IN THE SUPREME COURT OF FLORIDA

ETHAN ALLEN, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 81,872
	)	
GEORGETOWN MANOR, INC.,	)	
	)	
Appellee.	)	
	)	
	)	

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

REPLY BRIEF OF APPELLANT ETHAN ALLEN, INC.

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In its answer brief, Georgetown simply fails to come to grips with our arguments. It is unable to cite a single case that stands for the proposition that a plaintiff may be awarded damages for harms that are not the result of a breach of a legal duty. And Georgetown either mischaracterizes or ignores entirely the overwhelming body of Florida authority limiting recovery to cases where harm is done to an existing relationship under which the plaintiff has legal rights. This Court should reject Georgetown's invitation to chart a radical change in Florida law.

A. Factual Background

Georgetown devotes more than 10 pages of its brief (pp. 4-16) to what it describes (Br. 5) as a "short[] summary" of the evidence in this case. While there is much that is wrong with its account, the important thing to bear in mind for present purposes regarding Georgetown's factual statement is that it is *entirely* irrelevant to the issue before this Court. It may be accepted that Ethan Allen's placement of the disputed advertisement (reproduced at E.A. Br. 4-5) tortiously interfered with Georgetown's relationship with customers who had *existing* orders for furniture; the straightforward legal question now pending is whether, as damages for that tort, Georgetown may recover for the loss of goodwill based upon speculative "future sales to past customers." App. 13. The unhappy history of Ethan Allen's relationship with Georgetown simply has no bearing on that question.

Having said that, we nevertheless feel constrained to note that Georgetown's factual account is replete with gross

misstatements of the record. Space permits us to respond only to two of the more notable distortions. If the Court is interested, a fuller account of the facts appears in Ethan Allen's briefs to the Eleventh Circuit.

First, Georgetown asserts (Br. 11) that "the jury found -- in a portion of the verdict now affirmed by the federal appellate court--" that statements made in Ethan Allen's advertisement "were flat-out lies." That assertion is demonstrably false. Special verdict question 5(b) asked the jury to determine whether Ethan Allen had "fairly *and* truthfully represent[ed] to Georgetown customers the reason for non-delivery of furniture to the customers" (emphasis added). As Georgetown itself acknowledged in its brief to the Eleventh Circuit (at 46), this special verdict form "permitted the jury to rule for Georgetown even if the ad was true" because the jury could answer "no" by finding the ad *either* false *or* unfair. And the record strongly suggests that the jury, while believing the ad truthful, did find it unfair; indeed, Georgetown's evidence was directed *entirely* at showing, not that the ad was false, but that Ethan Allen acted with malice. See, *e.g.*, R46-36-39 (Seigle); R49-20-21 (Tobin); R70-217-222 (Ancell).1/

1/ Similarly, Georgetown's assertion (at Geo. Br. 11-12) that Ethan Allen acted *entirely* out of malice in placing the ad is incorrect. The jury found, in its answer to special verdict question 5(a), that Ethan Allen placed the ad "in order to protect a legitimate economic interest." The jury thus concluded that Ethan Allen acted, at least in part, for proper business purposes.

Second, Georgetown repeatedly contends that the Eleventh Circuit "held that Georgetown had offered substantial competent evidence of causation -- that the ad had created a sequence of events which destroyed Georgetown -- and substantial competent evidence that the value of Georgetown, destroyed by the ad, was approximately $8.9 million." Geo. Br. 16. See *id.* at 9 n.13, 14 n.11, 18, 26 n.25. This is an inexcusable misstatement of the record. In fact, the court of appeals had no occasion to say anything about the scope of Georgetown's damages for lost goodwill because it was unsure whether Georgetown was entitled to recovery *at all* on its "prospective interference" theory; that, of course, is why the Eleventh Circuit posed its certified question to this Court.2/ If this Court concludes that Florida law does permit Georgetown to recover for general loss of prospective business, upon return of this case to the Eleventh Circuit that court will have to determine whether Georgetown's outlandish damages calculation is supportable.

2/ The Eleventh Circuit's *entire* discussion of Georgetown's damage claim was this skeptical observation: "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." App. 11 n.4.

B. The Plaintiff In A Tortious Interference Action May Not Receive Damages For The Destruction of Prospective Business Relationships That Are Not Protected By The Tort

The larger part of Georgetown's brief is devoted to the argument that it may recover damages for interference with inchoate business prospects *even if such interference is not itself tortious*. See Geo. Br. 3-4, 18-30. In making this argument, Georgetown accuses us of failing to answer the question certified by the Eleventh Circuit because our initial brief discussed the issue by focusing on the scope of the tort rather than on damages. That accusation betrays the confusion that permeates Georgetown's legal arguments.

