IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

FERGUSON TRANSPORTATION, INC., etc.,

Petitioner, CASE NO: 84,156

vs.

NORTH AMERICAN VAN LINES, etc.,

Respondent.
_____/

NORTH AMERICAN VAN LINES, INC., etc.,

Petitioner, CASE NO: 84,167

vs.

FERGUSON TRANSPORTATION, INC., etc.,

Respondent.
_____/

PETITIONER'S REPLY BRIEF AND ANSWER BRIEF ON CROSS-PETITION

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STATEMENT OF THE CASE

NAVL does not claim that it did not breach Ferguson's exclusive agency agreement, nor that the amount of compensatory damages award is not supported by the evidence. While it raised those issues in the Fourth District, it has abandoned them here.

NAVL states that the Fourth District did not decide whether the punitive damage award was excessive. Therefore, NAVL argues that if this Court reverses the Fourth District's directed verdict on the tort claim, it should remand the punitive damage issue back to the Fourth District to determine. NAVL cites as authority HALL v. BILLY JACK'S, 458 So.2d 760 (Fla. 1984). However, in that case, unlike here, the Court remanded the case to the Fourth District to reconsider its decision in light of the fact that the Court had, in the interim, reversed the case upon which the Fourth District had relied. That procedural scenario does not exist here.

HALL v. BILLY JACK'S, supra, also did not involve a certified question, as here. At page 48 of its brief, NAVL acknowledges that this Court's review is not limited to the certified question. However, the Court's authority to consider issues other than those upon which its jurisdiction is based can only be exercised when the other issues have been properly briefed and argued, and are dispositive of the case. In SAVOIE v. STATE, 42 So.2d 308 (Fla. 1982), the Court quoted from one of its earlier opinions and explained the reasons why, once it had jurisdiction, it should exercise its discretion to dispose of the entire case:

> Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the most universal command of constitutions that justice should be

> administered without "sale, denial or delay". Piecemeal determination of a cause by our appellate courts should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here...."[m]orever, the efficient and speedy administration of justice is...promoted" by doing so.

NAVL was well aware when it filed its brief that if the Court decided the certified question in Ferguson Transportation's favor, the punitive damage award would be reinstated. Nonetheless, it chose not to present any challenge to the excessiveness of the punitive damage award if that occurred, even though NAVL filed a Cross-Notice to Invoke the Court's discretionary jurisdiction and raised a cross-issue in its brief. Because NAVL failed to challenge the punitive damage award in its Cross-Petition, it has now abandoned that issue. The case should not be sent back to the Fourth District to decide whether the punitive damages were excessive, which could only result in the issue being presented in another proceeding to this Court by one of the parties. This piecemeal procedure should not be allowed.

STATEMENT OF THE FACTS RELEVANT TO THE CERTIFIED QUESTION

Rebuttal of NAVL's Tortious Interference Facts

NAVL acknowledges that in reviewing the issue certified, the Court must view the facts in the light most favorable to Ferguson Transportation, since the Fourth District essentially directed a verdict on its claim for tortious interference. Yet, throughout its brief, where there are critical factual disputes, NAVL ignores evidence in Ferguson Transportation's favor and instead refers to the contrary evidence in its favor, which the

jury rejected. Those instances will be referred to as a discussion of the facts progresses.[1] Also, NAVL's statement of the facts would lead this Court to believe that it did everything it could to prevent Advance's tortious interference. That was NAVL's after-the-fact contention. Nothing was further from the truth.

While NAVL chooses to refer to its 1973 appointment of another agent in Broward County as being "a technical violation" of Murray Van's exclusive agency contract, it was in fact a blatant and premeditated disregard of Murray Van's contract rights. The fact that NAVL persists in using this "technical violation" jargon only demonstrates how NAVL still sees nothing wrong with simply doing whatever it unilaterally decides to do where its agents are concerned.

NAVL refers to the fact that fewer than 10 of its agents have exclusive agency agreements, citing Maxfield's testimony. His testimony was actually that less than 20 NAVL agents had some form of exclusive rights. In fact, the evidence before the jury showed that no other NAVL agent had the comprehensive exclusive agency agreement that NAVL had granted to Ferguson Transportation (R136).

Ferguson Transportation is concerned that NAVL's use of the names "Molloy" and "Molloy Brothers" interchangeably throughout its brief may confuse those entities. The record is clear that James Molloy, William Grochowski and their Florida corporation, Advance Relocation ("Advance"), the Defendants in this case, had no legal relationship

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[1]/The facts relevant to NAVL's issue on Cross-Petition will be discussed under that issue, infra.

with the "Molloy Brothers", the New York company to whom NAVL unilaterally gave the right in 1973 to compete with Murray Van & Storage in Broward County.

At page 7 of its brief, NAVL states as uncontradicted fact that Molloy promised he would not advertise in Broward County. In fact, Molloy testified that he never promised that at all (R735). He was adamant about the fact that Maxfield told him that he would not be restricted to Palm Beach County, regardless of his contract language (R677,737,PX72). Molloy denied ever agreeing not to advertise or solicit in Broward County (R734), and the jury could have believed him instead of Maxfield on this issue. Throughout its brief, NAVL simply ignores this evidentiary conflict which the jury resolved in Ferguson Transportation's favor. It also ignores the fact that Maxfield's secret agreement with Molloy was directly contrary to what Maxfield had told Ferguson.

NAVL refers to actions and letters of its lower level executives to show that it attempted to prevent Advance's tortious interference. However, the evidence showed that they never knew that Maxfield had told Molloy he could advertise and solicit in Broward County, and that NAVL would look the other way. Therefore, they took actions without knowing the true state of the facts. NAVL admits at page 7 of its brief that these lower executives testified that they seriously doubted that Molloy would ever agree not to advertise or solicit in Broward. Their view of what Molloy would or would not have agreed to supported Molloy's own testimony that he in fact had never agreed to refrain from advertising or soliciting in Broward County.

Alternatively, the jury could have concluded (as Ferguson Transportation argued) that the actions and letters of NAVL were intended only to placate Ferguson

Transportation by creating an appearance of resistance by NAVL to Advance's interference when NAVL was actually an active participant in the interference. This conclusion is strongly supported by the recognition that if NAVL were serious about deterring the invasion by Advance of Ferguson Transportation's exclusive territory it had the absolute power to do so because it held both the ICC license and the purse strings. Not only did NAVL fail to use its power to stop Advance, it provided active assistance essential to Advance's continuance of its unlawful conduct by booking the business out of Ferguson Transportation's territory and paying Advance to handle it.

NAVL states as uncontradicted fact that in November, 1985 it instructed Bell South that Advance could not advertise as its agent, again seeking to show that it attempted to prevent Advance's tortious interference. In fact, there was no proof that this ever occurred, and the jury could have concluded that it never occurred. NAVL cites to PX78, which is nothing more than an in-house memorandum from McTeague to NAVL's law department. McTeague told the law department that he had discussed the matter with Bell South and that they "seemed to be cooperative in assisting us" (PX78). However, McTeague made it clear that a letter had to be sent to Bell South no later than December 9, 1985, confirming that Advance should not be allowed to advertise in Broward using NAVL's name or logo (PX78). NAVL could never produce such a letter, and therefore the jury could have concluded that no letter was ever sent to Bell South in 1985. The jury could have concluded that while McTeague, who was sympathetic to Ferguson, wanted to assist him, Maxfield had had the final word. The jury could have determined that when the law department checked with Maxfield about sending the letter to Bell

South, he vetoed the idea. In any event, NAVL produced no such letter from its files and produced no one with Bell South to testify that they ever received such a letter. The jury could clearly have concluded that except for an initial inquiry of Bell South by McTeague, NAVL decided for whatever reason not to send the letter to Bell South that it knew was necessary to prevent Advance from advertising in its 1986 telephone book as NAVL's Broward agent.

Although NAVL states at page 8 of its brief that "unbeknownst to North American Van Lines, Advance placed an advertisement in the Donnelly yellow pages for Broward County" it cites no record page reference for that statement. In fact, the jury could have concluded that NAVL knew that Molloy was going to advertise in Broward County because the evidence demonstrated that Maxfield had specifically told Molloy that he could do so. There was ample evidence from which the jury could have concluded that NAVL was well aware in 1985, when it made Molloy an NAVL agent in Palm Beach County, that Molloy intended to advertise in Broward County.

NAVL states that in 1986 Jack McTeague and Tony Norcia told Molloy that he had to stop advertising in Broward County and threatened him if he did not withdraw the Broward County advertisement.[2] Again, these lower level NAVL officials had no knowledge of Maxfield's agreement with Molloy that he could advertise and solicit in Broward County. Therefore, the jury could have determined that their actions in writing

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[2]/ These lower level NAVL officials are the same ones whose objections to Molloy becoming an NAVL agent had been overridden by Maxfield, NAVL's president and CEO.

threatening letters to Molloy were taken without knowledge of the true agreement between Maxfield and Molloy, or were merely intended to disguise NAVL's true intentions and motives.

