of one of the two disputed witnesses, Preve, and ruled that the testimony of the other witness, Cormick, was admissible only as evidence of verbal acts under Fed.R.Evid. 801(c). The district court instructed the jury that "the statements of the customers that they saw the ad and demanded their money back is

not admissible for the truth of the statements," but only as support for the plaintiff's position that "these customers demanded their refunds from Georgetown. Nothing else. Just the act of demanding the money."

Because of the district court's clear limiting instruction that the testimony be considered only as evidence of the verbal acts of demanding refunds, we hold that the district court did not abuse its discretion in admitting Cormick's testimony as non-hearsay under rule 801(c). *See United States v. Rodriguez–Cardenas*, 866 F.2d 390, 394 (11th Cir. 1989) (recognizing that this court will not disturb an evidentiary ruling absent a clear showing that the district court abused its discretion), *cert. denied*, 493 U.S. 1069, 110 S.Ct. 1110, 107 L.Ed.2d 1017 (1990); *United States v. Peaden*, 727 F.2d 1493, 1500 (11th Cir.) (noting that rule 403 is the appropriate standard of reviewing a district court's admission of a statement for a non-hearsay purpose of rule 801(c), and setting forth the two limited categories of cases warranting reversal under that standard), *cert. denied*, 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 118 (1984).

(iv) Privileges and Affirmative Defense

For the reasons stated in the district court's excellent February 27, 1991 *Memorandum of Decision and Order*, we hold that the district court did not err in denying Ethan Allen's motion to dismiss the tortious interference claim based on the asserted common law privileges to compete and to protect legitimate economic interest.

[6] We also hold that Ethan Allen waived its right to assert that its publication of the February 3, 1985 advertisement is not actionable as tortious interference, based on its status as a party to the relationships allegedly interfered with and its privilege to publish truthful information. Contrary to Ethan Allen's claims, we find that Ethan Allen failed to assert either argument as a ground for a directed verdict at the close of all evidence. After the district court denied Ethan Allen's motion to dismiss the tortious interference claim, the court specifically asked Ethan Allen to clarify the basis for its contention that it was protecting its own rights when publishing the ad. In response, Ethan Allen cited cases and made arguments for the sole proposition that its publication of the ad was privileged because it has "an economic interest in the marketplace." Ethan Allen made absolutely no argument that it was protecting its right to publish truthful information under the common law and First Amendment. Moreover, even though Ethan Allen cited cases which also discuss the principle that a tortious interference claim does not lie against a party to the disputed relationship, Ethan Allen pointed to these cases only as support for the argument that it was privileged to protect its "economic interest in the marketplace." We note that Ethan Allen voiced no objection to the district court's jury charge, which did not include any instructions on a truthful information privilege or a defense based on Ethan Allen's alleged status as a party to the disputed business relationships.

Because a motion for JNOV is technically only a renewal of a motion for a directed verdict made at the close of the evidence, Ethan Allen cannot assert grounds supporting its motion for JNOV that were not included in its motion for a directed verdict. *See Litman v. Massachusetts Mutual Life Ins. Co.*, 739 F.2d 1549, 1557 (11th Cir.1984). Accordingly, we hold that the district court did not err in denying Ethan Allen's motion for JNOV or new trial based on the truthful information privilege and its alleged status as

a party to the disputed business relationships, because Ethan Allen waived its right to assert these grounds through its failure to assert them in its motion for directed verdict.

(v) Merits of Tortious Interference Claim

[7] Having concluded that the district court did not err in denying Ethan Allen's motion for JNOV or a new trial on the grounds of privilege and the party to the business relationship defense, we now turn to the merits of Ethan Allen's claims of error regarding the judgment in favor of Georgetown on the tortious interference claim. Under Florida law, a plaintiff must prove the following elements to state a valid tortious interference with advantageous business relations claim:

> (1) the existence of a business relationship under which the plaintiff has legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship.

Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1348–49 (11th Cir.1987) (citations omitted); *see also Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985).

Ethan Allen contends that Georgetown did not establish a tortious interference claim as a matter of Florida law. Ethan Allen also argues that the evidence was insufficient to support the jury's award of damages under either theory of Georgetown's tortious interference claim. We note that Ethan Allen properly preserved its arguments on the tortious interference claim for appellate review. Ethan Allen twice moved for summary judgment on the tortious interference claim which resulted in the district court's April 13, 1987 and March 30, 1990 orders limiting Georgetown's proof to showing "interference with an *existing* contractual or business relationship, coupled with legal rights and damages." At the close of all evidence, Ethan Allen moved for a directed verdict on Georgetown's tortious interference claim based on the absence of evidence showing causation between the disputed advertisement and the cancellation of existing orders, based on the absence of evidence demonstrating causation between the advertisement and lost future profits, and based on an argument that the 89,000 persons in Georgetown's prospective customer base cannot be the basis for any tortious interference claim under Florida law. After the court denied Ethan Allen's motion at the close of evidence and the jury returned its verdict, Ethan Allen raised the same arguments in its motion for a JNOV or new trial, and remittitur of damages.