As explained in our opening brief, the very definition of the tort of interference with a business relationship -- a definition stated literally dozens of times by the district courts of appeal (see E.A. Br. 12-13 n.13) and restated with approval by this Court (see *id.* at 12) -- requires a showing by the plaintiff of "(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.*, 386 So. 2d at 1223. The definition of the tort thus itself indicates that the legally relevant damage is that flowing from the breach of an existing business relationship.

Georgetown's argument to the contrary suffers from a marked ambiguity. At points, Georgetown appears to argue that a plaintiff may recover for interference with otherwise unprotected

expectancies, so long as the defendant *also* interfered with an existing business relationship. See Geo. Br. 3, 34. Elsewhere in its argument, however, Georgetown appears to offer an entirely different ground for recovery for the asserted destruction of its goodwill: that the loss of $285,000 in profits on its existing orders somehow *itself* "foreseeably resulted in Georgetown's destruction as a viable economic entity." *Id.* at 18. See *id.* at 26, 28, 29. But neither of these theories has substance.

1. If Georgetown means to contend that a plaintiff is entitled to damages for the loss of unprotected expectancies whenever the defendant also interferes with an existing business relationship, its argument has no foundation whatsoever in the law. The cases it cites at pages 18-28 of its brief stand only for the boilerplate propositions that plaintiffs may receive consequential damages and that loss of goodwill may be a part of those damages in a proper case. Those decisions, however, have no bearing here.

When breach of a legal duty results in injury, the principle of consequential damages entitles the injured party to recover for all losses flowing from the breach, even those that are indirect or remote in time. See Restatement (Second) of Torts § 910 (1979). Thus, for example, if a contractor breaches his duty of care by installing a defective water system in a hotel, the hotel owner may recover not only for the cost of replacing the system, but also for profits lost while the defective system was in place. Cf. *W.W. Gay Mechanical Contractor, Inc.* v. *Wharfside Two, Ltd.*, 545 So. 2d 1348

(Fla. 1989). In such a case, the compensable harm follows from injury the defendant inflicted upon a legally protected interest.

Here, however, Georgetown is not seeking damages that are a consequence of Ethan Allen's breach of its legal duty (which, by hypothesis, required only that Ethan Allen not disturb Georgetown's relationship with existing customers). Instead, Georgetown insists that it is entitled to damages for competitive injury flowing from *nontortious* aspects of Ethan Allen's conduct that occurred simultaneously with the destruction of Georgetown's existing business relationships. The logical flaws here are made apparent simply by considering the implications of Georgetown's argument. Under its approach, if Ethan Allen had interfered with *all* of Georgetown's future but *none* of its current relationships -- costing Georgetown many millions of dollars in future business -- no damages would be available. But if Ethan Allen's conduct also fortuitously dissuaded a *single* existing customer from carrying out its contract with Georgetown, Georgetown suddenly would be entitled to millions of dollars in compensation.3/

3/ Or imagine this hypothetical. Mr. Y is an auto dealer. Mr. X approaches Mr. Y on the street and shouts loudly in Mr. Y's ear, "you sold me a defective car." The statement, a truthful one that is privileged and not actionable, is overheard by Mr. Z, another of Mr. Y's customers, who therefore chooses not to do business with Mr. Y. The loud shout, however, shatters Mr. Y's eardrum, and he sues Mr. X and recovers for assault. Under Georgetown's theory, Mr. Y also could recover lost profits on the foregone sale to Mr. Z because loss of the sale was a "natural and probable consequence[] of the defendant's wrongdoing" (Geo. Br. 17) -- even though Mr. X breached no duty to anyone in disclosing that he had been sold a defective car, just as Ethan Allen breached no duty when it took actions that may have affected the willingness of Georgetown's prospective customers to purchase furniture from it.

There is no justification in the law of tort for such a bizarre outcome. Tort rules are designed to provide compensation for, and to deter, breaches of particular legal duties. See, e.g., W. Keeton, *Prosser & Keeton on the Law of Torts* § 1 at 5-6, § 4, at 20; Restatement § 4. But providing damages for "harms" that are not the consequence of such a breach gives the plaintiff a windfall that bears no relationship to the conduct condemned by the law, while causing massive overdeterrence of conduct that (again by hypothesis) is *approved* by society as facilitating untrammelled competition. See E.A. Br. 24. After all,

> Social policy makes certain conduct "tortious" because it involves certain kinds of risks or threats of harm to certain persons or groups of persons. *It would be unfair and inconsistent with that policy to hold a person engaged in such conduct * * * liable for harms which were completely outside the sort of thing which made his conduct the basis of liability.*

1 F. Harper, F. James, & O. Gray, *The Law of Torts* 1viii (2d ed. 1986) (emphasis added). See W. Keeton, *Prosser & Keeton on the Law of Torts* § 1, at 2-6 (emphasis added) (tort law provides "compensation of individuals * * * for losses which they have suffered *within the scope of their legally recognized interests*").