It was only because Ferguson continued to loudly complain when he learned in 1986 about Advance's advertising in Broward County, that NAVL was forced to insist that Molloy disconnect his Broward telephone for a short period of time. NAVL refers to two 1986 letters by Joe Ruffolo, head of NAVL's household goods division, sent to Molloy telling him he could not advertise nor solicit in Broward County. Again, Ruffolo was a lower level NAVL official who had no knowledge of the conversations or agreements between Molloy and Maxfield. Molloy responded by continuing to insist that he had been told by Maxfield that he could advertise and solicit in Broward County. However, he agreed to disconnect his Broward telephone for one year only, "as a show of good faith" (PX70). In fact, the telephone remained disconnected for only six months, and NAVL knew that. Although Maxfield told Ferguson that if Molloy reconnected his Broward telephone, he would cancel his agency agreement, it never did so upon being informed that he had reconnected that telephone (PX86).

NAVL's reference to Susan Kraft's testimony that the Broward telephone was disconnected for a year should be disregarded since it conflicts with the evidence showing that it was only disconnected for six months, from July 18, 1986 to January, 1987 (PX57,R507) and the jury could have chosen to believe that evidence. The Court should also disregard NAVL's statement that it "continued to monitor" the phone to make sure

it was not returned to service. The conflicting evidence, which the jury could have accepted, showed that NAVL monitored it for only a few days (R2578).

NAVL states that when Molloy advised it in January, 1987 that he was going to reconnect his Broward telephone and advertise in the 1987 Broward yellow pages, Ruffulo wrote various yellow page agencies and told them that Advance could not advertise as a NAVL agent. NAVL states that as a result Advance's 1987 Broward advertisements made no reference to NAVL or its logo. However, those advertisements did advertise Advance as a Broward County interstate carrier of household goods, listing NAVL's interstate commerce ICC number. Advance was not authorized to move goods in interstate commerce except through NAVL. While NAVL states in its brief that it could only legally control use of its trademark and logo, that is not true since NAVL admitted at trial that it could also have controlled use of its ICC number (R1092). NAVL was well aware that Advance's 1987 yellow page advertisements improperly stated that it was a Broward County interstate household carrier under NAVL's ICC number, but it did nothing to advise the yellow page agencies not to allow this advertising to occur in the future. The false advertising continued through 1989, when Ferguson Transportation was forced out of business.

Moreover, NAVL's letters objecting to Advance's advertisement were a farce for two reasons. All NAVL had to do to stop the false advertisements was terminate Advance's contract. Second, in addition to the advertisements, from 1986 through 1989, NAVL allowed Advance to use its name in direct solicitation of business in Broward

County through mass mailings, door-to-door solicitations, leaflet handouts, and telephone solicitations. Arguably, Advance's advertising paled in comparison.

NAVL contends that Ferguson Transportation sued it in August, 1987 before it ever had a chance to do anything about Advance's 1987 improper advertising and soliciting. In fact, the filing of the lawsuit did not excuse NAVL for taking no action. If anything, it should have prompted NAVL to take whatever action was necessary to prevent Advance from tortiously interfering with Ferguson Transportation's exclusive right to service all Broward customers seeking to move interstate with NAVL, and to itself cease facilitating and joining in that tortious interference. Instead, once the lawsuit was filed NAVL made the affirmative decision to continue its tortious interference.

NAVL states that the trial court ruled that just because NAVL appointed Advance to act as its agent in Palm Beach County, that did not mean NAVL had appointed it to advertise and solicit in Broward. What the trial court stated was that this was a factual issue that must be left to the jury to determine (R2246), and which the jury decided against NAVL.

Jury Question As To Whether NAVL and Molloy's Tortious Interference Caused Ferguson Transportation's Damages

NAVL's argument at pages 12-13 of its brief does nothing more than rehash the testimony and arguments it presented at trial as to why its actions did not cause Ferguson Transportation's damages. Admittedly, NAVL put on witnesses who claimed that everything else in the world (poor management, poor bookkeeping and record keeping

procedures, the change in the name of the business, deregulation, increased insurance costs, problems with sales management, productivity, advertising effectiveness, personnel turnover, no budget, etc.) was what caused Ferguson Transportation's business to decline. The problem is that the jury simply did not believe NAVL's parade of witnesses. Mr. Ferguson had made a profit for his company for 21 years until NAVL and Molloy began interfering with his business. Obviously, Mr. Ferguson was not the inept businessman that Defendants sought to portray at trial.

What caused the demise of Ferguson Transportation was a question of fact for the jury to determine, McCAIN v. FLORIDA POWER, 593 So.2d 500 (Fla. 1992), and there was ample evidence that it was NAVL and Molloy's 3 1/2 years of tortious interference. The jury saw through NAVL's parade of witnesses, and believed instead that the cause of Ferguson Transportation's lost profits was Defendants' tortious interference, and that the lost profits had in turn caused its downfall. In fact, Defendants' own witness admitted that even if Ferguson Transportation's financial condition was shaky in 1986 as a result of undergoing a major capital expansion, that simply made the business more susceptible to even greater damage than normal from the loss of income (R9597-58) caused by Defendants' tortious interference.

Ferguson Transportation's Damages

NAVL states that Advance booked relatively few interstate moves from Broward County. NAVL ignores the fact that it produced only a fraction of its bills of lading representing Advance's interstate moves from Broward County during the years 1986-

1989. This placed Ferguson Transportation in the position of having to estimate what it considered to be the minimum amount of its damages for those years. Ferguson Transportation was able to estimate that Defendants' tortious interference diverted millions of dollars in gross revenue from it to Advance, and that NAVL received a large fee from each of those moves. If anything, this estimate which was based on the bills of lading actually produced by NAVL, was just the tip of the iceberg.

Case law is clear that a defendant will not be permitted to take advantage of the uncertainty of the plaintiff's damages, which uncertainty he himself has caused by failing to hand over relevant records. MILLER v. ALLSTATE INS., 573 So.2d 24 (Fla. 3d DCA 1990). As stated in that case:

> Noting that although damages usually must be established within a reasonable degree of certainty...nevertheless,...when the difficulty in establishing damages is caused by the defendant, he should bear the risk of uncertainty that his own wrong created...

If defendants by their own wrongs have prevented precise computation of damages, a just and reasonable estimate of damages based on relevant data is permissible. HARTLEY v. FLORIDA BEVERAGE, 307 F.2d 916 (CA Fla. 1962).

Damages are not rendered uncertain because they cannot be calculated with absolute exactness. Uncertainty as to the precise amount of, or difficulty in proving, damages does not preclude recovery if there is some reasonable basis of computation although the result may be proximate. CLEARWATER ASSOCS. v. HICKS LAUNDRY, 433 So.2d 7 (Fla. 2d DCA 1983); W.W. MECH. CONTR. v. WHARFSIDE TWO, 545 So.2d 1348 (Fla. 1989). Damages are recoverable to the

extent the evidence affords a sufficient basis for estimating an amount of money with reasonable certainty. UNITED STEEL v. MONEX, 310 So.2d 339 (Fla. 3d DCA 1975). The inability to give a precise amount of damages does not preclude recovery when substantial damages have been suffered. ELECTRO SVCS. v. EXIDE, 847 F.2d 1524 (11th Cir. Fla. 1988).

As applied here, NAVL must fail in its argument that Ferguson Transportation did not prove sufficient interstate moves from Broward County by Advance to cause its business to fail, where the jury determined otherwise, and where NAVL refused to produce but a fraction of its records regarding those moves for 1986-1989.

Mr. Ferguson Testified that 99% of the Broward Customers That Booked Interstate Moves With Advance Relocation Would Have Booked Moves With Ferguson Transportation Instead But For the Tortious Interference

NAVL argues that Mr. Ferguson did not testify that the customers who booked interstate moves with Advance were his prior customers. He did not have to. What he testified to was that 99% of Advance's business from Broward County would have been Ferguson Transportation's business but for Defendants' tortious interference (improper advertising and solicitation of business in Broward County). Ferguson laid the groundwork for that testimony by testifying that his records showed that historically 40% of the Broward County customers calling NAVL was repeat business (R526), and that 50% was the result of yellow page advertising (R522). Advance was a new operator in Florida, and therefore it had no repeat business (R526). According to Mr. Ferguson, the

only reason Advance was called 99% of the time by Broward customers for interstate moves was because of its improper advertising and solicitation (R520-22):

> Q: ...Let's get back to my question, Mr. Ferguson. My question is this: A customer who has no knowledge of your agency contract or Advance's agency contract who happens to reside in Broward County, for whatever reason, that customer wants to ship with Advance, that customer may have shipped with Advance in New York but happens to reside in Broward County.
>
> It is your testimony that North American should tell that customer, after they had already selected Advance, and it's a fact that they reside in Broward County, they should go to that customer and say, Mr. Smith, you cannot ship with the agent that you have selected, you must use Ferguson; I just want to know, is that your testimony?
>
> A. Sir, as I had said earlier, I would give a one-percent weighted differential to the hundred percent that they should have. And, that is, if Advance did, in fact, have a relationship with that party in West Palm Beach or in New York, then, no, I would not say under that one-percent max example that North American should have told that customer that they had to use Ferguson. The other 99 percent of the time, yes.
>
> Q: Well, do you have any information as to why these customers shipped with Advance? (Emphasis added).
>
> A: Yes, they were in my yellow pages and they called local numbers thinking they were dealing with a local North American agent.
>
> Q: What information do you have, sir, other than the yellow page ad that appeared, that these particular customers called Advance because of that?
>
> A: I have copies in the files showing their direct mail program into Broward County where they show Palm Beach (sic) numbers, and on the post cards that they're soliciting

these appointments they're showing Broward County numbers.