Existing Orders

[8] We find Ethan Allen's first argument concerning Georgetown's failure to establish causation to be without merit. Ethan Allen contends that Georgetown did not establish causation between the advertisement and the lost profits on existing orders. Ethan Allen argues that Georgetown could no longer fill the existing orders for Ethan Allen furniture, regardless of the advertisement, once Ethan Allen had exercised its right to terminate the dealership relationship.[3] Ethan Allen's causation argument is flawed because it takes too narrow a view of an "advantageous business relationship" under Florida law. "An action for intentional interference is appro-

3. Although Ethan Allen makes a different causation argument than the one specifically delineated in its motion for directed verdict, we find that Ethan Allen preserved the argument based on its express incorporation of the earlier motion for directed verdict at the close of Georgetown's case which specifically set forth the causation argument on appeal.

priate even though it is predicated on an unenforceable agreement, if the jury finds that an understanding between the parties would have been completed had the defendant not interfered." *Landry v. Hornstein*, 462 So.2d 844, 846 (Fla. 3d D.C.A.1985) (citation omitted). Based on our review of the evidence, we find that a reasonable jury could have concluded that Georgetown and the customers with existing orders had an "understanding," not evidenced in the written orders, that they would purchase furniture from Georgetown even if that meant converting their orders to Ethan Allen furniture already in stock or Thomasville furniture. Therefore, we hold that the district court did not err in denying Ethan Allen's motion for a JNOV based on the argument that Georgetown failed to establish causation between the publication of the advertisement and the cancellation of Georgetown's existing orders. *See Ad–Vantage Telephone*, 849 F.2d at 1351 (stating that a motion for JNOV is inappropriate where jury's determination of causality is adequately supported in the record).

In addition, we affirm the jury's award of $285,000 damages for the lost profits on existing orders. Georgetown's expert estimated the lost profits on existing orders to be $285,000, after reducing his original estimate to account for ordinary cancellations not attributable to the alleged interference. Based on the expert testimony, we hold that the district court did not err in denying Ethan Allen's motion for a new trial based on the sufficiency of the evidence supporting the jury's award of damages for lost profits on existing orders.

Loss of Georgetown's Business, Including Goodwill

[9] The gravamen of this appeal and the issue most troubling to this court is Ethan Allen's assertion of error regarding the legal basis for the jury's award of $7,380,000 for the "loss of the value of Georgetown's business, including goodwill."[4] Ethan Allen argues that Georgetown's tortious interference claim is limited to alleged interference with existing advantageous business relations, as opposed to prospective customers. Thus, Ethan Allen argues that Georgetown could not establish a protected interest under Florida law for the loss of potential future sales to the 89,000 past customers in its customer database. Georgetown responds that Florida law does recognize a tortious interference claim based on the future profitability of an existing business enterprise, and based on prospective contractual or business relationships. Georgetown also argues that damages for a tortious interference claim need not be attributable to lost profits caused to identifiable contracts or relationships under Florida law.

We note that Georgetown's fourth amended complaint alleged that Ethan Allen had interfered with its "past, present, and future customers." In the March 30, 1990 order, the district court expressly limited Georgetown's proof to showing "interference with an *existing* contractual or business relationship." In addition, based on our review of the charge to the jury, we cannot say as a matter of law that Georgetown failed to establish intentional and unjustified interference with existing advantageous business relationships that caused some damages. Indeed, we have already held that Georgetown

4. For purposes of context, we note that the $7.38 million damage calculation is based on the testimony of Georgetown's experts who opined that a hypothetical investor would have paid up to $6,223,000 for Georgetown before the February 3, 1985 advertisement, but that Georgetown had no value after the publication of the advertisement.

stated a valid tortious interference claim as it relates to the cancellation of existing orders. Thus, the issue before us is not simply whether Georgetown failed to establish a prima facie case for tortious interference with a business relationship under Florida law. The question before us is properly recast as whether the evidence supporting the jury's $7.38 million damage award is within the scope of damages under Florida law. It was on the issue of damages that the district court gave the jury instructions which countenanced both Georgetown's theory for lost profits on existing orders, and its theory that Florida law on tortious interference allows recovery of damages for interference with an existing business enterprise, including goodwill.[5]

Ethan Allen argues that "the tort of interference with a business relationship does not operate as a broad protection of commercial reputation or potential business opportunities generally. Rather, [Florida law] protects only actual, identifiable relationships." Ethan Allen acknowledges that a protectible business relationship need not be evidenced in an enforceable contract, but argues that a plaintiff must identify particular relationships, which accord the plaintiff some legal rights against the other party, in order to recover damages for a defendant's interference. Ethan Allen relies on decisions from several Florida appellate courts. *See, e.g., Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489, 496 (Fla. 2d D.C.A. 1987) (rejecting the tortious interference claim of a bar owner who did not identify a particular advantageous business relationship, after finding no case that recognized "a cause of action exists for the tortious interference with a business relationship with the community at large"); *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So.2d 303, 306 (Fla. 5th D.C.A.1980) (holding that "economically advantageous business relationships, capable of ascertainment, existed between [the plaintiff] and its numerous insurance company clients, pursuant to which [the plaintiff] had legal rights"); *Lake Gateway Motor Inn v. Matt's Sunshine Gift Shops, Inc.*, 361 So.2d 769, 771–72 (Fla. 4th D.C.A.1978) (rejecting a tortious interference claim because "a mere offer to sell a business which the buyer says he will consider, does not by itself give rise to legal rights which bind the buyer or anyone else with whom he deals").