Indeed, the distinction between the compensable and noncompensable aspects of harm is fundamental to tort law. As the Restatement puts it, compensable

> [d]amages flow from an injury. * * * [I]njury denotes the invasion of any *legally protected interest*. "Injury" is thus distinguished from "harm," which is a nonlegal word implying merely a detriment in fact. The infliction of harm does not always give rise to a cause of action.

Restatement § 902, cmt. a (emphasis added). See *id.* §§ 903-906 (plaintiffs may obtain "damages," thus defined, in tort actions); *id.* § 7 (distinguishing "injury" from "harm").

Moreover, the idea that the same act may have both wrongful and noncompensable consequences is a familiar one across the legal landscape. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), for example, the United States Supreme Court held that a plaintiff may not obtain damages for all injuries flowing from a violation of the antitrust laws; instead, the Court concluded that a plaintiff may recover only for competitive injuries of the sort condemned by those laws. To hold otherwise, the Court explained, would make "recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws." *Id.* at 487 (footnote omitted). That reasoning is equally applicable here: Georgetown's theory would make recovery turn fortuitously on whether the defendant interfered with existing as well as future business relationships, and would authorize damages for losses that are not condemned by rules of tort.

2. Evidently recognizing the weakness in its position, Georgetown appears to offer this Court an alternative theory to support the $7.38 million award for the alleged loss of value of Georgetown's business: it repeatedly implies that Ethan Allen's interference with Georgetown's "*existing* contractual or business relationships" -- that is, the interference with current customers for which Georgetown was awarded $285,000 -- "was so damaging that it also put [Georgetown] out of business." Geo. Br. 4 (emphasis

added). See *id.* at 13, 18, 26, 28. This preposterous argument (if it is Georgetown's argument) need not detain the Court long.

We readily acknowledge that it is possible to imagine a case in which interference with existing contracts leads to destruction of a business (perhaps, for example, where the immediate disruption of cash flow makes it impossible for the business to meet its obligations), and in such a case the injury to the business would be compensable. But this is not such a case. The theory of liability for long-term damages that Georgetown presented to the jury (and the evidence supporting that theory) was premised on the alleged loss of sales that Georgetown hoped to make in the future to its 89,000 past customers. That was the theory applied by Judge Mishler (see R32-18, 20-21, 27); that was the theory propounded by Georgetown to the Eleventh Circuit. See Geo. CA Br. 63.

Most important for this Court's purposes, the Eleventh Circuit plainly understood Georgetown's argument to be that Florida law permits recovery "in a tortious interference action for the loss of goodwill with *past customers*, even in the absence of present legal rights." App. 12 (emphasis added). See *id.* at 11. The Eleventh Circuit accordingly asked this Court whether a plaintiff may "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.*" *Id.* at 13 (emphasis added). This Court should return a straightforward answer to the Eleventh Circuit.

C. Florida's Law Of Tortious Interference Protects Only Existing Business Relationships Under Which The Plaintiff Has Legal Rights

1. Georgetown's argument (at Br. 31-44) that Florida *does* recognize a cause of action for tortious interference with future business expectancies that have not yet solidified into concrete agreements or understandings between identifiable parties is wholly without merit. As noted above, the tort as recognized by Florida courts requires proof of "the existence of a business relationship under which the plaintiff has legal rights." *Ethyl Corp.*, 386 So. 2d at 1223. Georgetown simply ignores this definition.

Instead, Georgetown attempts (at Br. 35-36) to explain away the myriad Florida decisions embracing and applying that definition by concocting a "prove only what you plead theory": Georgetown contends that the claims failed in those cases because the plaintiffs alleged but were unable to prove the existence of a concrete relationship. Plaintiffs may avoid this problem of proof, Georgetown continues, through the simple expedient of alleging only interference with an expectation of unspecified future business.