I have letters from Sue Kraft sent to people in Broward County saying that they have been an agent here and have dealt with these peoples' friends and neighbors for 50 years, showing a Broward County telephone number. And people, not knowing the difference between my contract perhaps and Advance's contract perhaps, but having seen that name, North American, advertised, at a cost to my corporation averaging 200 to $250,000 a year in promoting that name, would have no reason but to want to call North American.

And in this case, because of the violation of my contract, did, in fact, call the wrong North American agent.

Q: How do you know, Mr. Ferguson, that each one of these people who shipped with Advance out of Broward County shipped because of your yellow page or the yellow page advertisement as opposed to some other reason totally unrelated to the yellow page advertising? Do you have any specific information with respect to any specific identifiable Broward County customer that is on the bill of lading?

A: Mr. Murphy, I can answer that question with a request for production made by you of my sales department to where I earlier explained each telephone call that would come into my company. This sheet of paper of which we have in as an exhibit lists the various sources of why people would call, they're former North American customers, former Ferguson/Murray customers, they were recommended by a neighbor or friend, they were associated with me in one of my many, many business, professional and civil organizations I was involved in.

50 percent of the calls that came into Ferguson Transportation came because of the yellow page advertising.

The above testimony makes it clear that Ferguson did not merely testify that 99% of the time NAVL should have told customers booking moves with Advance to call Ferguson Transportation, as NAVL contends. Rather, he testified that 99% of the time

customers called Advance because of the improper advertising and solicitation in Broward. That in turn was the reason that 99% of the time NAVL should have told customers booking moves with Advance to call Ferguson Transportation.

The Parties Stipulated That Only One Compensatory Damage Award Would Be Entered Against NAVL

NAVL states that pursuant to the parties' stipulation, the trial court "struck" one of the compensatory damage awards. What actually occurred is as follows: during the charge conference, it was acknowledged that Ferguson Transportation's claims for breach of contract and tortious interference were not inconsistent remedies (R1419-20). NAVL agreed that it was likely the jury's compensatory award on each claim would be "similar or identical" (R1419-21). NAVL wanted to make sure the amount awarded by the jury on each claim would not be awarded against NAVL. So the parties stipulated that a judgment for compensatory damages would only be entered for the highest amount awarded on the two claims in order to prevent a double recovery (R1419-21,1443-44). This procedure was in accord with cases providing that where remedies are not inconsistent, the court properly allows a verdict to be returned on each cause of action for which the jury finds the defendant liable, but renders a single judgment of compensatory damages in order to avoid a double recovery. VILLENEUVE v. ATLAS YACHT SALES, INC., 483 So.2d 67 (Fla. 4th DCA 1986); GOLDSTEIN v. SERIO, 566 So.2d 1338 (Fla. 4th DCA 1990); BESETT v. BASNETT, 437 So.2d 172 (Fla. 2d DCA 1983); 22 Am.Jur.2d Damages §35.

CERTIFIED QUESTION

WHETHER, UNDER FLORIDA LAW, A PLAINTIFF WHO HAS AN EXCLUSIVE CONTRACT WITHIN A GEOGRAPHICAL TERRITORY, IS AFFORDED A BUSINESS RELATIONSHIP WITH ALL PROSPECTIVE CUSTOMERS WITHIN THAT TERRITORY, WHICH IS PROTECTIBLE AGAINST TORTIOUS INTERFERENCE, OR MUST THE PLAINTIFF PROVE A BUSINESS RELATIONSHIP WITH IDENTIFIABLE CUSTOMERS?

PRELIMINARY STATEMENT

NAVL has responded to the certified question through Subsections (A) through (E) in its brief. The only Subsection that responds to the certified question is (B). Subsection (C) is a policy argument, and (E) responds to an argument raised in Ferguson Transportation's brief. However, Subsection (A) and its divisions, and Subsection (D), raise separate issues that were not decided by the Fourth District in NAVL's favor and which should have been raised as cross-issues by NAVL. Since they were not, those arguments, which do not address the certified question, have been waived.

ARGUMENT

NAVL begins its argument by stating that an exclusive agency agreement does not create legal rights in business relationships between the agent and its potential customers in its exclusive geographical area. NAVL cites no case law throughout its brief to support its contention.

A1) Ferguson Transportation's Claim Against NAVL for Tortious Interference Accomplished Through 3 1/2 Years of Post-Breach of Contract Lies, Deception, Misrepresentation and False Advertising Constitutes a Separate and Independent Tort

NAVL acknowledges that a plaintiff suing for breach of contract may also recover damages in tort, including punitive damages, if he pleads and proves a separate and independent tort in addition to the breach of contract. NAVL's argument is that a breach of the contract cannot form the basis for the tort claim, that an intentional breach of contract cannot be converted into a tort, that the tort must arise from conduct separate and independent of the conduct which constitutes a breach of contract, and that separate tort and contract damages must be proven. Each of these arguments will be addressed.

Ferguson Transportation agrees that the rights of the parties are not to be determined by playing a game of labels. If the relationship of the parties is such as to support a cause of action in tort, that cause of action is not to be denied simply because the parties happened to also have a contract. Conversely, a breach of contract is not, standing alone, a tort as well. And, it cannot be converted into a tort merely by attaching to the contract, or to its breach, new labels that sound in tort. Calling a breach of contract a "tortious repudiation of contract" or "intentional breach of contract" does not convert the breach of contract into a tort.

With these principles in mind, the issue in this case becomes whether Ferguson Transportation's claim of tortious interference constitutes a separate and independent tort, rather that a relabeled breach of contract. In making that determination, Ferguson Transportation does not agree that conduct which serves as a basis for the breach of

contract cannot also serve as the basis for the tort. This Court stated in GRIFFIN v. SHAMROCK VILLAGE, 94 So.2d 854, 858 (Fla. 1957) that "where the acts constituting a breach of contract also amount to a cause of action in tort" there can be recovery for both breach of contract and for the tort, including punitive damages. This Court reiterated its ruling in NICHOLAS v. MIAMI BURGLAR ALARM, 339 So.2d 175 (Fla. 1976) and LEWIS v. GUTHARTZ, 428 So.2d 222 (Fla. 1982).

In light of the above language in this Court's decisions, the Second District has held that the conduct producing the breach must merely be "endowed with the characteristics of an independent, actionable tort". Likewise, the Eleventh Circuit in GREGG v. U.S. INDS, 887 F.2d 1462, 1474 (11th Cir. 1989) has held that the language in this Court's prior decisions "does not require plaintiff to prove that the conduct or acts giving rise to a tort claim are different from or additional to those acts that support the plaintiff's breach of contract claim. The court held likewise in SERINA v. ALBERTSON'S, 744 F.Supp. 1113, 1116 (M.D. Fla. 1990):

> ...This Court must disagree with the defendant that the requisite separate and independent tort must arise out of separate conduct from that which led to the breach of contract. It appears that the independent tort can be derived from the same conduct which led to the breach of contract, as long as the elements necessary to prove that independent tort are alleged and proven.

Ferguson Transportation clearly proved a separate and independent tort. Not only did it prove that NAVL breached its contract by appointing Advance to act as its agent in Broward, but after doing so NAVL joined with Advance in directly and tortiously interfering with Ferguson Transportation's business relationships for the next 3 1/2 years.

And it accomplished this tortious interference through lies, deception, misrepresentations and false advertising. Florida law is clear that tortious interference with business relationships itself constitutes a separate independent tort, MEAD CORP. v. MASON, 191 So.2d 592 (Fla. 3d DCA 1966); HALES v. ASHLAND OIL, 342 So.2d 984 (Fla. 3d DCA 1977), disapproved on other grounds, 463 So.2d 1126, even if not accompanied by lies, deceit and misrepresentation. See also UNITED YACHT BROKERS v. GILLESPIE, 377 So.2d 668, 672 (Fla. 1979), where this Court referred to tortious interference as a "separate cause of action" and an "independent cause of action" from a breach of contract action.