In contrast, Georgetown relies on *Insurance Field* and other Florida decisions as recognizing that a plaintiff may recover damages in a tortious interference action for the loss of goodwill with past customers, even in the absence of present legal rights. In considering the scope of damages that an insurance auditor could recover from a former employee for his tortious interference with sixteen insurance company clients, the court in *Insurance Field* concluded that the plain-

5. The district court charged the jury on three theories of compensatory damages: (1) loss of profits and existing contracts as of February 3, 1985; (2) loss of profit in the going out of business sale; and (3) loss of value of Georgetown's business, including goodwill. On the goodwill theory, the district court charged the jury as follows:

> The goodwill of a company is an intangible business value which reflects the basic human tendency to do business with a merchant who offers product of the type and quality which the customer desires and expects. Service to the customer and a willingness to stand behind the product which is sold by the merchant are all factors. In determining goodwill, whether goodwill attaches, where the goodwill attaches to a product or a business, it may be symbolized in part by the public's acceptance and recognition of the product.... And so here as part of the damages, Georgetown claims a destruction of its goodwill. You first determine whether Georgetown proved by a preponderance of the evidence that it was destroyed or not destroyed, the extent to which it was impaired and the value of its loss.

tiff could recover damages based on loss of goodwill "occasioned solely by [the defendant's] conduct." *See Insurance Field*, 384 So.2d at 308 (noting that "Plaintiff's business, like most companies, revolves, in large measure, upon the building of goodwill accomplished when a client becomes accustomed to dealing with someone who is regularly performing a service. [The plaintiff's] field representatives and the individual [defendants] had been performing services for [plaintiff's] customers in a satisfactory manner, and the record provides no indication that its customers had any inclination to terminate using appellee's services"). Based on the *Insurance Field* court's decision and its favorable citation to the *Restatement (Second) of Torts*, Georgetown argues that Florida law allows recovery for the loss of value in a continuing business, including goodwill, in a tortious interference action. *See Restatement (Second) of Torts* § 766B, comment c (1979).

Because we do not find the decisions of the Florida district courts of appeal determinative of whether a business may recover for the loss of its value, including goodwill, and we find no controlling precedent of the Florida Supreme Court on the scope of damages under the tortious interference cause of action, we consider it appropriate to certify to the Florida Supreme Court for resolution this potentially recurring question on whether loss of a business's goodwill with past customers is recoverable under the tortious interference cause of action.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO ARTICLE 5, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

Based upon the facts recited herein, we certify the following question in the above-styled case to the Florida Supreme Court:

> Under Florida law, in a tortious interference with business relationships tort action, may a plaintiff recover damages for the loss of goodwill based upon future sales to past customers with whom the plaintiff has no understanding that they will continue to do business with the plaintiff, or is the plaintiff's recovery of damages limited to harm done to existing business relationships pursuant to which plaintiff has legal rights, as discussed in *Landry v. Hornstein*, 462 So.2d 844, 846 (Fla. 3d D.C.A.1985); *Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc.*, 459 So.2d 335, 336 (Fla. 5th D.C.A. 1984); *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So.2d 303, 306 (Fla. 5th D.C.A.1980); and *Lake Gateway Motor Inn v. Matt's Sunshine Gift Shops, Inc.*, 361 So.2d 769, 771–72 (Fla. 4th D.C.A. 1978)?

Our phrasing of this question is not intended to limit the Supreme Court of Florida in considering the issue presented. The entire record in this case and the briefs to the parties shall be transmitted to the Florida Supreme Court for assistance in answering this question.

CONCLUSION

We affirm the judgment of the district court in all respects on Ethan Allen's counterclaims. On Georgetown's tortious interference claim, we reject the various claims of error and affirm that portion of the judgment of the district court that awards Georgetown $285,000 in damages for its lost profits attrib-

utable to Ethan Allen's tortious interference with Georgetown's advantageous business relationships with those customers who had existing orders. We certify the loss of the value in Georgetown's business, including goodwill, question to the Florida Supreme Court. We affirm the judgment of the district court on Georgetown's other claims.

AFFIRMED in part and CERTIFIED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

CERTIFICATE OF SERVICE

I hereby certify that on this third day of September, 1993, copies of the foregoing Brief for Appellant were delivered by mail to:

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