This contention rests on a patent misreading of the cases. The plaintiffs' problems in the decisions cited in our initial brief were not matters of pleading deficiencies, but of substantive limits on the tort. Proof of the existence of some concrete, identifiable relationship is a necessary element of the tort, and facts sufficient to establish each element must be "pleaded and proved." *MD Assocs.* v. *Friedman*, 556 So. 2d 1158, 1159 (Fla. 4th DCA 1990). Thus, in both *Register* v. *Pierce*, 530 So. 2d 990, 993

(Fla. 1st DCA), *cert. denied*, 537 So. 2d 569 (Fla. 1988), and *Water & Sewer Utility Construction, Inc.* v. *Mandarin Utilities, Inc.*, 440 So.2d 428, 430 (Fla. 1st DCA 1983), to give just two examples, the court found that the plaintiff failed to state a claim because he had not even *alleged* that the relationships interfered with afforded him any legal rights.

Georgetown's claim that at least some Florida decisions support its contention that the interference tort does not require an existing, identifiable relationship is equally untenable. Georgetown is flatly wrong in asserting (at Br. 39-41) that the plaintiff's relationships in *Insurance Field Servs., Inc.* v. *White & White Inspection & Audit Serv., Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980), the case upon which it principally relies, were with "past" customers. In fact, the court specifically found 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*." *Id.* at 306 (emphasis added). The plaintiff's clients were specific companies that used the plaintiff's services on a continuing basis and that had not shown "any inclination to *terminate* using [those] services" prior to the interference (*id.* at 308 (emphasis added)); indeed, the defendant took from the plaintiff many of the customers' work "items * * * previously submitted to [the plaintiff]." *Id.* at 306.

Similarly, in *Unistar Corp.* v. *Child*, 415 So. 2d 733, 734 (Fla. 3d DCA 1982) (cited at Geo. Br. 38-39), the defendants

allegedly had interfered with the plaintiff's *existing* business relationship with 1,850 dealers who had "signed" with the plaintiff to sell its product; the relationship was not the vague "past or prospective" one described by Georgetown. And in *NAACP* v. *Webb's City, Inc.*, 152 So. 2d 179, 182 (Fla. 2d DCA 1963), vacated as moot, 376 U.S. 190 (1964) (cited at Geo. Br. 38), the court nowhere stated the elements of the interference tort or even identified that tort as the cause of action under which the plaintiff proceeded. The court's holding, in any event, was that "coercive picketing" is impermissible, a conclusion that has no bearing here. 152 So. 2d at 182-183.4/

2. The non-Florida cases cited by Georgetown (at Br. 41-44 & n.36) are wholly beside the point. This State need not blindly

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4/ Georgetown cites only two cases that did not *clearly* involve identifiable, existing relationships. In *Zimmerman* v. *D.C.A. at Welleby, Inc.*, 505 So. 2d 1371 (Fla. 4th DCA 1987), protesters and picketers at a condominium led to loss of sales of condominium units to "potential customers." *Id.* at 1373. While those potential customers had not yet entered into purchase agreements, however, the court recognized that an element of the interference tort -- which it held satisfied -- was "'the existence of a business relationship under which the plaintiff has legal rights.'" *Ibid.* (citation omitted). The court found such relationships where customers who approached the condominium about possible purchases were dissuaded by the defendants from going forward.

In *Merlite Land, Sea & Sky, Inc.* v. *Palm Beach Inv. Properties, Inc.*, 426 F.2d 495 (5th Cir. 1970) (cited at Geo. Br. 39), the court rejected the defendant's argument that the plaintiff had to show interference with a *contractual* relationship to recover. 426 F.2d at 498. The court went on to state that the interference tort "encompasses prospective as well as current customers." *Ibid.* The court's statement is of little moment, however, because, among other things, it came in a discussion of the effect of a "limitation of liability" clause, not in a discussion of the elements of the tort. In any event, *Merlite* was decided before most of the relevant Florida cases.

follow the lead of jurisdictions that are more willing than Florida to chill speech and discourage vigorous competition. In any event, on examination it is plain that most of the cases cited by Georgetown do not support its position. Some in fact echo the restrictive Florida rule.5/ Many others, while talking of "prospective contractual relations," "business expectancies," and the like, involved *current*, concrete relationships between the plaintiff and specific, identifiable third parties.6/ And the more expansive cases from other jurisdictions cited by Georgetown are flatly inconsistent with Florida precedents.7/

5/ See, *e.g.*, *Whelan* v. *Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (cited at Geo. Br. 43) (plaintiff must have "concrete business opportunities"), *cert. denied*, 113 S. Ct. 300 (1992); *Locricchio* v. *Legal Servs. Corp.*, 833 F.2d 1352, 1357 (9th Cir. 1987) (cited at Geo. Br. 43) (while court referred to "prospective economic relationship[s]," it made clear that a plaintiff must show that he has an *existing* relationship with a particular person; only the economic benefit may be prospective).