NAVL argues that the only parties who could be guilty of tortious interference here are NAVL and its other agents, and that this fact indicates that Ferguson Transportation's tort claim is dependent upon the contract, and duplicates its breach of contract claim. NAVL's argument is false. Ferguson Transportation's exclusive agency agreement protects it from tortious interference not only by NAVL and other NAVL agents, but by anyone falsely claiming to be an authorized NAVL agent within Ferguson Transportation's exclusive geographical territory. That is what its exclusive agency agreement with NAVL is all about. The agreement obviously does not prohibit other movers and their agents from competing in Broward County as long as they do not masquerade as NAVL agents. They could compete in Broward County without tortiously interfering with Ferguson Transportation's rights. NAVL and Advance could not.

NAVL queries what it did that was a breach of a duty apart from its duties under the parties' contract. The answer is simple. It breached the contract when Maxfield

appointed Advance as a Palm Beach County agent knowing he intended to advertise and solicit business in Broward County, and when Maxfield advised Molloy NAVL would look the other way. Even Molloy admitted that NAVL was telling him one thing while it was telling Ferguson the opposite (R2699-2700). When Ferguson protested, however, NAVL did not tell him the truth, i.e., that it was breaching his contract by appointing Advance to also act as its agent in Broward County, which would have given Ferguson Transportation the option of becoming an exclusive Broward County agent for another ICC carrier. Instead, NAVL misrepresented to Ferguson that it was doing everything it could to protect him from Advance. In fact, NAVL thereafter engaged in a series of lies, deceptions and fraudulent misrepresentations over the next 3 1/2 years while it assisted, facilitated and joined in Advance's tortious interference by: allowing Molloy's Broward telephone to be disconnected for only five months, while representing to Ferguson that it was permanently disconnected; allowing Advance to advertise under its name, or advertise under NAVL's ICC number and represent itself as an interstate carrier; allowing Advance to use its name in direct massive solicitations in Broward County; in booking every Broward County move called in by Advance; and in paying Advance for Broward County moves that should have been performed by Ferguson Transportation. While Ferguson knew that NAVL was not taking any affirmative action to cancel Advance as its agent, he did not know that NAVL was taking other affirmative action to tortiously interfere with his business, deceptively, surreptitiously, and behind his back. NAVL's lies, deception, misrepresentations and fraud constituted a breach of duties independent of NAVL's duties under the parties' contract.

Case law is clear that if there is both a contractual relationship, and a relationship between the parties that gives rise to a legal duty (and where the economic loss rule does not apply, as demonstrated, infra) a plaintiff can sue in contract and/or tort depending upon whether the breach is a failure to perform specific terms of the contract itself, or a failure to perform a legal duty imposed by law. DAVIS v. JEFFERSON, 820 S.W.2d 549 (Miss. 1991); IN THE MATTER OF THE CLAIM OF ROCHELLE CHAPMAN v. JOHN F. HUDACS, 593 N.Y.S.2d 602 (N.Y. 1993); GEORGETOWN REALTY, INC. v. HOME INS. CO., 831 P.2d 7 (Or. 1992). If a party sues for breach of a duty prescribed by law as an incident to the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract. DAVIDSON v. HESS, 673 S.W.2d 111 (Mo. App. 1984). The difference between the tort and contract action is that a breach of contract involves the failure to perform a duty arising or imposed by the contract itself; whereas, a tort involves the violation of a duty imposed by law. TAMARAC DEVELOPMENT CO., INC. v. DELAMATER FREUND & ASSOCIATES, P.A., 675 P.2d 361 (Kan. 1982); GUARANTEE ABSTRACT & TITLE CO., INC. v. INTERSTATE FIRE AND CASUALTY CO., INC., 652 P.2d 665 (Kan. 1982); BRUECK v. T.R. KRINGS, 638 P.2d 904 (Kan. 1982).

Tort law rests on obligations or duties imposed by law rather than by bargain. PENNSYLVANIA GLASS AND v. CATERPILLAR TRACTOR CO., 652 F.2d 1165 (3d Cir. 1987). Where liability arises from a breach of duty imposed by statute or the common law, and not by the parties' contract, the liability is in tort. JACOBS v. FDIC,

638 F.Supp. 214 (E.D. Tenn. 1986). Actions for breach of contract protect the interest in having contract promises performed and tort actions protect the interest in freedom from harm incident to intrusions upon legally protected interests. REDGRAVE v. BOSTON SYMPHONY ORCHESTRA, 557 F.Supp. 230 (Mass. DC 1983). The law of torts offers redress for losses suffered by reason of breach of some duty imposed by law to protect the broad interests of social policy. FLOOR CRAFT v. PARMA COM. GEN. HOSP., 560 N.E.2d 206, 211 (Ohio 1990).

In this case, Ferguson Transportation's right not to be tortiously interfered with, is a duty imposed by law, not its agency agreement with NAVL. That common law duty flows to Ferguson Transportation as a result of the principle that a person's business is property in which he is entitled to protection from tortious interference by others who have no right to interfere, and not as the result of specific contract provisions. It defies logic and common sense to say that so long as NAVL has a contract with Ferguson Transportation, it is only liable in contract and cannot be sued for 3 1/2 years of direct tortious interference that was accomplished through NAVL's post-breach of contract, lies, deceit and fraudulent misrepresentations to Ferguson, and the public.

NAVL incorrectly argues that Ferguson Transportation never asserted that its tort claim was separate from its contract claim. In response to NAVL's motions for directed verdict, Plaintiff's counsel argued that a separate tort existed (R257). That has always been Plaintiff's position.

NAVL next argues that Ferguson Transportation was required to plead and prove separate and independent damages on the tort and contract claims. However, since

NAVL stipulated to a judgment against it for only one compensatory damage award for both claims, it has waived the right to claim Ferguson Transportation had to prove separate damages for each count.

Moreover, case law is clear that in cases not involving the economic loss rule, if a plaintiff has a breach of contract claim and a tort claim, the fact that his compensatory damages are the same does not preclude him from recovering for the tort. If in fact the compensatory damage awards are duplicative, the plaintiff cannot receive a double recovery of compensatory damages. He can only recover one compensatory damage award, but he can recover tort damages, including punitive damages, if he has proven a separate and independent tort. SAFECO TITLE INSURANCE v. REYNOLDS, 452 So.2d 45, 49 (Fla. 2d DCA 1984); BOYD v. ORIOLE HOMES, 515 So.2d 300 (Fla. 4th DCA 1987) and cases cited at page 15, supra.

NAVL relies upon GINSBERG v. LENNAR FLORIDA HOLDINGS, 19 Fla.L.Weekly 2117, 2118 (Fla. 3d DCA 1994), and other economic loss rule cases cited therein, for the proposition that unless the damages sought in tort and contract are different, tort damages are not recoverable. While that principle applies in economic loss rule cases, it does not apply here where the economic loss rule is inapplicable (discussed infra), where Plaintiff's contract and tort claim were not inconsistent, and where Plaintiff recovered no duplicative damages. SAFECO TITLE v. REYNOLDS, 452 So.2d 45 (Fla. 1984). NAVL's argument that separate damages for contract and tort must be proven would do away with the above case law and cases cited on page 16, supra.

NAVL's reliance upon ROSEN v. MARLIN, 486 So.2d 623 (Fla. 3d DCA 1986) and ROLLS v. BLISS & NYITRAY, 408 So.2d 229 (Fla. 3d DCA 1981) is misplaced. Those decisions were clarified by the Third District in MASVIDAL v. OCHOA, 505 So.2d 555 (Fla. 3d DCA 1987), where it explained that it had never intended ROSEN to preclude recovery in tort if there was proof of an independent tort, in addition to the breach of contract. See also NOVA FLIGHT CENTER v. VIEGA, 554 So.2d 626 (Fla. 5th DCA 1989); O'DONNELL v. ARCOIRIES, 561 So.2d 344 (Fla. 4th DCA 1990); ACCENT HOMES v. NARCO REALTY, 566 So.2d 5 (Fla. 4th DCA 1990), all of which distinguished ROSEN. As stated in GORDON v. OMNI EQUITIES, 605 So.2d 538, 541 (Fla. 1st DCA 1992), "Such a broad interpretation of these cases [ROSEN being one of them] has been properly rejected by a number of appellate courts".

Finally, requiring proof of separate tort and contract damages, where the tort involved is tortious interference, would do away with recovery for the tort altogether. The damages are necessarily the same. Cf. AMERICAN NAT. PETRO. v. TRANS. GAS, 798 S.W.2d 274 (Tex. 1990).

NAVL argues that Florida law does not provide that direct interference is sufficient to allow recovery for tortious interference with advantageous business relationships, in addition to breach of contract. While NAVL attempts to distinguish the out-of-state cases so holding, it does not mention the numerous Florida cases so holding. Ferguson Transportation reiterates its position in its initial brief that direct tortious interference by NAVL for 3 1/2 years as a result of lies, deceit, and misrepresentations constitutes a separate and independent tort. Under NAVL's theory, Advance would be liable for

tortiously interfering with Ferguson's advantageous business relationships, but NAVL would not. Yet, NAVL facilitated, participated in and received money for those same moves. If Advance could be liable for tortious interference, so could NAVL.

A2) NAVL's Economic Loss Rule Defense Was Not Preserved, and It Is Not Applicable To, Intentional Torts Structured To Protect Purely Economic Interests, Such As Tortious Interference With Advantageous Business Relationships

This argument has not been preserved. NAVL filed a pretrial memorandum raising the economic loss rule (R3219) and thereafter abandoned it. While NAVL's counsel argued as a basis for his Motion for Directed Verdict that Ferguson Transportation must prove both a tort and a breach of contract to recover for both, he never argued the economic loss rule (R852-72). Nor were such arguments raised in NAVL's JNOV (R3231-36). NAVL's argument for a directed verdict based on the economic loss rule was raised for the first time in the Fourth District.

The economic loss rule is not applicable to this case because it applies solely to the sale of goods and services. AFM v. SOUTHERN BELL, 505 So.2d 180 (Fla. 1987). FLORIDA POWER & LIGHT v. WESTINGHOUSE, 510 So.2d 899 (Fla. 1987). Here, Ferguson Transportation's claim for tortious interference with advantageous business relationships is not a claim against NAVL for failing to provide goods or services, or for providing defective goods or services. Therefore, the economic loss rule is inapplicable.

The economic loss rule also does not apply to tortious interference cases since the very purpose of the tort is to provide recovery for damages sustained to purely economic interests. Case law throughout the country has consistently held that an action for

tortious interference can be brought even though the only loss is an economic one. The courts have concluded that since the very interest protected by the tort is the reasonable expectation of economic advantage, it only stands to reason that the losses resulting from tortious interference would only be economic losses. WALDINGER v. CRS, 775 F.2d 781, 792 (7th Cir. 1985). If purely economic losses are not recoverable in tortious interference cases, the tort disappears. For this reason, the cases are clear that the economic loss rule, which prohibits the bringing of a tort action to recover purely economic losses, does not apply to tortious interference cases. SANTUCCI CONST. v. BAXTER & WOODMAN, 502 N.E.2d 1134 (Ill. App. 1986); HPI v. MT. VERNON, 527 N.E. 2d 97 (Ill. App. 1988), reversed in part on other grounds, 545 N.E.2d 672; WERBLOOD v. COLUMBIA COLLEGE, 536 N.E.2d 750 (Ill. App. 1989).

In WALDINGER, supra, the Seventh Circuit stated at 775 F.2d 792:

> ...We fully agree with the district court that because "the interest protected [by the tort of intentional interference with a contractual relationship] is the reasonable expectation of economic advantage...economic losses are recoverable".

In SANTUCCI CONSTR., supra, the trial court dismissed claims for tortious interference with contract and tortious interference with prospective advantage in future business, ruling that they were barred by the economic loss rule. On appeal Santucci Construction Co. contended at 502 N.E.2d 1138:

> ...that the trial court, by dismissing these causes of action, ignored the fact that by so holding it implies the abolition of two previously recognized and significant causes of action under Illinois law which, in essence, allows recovery for intentional damage to a plaintiff's economic benefit.

The Illinois appellate court agreed at 1138, stating that it did not believe that the Illinois Supreme Court had "intended to abolish causes of action for intentional interference with contract and prospective advantage" in its prior decision of MOORMAN MFG v. NATIONAL TANK, supra. The court instead held at 1139:

> Because the very interest protected by the torts of intentional inference with contractual relations and prospective advantage is the reasonable expectation of economic advantage, economic losses are the damages recoverable....MOORMAN and its progeny arose out of economic losses suffered from alleged negligence or strict liability whereas the economic loss in the interference torts is occasioned by an intentional and improper interference with the performance of a contract or of a prospective contractual relation by third parties. We conclude that these interference actions are...still viable causes of action in Illinois.

SANTUCCI was followed by WERBLOOD v. COLUMBIA COLLEGE, supra, where the appellate court concluded that a former faculty member's claim for tortious interference with prospective economic advantage was not barred by the economic loss rule. The Illinois Supreme Court subsequently agreed with the holding of the Illinois intermediate appellate courts that purely economic losses could be recovered in tortious interference cases, in 2314 LINCOLN PARK WEST v. MANN, 555 N.E.2d 346, 352 (Ill. 1990), where it stated:

> As we have already noted, MOORMAN expressly recognized two instances--intentional misrepresentation and negligent misrepresentation--in which tort recovery may be allowed for economic loss. (MOORMAN, 91 Ill.2d at 88-89, 61 Ill. Dec. 746, 435 N.E.2d 443; see also BOARD OF EDUCATION OF CITY OF CHICAGO v. A, C & S, INC. (1989), 131 Ill.2d 428, 453-54, 137 Ill. Dec. 635, 546 N.E.2d 580.) Since MOORMAN, the appellate court has allowed recovery of economic losses in tort for intentional interference with contract and for intentional interference with prospective business advantage. (See WERBLOOD v. COLUMBIA COLLEGE (1989), 180 Ill.App.3d 967, 129 Ill.Dec. 700, 536 N.E.2d

> 750 (intentional interference with prospective advantage); SANTUCCI CONSTRUCTION CO. v. BAXTER & WOODMAN, INC. (1986), 151 Ill.App.3d 547, 104 Ill.Dec. 474, 502 N.E.2d 1134 (intentional interference with contractual relations and intentional interference with prospective economic advantage); see also WALDINGER CORP. v. CRS GROUP ENGINEER, INC., CLARK DIETZ DIVISION (7th Cir. 1985), 775 F.2d 781 (applying Illinois law; allowing recovery of economic loss in action for intentional interference with contractual relations). The principle common to those decisions is that the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred.

Finally, in LOCAL JOINT EXEC. BD. OF LAS VEGAS v. STERN, 651 P.2d 637, 638 (Nev. 1982), the Nevada Supreme Court likewise held that:

> ...Purely economic loss is recoverable for tortious interference with contractual relations or prospective economic advantage, but the interference must be intentional....

See also AIKENS v. BALTIMORE & OHIO R&R, 501 A.2d 277 (Pa. Super 1985).

GNB, INC. v. DANCO BATTERIES, INC., 627 So.2d 492 (Fla. 2d DCA 1993) is in line with the above case law. In that case, the Second District affirmed a tortious interference with advantageous business relationship award between parties to a contract. Obviously, the court did not find that the economic loss rule precluded recovery for the tort. Judge Altenbernd dissented because he did not feel that there was proof of direct interference with Danco's customers. Nonetheless, in footnote 9, he noted that he did not believe that the Florida Supreme Court had extended the economic loss rule to intentional torts that were structured to protect purely economic interests, such as tortious interference with advantageous business relationships.

Based upon the above case law, the economic loss rule does not apply to this case.

A3) Plaintiff's Theory Does Not Lack Case Support

NAVL claims that Ferguson Transportation's tortious interference claim lacks case support. In fact, it is NAVL's position that lacks case support. Case law is clear that a party to a contract can recover for both breach of contract and a separate and independent tort, so long as there is no double recovery of damages. NAVL cites no case that holds to the contrary. SOUTHERN ALLIANCE, supra, does not support NAVL's position because, unlike here, it involved nothing more than a relationship with the community at large. Therefore, in SOUTHERN ALLIANCE, there was no legal entitlement to the future business. This case differs for two reasons. First, Ferguson testified that 99 percent of Advance's Broward customers had booked moves with it because of Defendants' improper solicitation and advertising, and that but for that tortious interference those moves would have been booked with Ferguson Transportation. Therefore, the business relationships were specifically identifiable rather than with the community at large. Second, the exclusive agency agreement itself gave Ferguson Transportation a business relationship or expectancy with prospective Broward customers which the evidence showed would have moved with it but for Defendants' tortious interference. That fact makes this case entirely different from SOUTHERN ALLIANCE, where the Second District held that the lounge owner had no legal right to future business with its patrons.

NAVL argues that even if the lounge owner in SOUTHERN ALLIANCE had been a franchisee of a national chain, it still would have had no cause of action against the city for tortious interference because the franchise agreement could not require its prior

patrons (third parties) to return to its lounge. NAVL's argument misses the point here. Obviously, an exclusive franchise would not be binding on customers, but it would be binding on the national franchisor and any other third-party with whom the franchisor entered into a franchise agreement for the same geographical area. As stated in W. Keating, Franchising Advisor §5.22 (1987):

> Granting an exclusive geographical marketing territory to a franchisee does not necessarily constitute a restriction on customers. The clause merely promises the franchisee that the franchisor will not award a competitive franchise within the exclusively franchised area.