6/ Space does not permit an exhaustive catalog of those cases. The following (all cited at Geo. Br. 41-42 n.26) are typical. *Brotherhood Ry. Carmen* v. *Missouri Pac. R.R. Co.*, 944 F.2d 1422, 1430 (8th Cir. 1991) (Mo. law) (ongoing relationship between union and railroad employers; relationship *not* protected because union lacked "'reasonable expectancy' of a prospective contractual relationship"); *Fishman* v. *Estate of Wirtz*, 807 F.2d 520, 526, 529 (7th Cir. 1986) (Ill. law) (existing contract for sale of the Chicago Bulls, pending approval of NBA); *Zippertubing Co.* v. *Teleflex, Inc.*, 757 F.2d 1401, 1404-1405, 1407-1408 (3d Cir. 1985) (N.J. law) (existing agreement in which plaintiff and third party had "arrived at a meeting of the minds on almost all particulars"); *Hamro* v. *Shell Oil Co.*, 674 F.2d 784, 789 (9th Cir. 1982) (Cal. law) (existing agreement with specific person to sell franchise, subject to defendant's approval).

7/ Compare *Kiepfer* v. *Beller*, 944 F.2d 1213, 1220 (5th Cir., 1991) (cited at Geo. Br. 42) (interference with physician's referral practice actionable), with *Lake Hosp. & Clinic, Inc.* v. *Silversmith*, 551 So. 2d 538, 545 (Fla. 4th DCA 1989), *rev. denied*, 563 So. 2d 634 (Fla. 1990) (where physician's staff privileges terminated, no cause of action because there was no showing of

3. Georgetown's contention (at Br. 32) that Ethan Allen interfered with Georgetown's "existing legal right" in the value of its own goodwill is nonsensical. Goodwill is a business asset, just like business inventory or physical plant. Destruction of that goodwill is compensable when it is the result of a tortious act. But defining the interference tort as anything that diminishes goodwill is tautological. It is interference with the plaintiff's existing "business relationships," under which the plaintiff has "legal rights" to future business, that is tortious; actions by Ethan Allen that discouraged prospective customers from doing business with Georgetown worked no such interference, whether or not those actions affected Georgetown's goodwill. Nor is Georgetown correct in asserting (Br. 31-33, 43-44) that it would be anomalous for Florida to permit an action for conduct that interferes with an existing relationship while providing no cause of action when similar conduct disturbs prospective relations. As we explained in our opening brief (at 23-24), that distinction reflects society's judgment that the interest in free competition and uninhibited speech outweighs the entitlement to pursue speculative business opportunities that have not yet ripened into

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interference with "a particular doctor/doctor or doctor/patient relationship"); compare *Drouet* v. *Moulton*, 245 Cal. App. 2d 667, 669-670, 54 Cal. Rptr. 278, 280 (1966) (cited at Geo. Br. 42-43) (claim stated where defendant disrupted business at a tavern to drive away customers) with *Southern Alliance Corp.* v. *City of Winter Haven*, 505 So. 2d 489, 496 (Fla. 2d DCA 1987) (where defendants closed tavern so as to drive away customers, no cause of action because owner did not show "the existence of a business relationship under which it has legal rights").

concrete relationships -- an entitlement that remains protected if the interfering conduct is independently tortious.

Accordingly, Georgetown's suggestion (at 32) that failure to expand the interference tort will allow unscrupulous competitors to "lie[], steal[] or cheat[]" with impunity, is a red herring. Other torts -- defamation, trade libel, conversion, fraud, and so on -- are available to deal with such conduct. As we note in our opening brief (at 25 n.25), Georgetown actually brought a trade libel claim in its Amended Complaint but subsequently dropped it, evidently because it recognized the difficulty it would have in proving falsity. Georgetown is now attempting to convert the interference tort into a catchall that will give comfort to plaintiffs who are unable to make out the elements of other causes of action. There is no reason for this Court to take such a step, which will chill commercial speech and inhibit vigorous competition.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the Court should reaffirm that the Florida law of tortious interference does not permit recovery of damages for the loss of potential future business from past customers with whom the plaintiff has no understanding about future transactions.

Respectfully submitted,

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I hereby certify that on this eighteenth day of November, 1993, copies of the foregoing Reply Brief for Appellant were served by first class mail, postage pre-paid, on the following:

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