Repeatedly throughout NAVL's brief it argues that Ferguson Transportation's tortious interference theory would require every Broward County customer wishing to move interstate to do so through it, whether they wanted to move with NAVL or not; and that it would prohibit other movers and their agents from competing in Broward County. NAVL continually returns to this theme to make Ferguson Transportation's position look absurd. Obviously, Ferguson Transportation's protectible interest only applied to Broward customers wishing to move with NAVL because those were the only customers that would be affected by the parties' exclusive agency contract. This fact was discussed in AMERICAN SANITARY SERVICE v. WALKER, 554 P.2d 1010 (Oregon 1976):

> ...[t]he mere existence of a contract does not necessarily give rise to an interest protectible by an action for tortious interference. For instance, this cause of action will not lie where neither party to the contract can, absent the contract, prevent third-parties from exploiting the right underlying the contract.

In other words, in order for a protectible interest to arise, the party giving someone an exclusive contract right must have the authority, absent that contract, to prevent third-parties from exploiting that right. For example, if a party gives an agent the exclusive right to sell Christmas trees in Florida, the contract would not give the agent a protectible interest against tortious interference because the party giving the contract would have no right to prevent third-parties from selling Christmas trees in Florida. In the present case, NAVL did have the right to prevent third-parties from advertising and soliciting business as its agent in Broward County, it had the obligation to prevent this from occurring as a result of its exclusive contract with Ferguson Transportation, and it had a duty to refrain from assisting anyone other than Ferguson Transportation in performing Broward County moves. Therefore, Ferguson Transportation had an interest protectible by an action for tortious interference.

NAVL summarily dismisses the cases cited by Ferguson Transportation to the effect that a party to a nonexclusive agency agreement cannot claim tortious interference. The reverse of that is, quite clearly, that a party who has an exclusive agency agreement can claim tortious interference. See for example, 2 W.M. Garner, Franchise & Distribution Law & Practice, §9.38 (1990):

> [a]ppointment of a new franchisee or distributor in a nonexclusive territory usually does not constitute tortious interference with contracts.
>
> * * *
>
> A franchisor's dealings with a franchisee's customers may or may not constitute tortious interference with contracts or business relations, depending upon the facts. If the

> franchisee does not have an exclusive territory, then the franchisor is free to deal with customers in the territory, assuming, of course, that it uses lawful means to do so....

See also NORTH SHORE BOT. CO. v. C. SCHMIDT & SONS, INC., 292 N.Y.S.2d 86 (N.Y. App. 1968). In that case, a bottling company made the plaintiff its exclusive wholesale distributor for defendant's beer in a certain county. The bottling company subsequently designated another company as its distributor in place of the plaintiff, which resulted in the plaintiff suing for breach of contract, and conspiracy to defraud and cheat him out of his business and the fruits of his labor and expenditures. The plaintiff alleged that in reliance on its representations with respect to the exclusive distributorship, he had undergone tremendous expense in building up the business in his exclusive area. The appellate court upheld the plaintiff's cause of action rejecting the argument that he had simply alleged a conspiracy to breach the contract between him and the bottling company. Rather, the court stated that the plaintiff had alleged a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract. NORTH SHORE clearly indicates that an exclusive agent can have a tort claim against his principal, as well as a breach of contract claim. The issue here is simply whether a separate and independent tort was committed.

B) Proof of Tortious Interference Does Not Require Proof of Business Relationships With Identifiable Customers

NAVL spends much of its argument under this issue citing cases for the proposition that tortious interference can only occur if the plaintiff has a legally

enforceable right to a business relationship. Ferguson Transportation agrees and in fact cited cases so holding in its initial brief. The issue in this case is not whether such a legal right has to exist, but whether Ferguson Transportation's exclusive agency agreement gave it a legally enforceable right to future NAVL customers in Broward County, where it proved that the customers would have used it rather than Advance Relocation, but for Defendants' tortious interference. NAVL's argument, with no cases cited in support, is that in order to have a legally enforceable right to a business relationship there must be a particular business relation that is sufficiently concrete with a party who can be specifically identified. NAVL's argument is just that, argument, with no case law to back it up, except a case that is totally distinguishable, SOUTHERN ALLIANCE CORP. v. WINTERHAVEN, 505 So.2d 489 (Fla. 2d DCA 1987), because it did not involve an exclusive agency agreement for a geographical area, as here.

After Ferguson Transportation and NAVL filed their initial briefs, this Court entered its decision in ETHAN ALLEN, INC. v. GEORGETOWN MANOR, INC., 19 Fla.L.Weekly S566 (Fla. Nov. 10, 1994). NAVL has filed a Notice of Supplemental Authority relying upon ETHAN ALLEN. The issue in that case was whether a furniture store, in a tortious interference with business relationship case, could recover damages for loss of good will based upon the loss of potential future sales to past customers, where there was no agreement that they would continue to do business with the furniture store in the future. In analyzing that issue, the Court reiterated that the business relationship must afford the plaintiff existing or prospective legal or contractual rights. The Court agreed with SOUTHERN ALLIANCE to the extent that there could be no

cause of action for tortious interference with a business's relationship with the community at large. The Court held that that was essentially what the furniture store was claiming because its loss of good will was based on sheer speculation that past customers would return to purchase furniture from Ethan Allen in the future. The court held that this speculation regarding future customers was insufficient, and that there had to be an understanding or agreement that the customers would do future business with the furniture store.

Under the ETHAN ALLEN rationale, Ferguson Transportation proved a cause of action for tortious interference with business relationships. Here, Ferguson Transportation was not seeking future compensatory damages, i.e., loss of good will based on an estimate of customers who would return in the future but for Defendants' tortious interference. Rather, Ferguson Transportation sought to recover <u>past</u> compensatory damages resulting from Defendants' tortious interference. Unlike ETHAN ALLEN, there was no speculation here as to whether these interstate moves would take place because they had already occurred, nor was there any speculation as to whether the customers would seek to move with NAVL, as opposed to some other interstate carrier, because again, the moves had already occurred. At trial, Ferguson Transportation proved the identity of specific Broward customers who had chosen to move with NAVL during 1986-1989, through Advance, because the few records that NAVL did produce, confirmed those moves from Broward County. These moves were not speculative as in ETHAN ALLEN, but were fully documented.

The only issue at trial was whether these identified customers would have gone to Ferguson Transportation, rather than Advance. While NAVL argues that Ferguson Transportation failed to present evidence that these customers went to Advance as a result of its improper advertising and solicitation, and that they otherwise would have gone to Ferguson Transportation, that is exactly what Ferguson Transportation proved. NAVL presented no evidence to the contrary. The jury was instructed that if the customers went to Advance for other reasons, unrelated to its improper advertising and solicitation in Broward County, Defendants were not guilty tortious interference. The jury resolved this factual issue in Ferguson Transportation's favor.

NAVL's argument that Ferguson Transportation must prove a concrete relationship with identifiable customers ignores its exclusive agency agreement for Broward County, and the fact that, Ferguson Transportation proved that the Broward customers who moved with Advance would have moved with it but for Defendants' tortious interference.

Finally, NAVL argues that the fact that Advance could move Broward County customers so long as they did not come to Advance as a result of its advertising or soliciting in Broward, and the fact that Ferguson Transportation could not compel all Broward County movers to move with it instead of with agents of other authorized Broward County movers, indicates that Ferguson Transportation had no "legal right" to all Broward County customers seeking to move interstate. Obviously, there were customers Ferguson Transportation would not have been entitled to. What this case is about, however, is the customers Ferguson Transportation was entitled to, i.e., all

Broward County customers seeking to move with NAVL (through Advance) but who would have used Ferguson Transportation but for Defendants' tortious interference.

C) **Ferguson Transportation's Claim Does Not Expand Tort Law**

NAVL's statement that tortious interference is limited to cases where the interference is accompanied by violence and threats is a mischaracterization of the tort, and not in accord with the Standard Jury Instruction given in this case. The jury was instructed that interference cannot be done through improper means which includes "misrepresentations or illegal conduct and the like" (T1624). There were plenty of misrepresentations by NAVL here.

NAVL next argues that tort law provides that interference is permissible where a contract is terminable-at-will. That statement is incorrect. In Florida, an action can be brought for tortious interference with a contract terminable-at-will if the interference is unjustified. McCURDY v. COLLIS, 508 So.2d 380 (Fla. 1st DCA 1987); PEREZ v. RIVERO, 534 So.2d 914 (Fla. 3d DCA 1988). It is a mystery, however, why NAVL is making this argument since this case does not involve an at-will contract. Nor is it clear why NAVL cites cases involving competition for business in non-exclusive territories since this case involves an agent's exclusive territory.

NAVL argues that allowing it to be held responsible for tortious interference in this case could lead to massive punitive damage awards and reduce the willingness of national chains to operate through exclusive agents or franchisees. In fact, all it would do is require a national chain to honor agreements with its agents or franchisees, and not

to go behind their back and tortiously interfere with their businesses. It preserves the viability of exclusivity agreements which would otherwise be rendered meaningless and worthless.

Contrary to NAVL's argument, the purpose in allowing tort recovery here is not to allow punitive damages for breach of contract, but it is to allow punitive damages for NAVL's tort, which was separate and independent from its breach of contract. It is to prevent NAVL from hiding behind its contract in an attempt to insulate itself from tort liability for tortious interference accomplished through 3 1/2 years of lies, deception, misrepresentations and false advertising.

Finally, NAVL argues that Ferguson Transportation's tort theory is inherently unsound because it would create business relationships with customers who had never heard of Ferguson Transportation and who preferred to deal with other agents or other moving companies. NAVL continues to advance this argument in an attempt to make Ferguson Transportation's argument appear absurd. Obviously, Ferguson Transportation had no protectible interest in customers who wished to move with another non-NAVL agent or moving company. The customers in which Ferguson Transportation had a protectible interest were those who sought to move with NAVL's local Broward County agent, and instead were induced to deal with Advance as a result of tortious interference.

NAVL next argues that if exclusivity provisions are protectible against interference "from any competitor" then competition in Broward County by agents for other moving companies would also constitute tortious interference. Of course, that is not Ferguson Transportation's argument at all. Agents for other moving companies could compete in

Broward County for business to their hearts' content so long as they did not falsely represent themselves as authorized NAVL agents. NAVL agents in other counties could also move Broward County customers if those customers' requests were not the result of improper advertising or soliciting in Broward County. However, Advance and all other NAVL agents (except for the New York companies excepted from Ferguson Transportation's exclusive territory) could not move customers who came to them as a result of advertising or soliciting business in Broward County. Three-and-one-half years of doing so was tortious interference, and NAVL's 3 1/2 years of joining in with Advance, facilitating and profiting therefrom was likewise tortious interference, particularly where NAVL was successful in accomplishing the interference through lies, deception and misrepresentations.

D) NAVL Was Not a Party to Ferguson Transportation's Business Relationship With Its Customers or Potential Customers

NAVL argues that even if it interfered with Ferguson Transportation's advantageous business relationships, it cannot be held liable because it was a party to the business relationships interfered with. In other words, NAVL argues that it can have no tort liability because every interstate shipment, whether booked by Advance or by Ferguson Transportation, was governed by NAVL's bill of lading. This argument misidentifies the business relationships interfered with, which were the ones existing between Ferguson Transportation and its customers or prospective customers. Obviously, if Ferguson Transportation lost these business relationships to Advance, Ferguson

Transportation never entered into a bill of lading (to which NAVL was a party) with those customers. The fact that Advance entered into a bill of lading (to which NAVL was a party) with those customers after it stole that business does not protect NAVL from tortious interference. The bills of lading Advance and NAVL entered into with those customers represented a separate business relationship from the one Ferguson Transportation had with its customers or potential customers. Only Ferguson Transportation and its customers or potential customers were parties to that relationship. NAVL was clearly not a party to the business relationships Ferguson Transportation had with its customers when they were stolen by Advance.

NAVL's argument is essentially that since it successfully helped Advance steal Ferguson Transportation's customers, and thereafter entered into a bill of lading with those customers, NAVL became a party to the stolen business and cannot be sued for tortious interference. Reduced to its basics, NAVL's argument is that because it was successful in tortiously interfering, it cannot be held liable. NAVL is wrong. It was not a party to Ferguson Transportation's business relationship with its customers or prospective customers when that relationship was interfered with. The fact that NAVL later entered into a business transaction with those customers is irrelevant.

NAVL next argues that just as an agent is not considered a third party distinct from his principal for purposes of tortious interference, the same rationale "a fortiori" applies so that a principal who interferes with his agent's contracts or relationships can not be liable for tortious interference as a third party. NAVL overlooks the fact that the very basis for ruling that an agent is a party to his principal's business relationships is the

agency relationship. Cf. SLOAN v. SAX, 505 So.2d 526 (Fla. 3d DCA 1987). In contrast, a principal is not an agent of his own agent, and therefore he acts as a "third-party" when he interferes with his agent's contracts or relationships.

NAVL next argues that GENET v. ANHEUSER BUSCH, 498 So.2d 683 (Fla. 3d DCA 1986) held that a cause of action for tortious interference does not exist where the defendant is the "source" of the business opportunity interfered with. GENET is factually distinguishable because the contract between Anheuser Busch and the wholesaler gave the former the right to approve any transfer of the liquor wholesalership. When Anheuser Busch disapproved a proposed transfer, the purchasers sued it for tortiously interfering with its business relationship with the wholesaler. The Third District held that the manufacturer was a party to the agreement interfered with because its approval of the transfer was required. Unlike GENET, Ferguson Transportation's contract did not give NAVL the right to interfere with its relationship with its customers.

NAVL's argument is that so long as it has an agency contract with Ferguson Transportation, it cannot be held liable for tortious interference with the latter's relationships with its customers. Except for GENET, which is distinguishable, NAVL cites no case law to support its argument. It merely attempts to distinguish cases cited by Ferguson Transportation. SCHELLER v. AMI, 502 So.2d 1268, 1272 (Fla. 4th DCA 1987) is not distinguishable. In that case, the hospital's bylaws constituted a contract with Dr. Scheller, a staff pathologist, and the bylaws allowed staff physicians to appoint Dr. Scheller as their pathologist instead of the hospital's pathologist. The hospital argued that since it was a party to the bylaws it could not be held responsible for tortiously

interfering with the staff physicians' appointment of Dr. Scheller as their pathologist. The Fourth District rejected that argument finding that the hospital was not a party to the business relationships it was being sued for having interfered with.

E) NAVL Was Also Liable Vicariously For the Acts of its Agent, Advance Relocation

NAVL argues that there is no indication that 49 U.S.C. §10934 is to pre-empt state tort law. It clearly does. EMPIRE FIRE & MARINE INS. CO. v. INSURANCE CO. OF PENNSYLVANIA, 19 Fla.L.Weekly D1152, 1153 (3d DCA May 24, 1994).

NAVL contends that it cannot be held vicariously liable for Advance's tortious interference because it was dependent upon NAVL's breach of contract. As demonstrated, supra, NAVL's 3 1/2 years of direct tortious interference through lies, deception and misrepresentations was separate and independent from NAVL's breach of contract.

NAVL argues that the Fourth District's affirmance of the tortious interference judgment against Advance is not inconsistent with its directed verdict in NAVL's favor on that claim. NAVL claims that the court could have found that Advance interfered with Ferguson Transportation's contract with NAVL, whereas NAVL could not be held liable for tortiously interfering with its own contract. The fallacy in this argument is that Ferguson Transportation's claims against NAVL and Advance were identical, i.e., tortious interference with its advantageous business relationship with its existing and prospective customers (not tortious interference with its contract with NAVL), the proof

was identical as to both NAVL and Advance, the jury instructions were identical as to NAVL and Advance, and the interrogatory verdict questions were identical. It was inconsistent to affirm Ferguson Transportation's tortious interference claim against Advance, and yet to reverse it as to NAVL, since both claims were identical.

ISSUE RAISED BY NAVL'S CROSS-PETITION

ADMISSION OF THE 1974 DOCUMENTS AND NAVL'S NET WORTH WAS NOT AN ABUSE OF DISCRETION

STATEMENT OF FACTS RELEVANT TO NAVL'S CROSS-PETITION

NAVL's Net Worth

NAVL's argument regarding the admission of its net worth has not been preserved. NAVL did not ask the trial court to prohibit its net worth from being introduced until after the jury determined punitive damages were warranted. Rather, NAVL's argument was that its net worth should not be placed before the jury until the court made a determination that sufficient evidence was presented to entitle the issue of punitive damages to go to the jury (R247-59). Pursuant to that request, the court refused to allow evidence of NAVL's net worth until the parties had rested (R1267-73).

Admission of the 1974 Documents

These documents resolved a 1974 violation of Murray Van's exclusive agency agreement when it appointed the New York company to also act as NAVL's agent in Broward County. These documents showed the evil that the 1983 exclusive agency

agreement was intended to prevent, and therefore assisted the jury in determining how to construe its exclusivity provision which the court ruled was ambiguous.

ARGUMENT ON NAVL'S ISSUE ON CROSS-PETITION

NAVL's Net Worth

NAVL is raising this argument for the first time on appeal, obviously attempting to take advantage of this Court's decision in W.R. GRACE & CO.--CONN v. WATERS, 638 So.2d 502 (Fla. 1994). The problem is that NAVL never asked for a bifurcated trial. It only asked that the trial court not allow evidence or argument regarding its net worth until after the court ruled that there was sufficient evidence for the issue of punitive damages to go to the jury. The trial court did exactly what NAVL asked.

Additionally, even if this issue had been preserved, admission of NAVL's net worth would not require a new trial on compensatory damages, as NAVL contends. Obviously, admission of NAVL's net worth of approximately 200 million dollars was harmless error. It had no relationship to the amount of compensatory damages awarded by the jury. The jury's 1.3 million dollar compensatory damage award was based on Plaintiff's evidence of its loss of income and loss of the value of its business. In no stretch of the imagination can NAVL's net worth of close to 200 million dollars have influenced or inflated the jury's 1.3 million dollar award, which was clearly supported by Ferguson Transportation's damage evidence. [See JOSEY v. FUTCH, 254 So.2d 786 (Fla. 1971) - admission of evidence of insurance is not reversible error where the jury's

award was supported by the evidence and there is no indication that the policy limits influenced the amount of the verdict].

The 1974 Documents Were Relevant and Admissible

The 1974 documents were admissible to clarify what the parties had intended by the exclusivity language included in the 1983 contract, because the court had ruled that language was unambiguous. The court ruled that the contract unambiguously provided that NAVL could not appoint a person or entity "to act as the Company's agent in Broward" (R2165-66). However, the court ruled that what that language meant was a question for the jury, and that the parties' past dealings with each other, "their history together" was relevant to what they intended (R2243-46).

Advance claimed that Ferguson's exclusivity provision did not prevent NAVL from appointing another agent to advertise or solicit in Broward County, so long as it did not maintain an office there (R44-50,2517). NAVL claimed that the contract language only prevented it from appointing another agent to advertise there (R1016,2528-31). Ferguson, on the other hand, testified that as a result of NAVL's 1974 violation, he had this specific exclusivity provision placed in his 1983 contract to prevent any soliciting or advertising in Broward by another NAVL agent, except the New York entities specifically listed (R120). He had been "burned" once before and wanted to make sure it never happened again. Because of this dispute as to what the exclusivity provision meant, the court ruled the parties' prior dealings, including the prior contract violation and settlement, were relevant to show what the parties had intended the 1983 exclusivity

provision to mean. That meaning would affect NAVL's liability for breach of contract and tortious interference.

Parol evidence as to prior contracts, and the interpretation given provisions therein by the parties, is strong evidence of the interpretation to be given a subsequent disputed contract. HARTFORD v. SCHWARTZMAN, 423 F.2d 1170 (10th Cir. 1970); CRESSWELL v. U.S., 173 F.Supp. 805 (Clms Ct. 1959); MINNEAPOLIS-MOLINE CO. v. U.S., 149 F.Supp. 146 (Clms Ct. 1957); FREY v. AMOCO, 603 So.2d 166 (La. 1992). Additionally, evidence as to events that occurred prior to execution of a contract are admissible to explain and make clear ambiguous contract language. BABE v. BABY'S FORMULA, 165 So.2d 795 (Fla. 3d DCA 1964). Evidence showing the facts and circumstances surrounding the making of an agreement, the objects sought to be accomplished and the obligations created may be received to assist the jury in interpreting the agreement. HOWARD v. HOWARD, 467 So.2d 768 (Fla. 1st DCA 1985); TRIPLE E v. FLORIDAGOLD, 51 So.2d 435, 438 (Fla. 1951). The 1974 documents were properly admitted under each of these principles.

The 1974 documents were also relevant to establish that NAVL's interference was intentional. The 1970 exclusive agency agreement, construed along with the 1974 settlement documents, established the parameters of the exclusive agency conferred upon Ferguson Transportation by NAVL in the 1983 exclusive agency agreement. The fact that NAVL had previously acknowledged Ferguson Transportation's exclusive territory in the 1974 documents established that NAVL'S interference in 1983 was intentional and malicious. As stated in SYMON v. DAVIS, 245 So.2d 278, 280 (Fla. 4th DCA 1971),

"to do intentionally that which is calculated in the ordinary course of events to damage, and which in fact does damage, another person, his property or trade, is malicious in the law, and is actionable if done without just cause or excuse" Id. at 280.

The 1974 documents were also relevant to punitive damages. In RINALDI v. AARON, 314 So.2d 762, 763 (Fla. 1975), the Supreme Court stated the factors to be considered by the jury in determining the amount of punitive damages:

> The jury may consider the nature, extent and enormity of the wrong, the intent of the party committing it and all circumstances attending the particular incident....(emphasis added)

Evidence of NAVL's prior dealings with Ferguson, the prior violation and the settlement which established Ferguson Transportation's exclusive territory were admissible to show NAVL's intent. And, in JOHNS-MANVILLE SALES v. JANSSENS, 463 So.2d 242, 256 (Fla. 1st DCA 1984) the court stated:

> Evidence of repetition and concealment of offensive conduct after it initially occurred is indicative of malice or evil intent sufficient to support punitive damages.

Accordingly, evidence of NAVL's prior offensive conduct was properly heard by the jury. The fact that NAVL was a "repeat offender" was highly probative in judging the magnitude of its misconduct and the amount of punitive damages necessary to deter further repetition of the same or similar acts. NAVL argues that since the punitive damage award was reversed, this evidence would not have gone to the jury. As demonstrated, supra, the evidence was admissible on the meaning of the contract language. But even if it was solely admissible on the issue of punitive damage award,

reversal of the punitive damages would not require a new trial on the breach of contract issue. FINCKE v. PEEPLES, 476 So.2d 1319 (Fla. 4th DCA 1985).

NAVL argued to the Fourth District that even if the 1974 documents were admissible, they should have been excluded under §90.403 as "unfairly prejudicial" because they had no value except to inflame the jury. In fact, the entire case turned on the meaning of the 1983 exclusivity provision, which was based on the parties' intent. Their past conduct and dealings with each other, and how they had resolved the 1970's violation, had great value in assisting the jury in determining what Ferguson's exclusivity clause, which prohibited NAVL from appointing any other entity "to act as an agent...in Broward," meant. Did it mean another agent could not advertise or solicit or both? The 1970's violation and its resolution shed light on that issue.

Moreover, broad discretion rests with the trial court to determine whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. STATE v. McCLAIN, 525 So.2d 420 (Fla. 1988). Where, as here, the record shows that "the trial court engaged in a sensitive analysis of the need for the evidence as proof", the resulting decision is neither "arbitrary nor cursory". TREES v. K-MART, 467 So.2d 401, 403 (Fla. 4th DCA 1985). The decision of a trial court to admit or exclude evidence, after weighing its probative value against its prejudicial impact, will not be overturned on appeal in the absence of a gross abuse of discretion. McCLAIN and TREES, supra. No such abuse exists here.

NAVL also previously relied on cases dealing with: the inadmissibility of character evidence or mental problems of a party, prior traffic citations, a disciplinary action

against a state trooper involved in a negligence accident, and a "peeping Tom" incident 20 years prior. Those cases have nothing to do with this case. They do not deal with contractual parties' past conduct and dealings, bearing on their intent in a present contract.

NAVL's argument to the Fourth District that the 1974 documents, which clarified and memorialized the rights and obligations of the parties at that time, was too remote in time, is spurious. The 1974 violation and its resolution were relevant to what the parties intended when they entered into the 1983 agreement nine years later. The time span is irrelevant. 1983 was the first time the parties renegotiated their contract since the 1974 violation and settlement. All the documents taken as a whole demonstrated the true intention of the parties in the 1983 agreement. Additionally, remoteness in time goes to the weight rather than the admissibility of evidence. GALLAGHER v. C. K. RESTAURANT, 481 So.2d 562 (Fla. 5th DCA 1986).

Cases previously relied upon by NAVL regarding the inadmissibility of a settlement, or offer of settlement, are also inapplicable. Section 90.408 merely prohibits the admission of an offer of compromise on a claim which is disputed "to prove liability" for the claim. To be inadmissible the settlement offer must pertain to settlement of the pending controversy. ALLSTATE INS. CO. v. WINNEMORE, 413 F.2d 858 (C.A. Fla. 1969). In the present case, the 1974 documents obviously did not settle, or offer to settle, the disagreement arising out of the 1983 contract. Rather, they were admitted to inform the jury of the 1974 problem that the parties had intended to resolve, and how they had done so when they included the exclusivity language in the 1983 contract.

Obviously, a prior settlement between the parties is admissible to show what the parties intended under a present agreement. In CATES v. MORGAN PORTABLE BUILDING CORP., 780 F.2d 683 (7th Cir. 1985), motel owners brought an action for breach of contract against the manufacturer of defective portable building units they had purchased. The parties' settlement was admissible to show the terms agreed upon by the manufacturer, where the manufacturer failed to abide by the terms of the settlement and was subsequently found liable for damages.

NAVL's reliance on JOHNSTON v. GIRTMAN, 542 So.2d 1033 (Fla. 3d DCA 1989) is misplaced. That case merely held that settlements by some grantees with an estate have no res judicata or collateral estoppel effect upon a later lawsuit brought by other grantees against the estate. This case differs because the same parties were involved in the 1974 settlement, and because that settlement was relevant to the parties' intent in the 1983 agreement. Neither factor was present in GIRTMAN.

CONCLUSION

Ferguson Transportation's claim for tortious interference, and the punitive damage award thereon, should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 22nd day of DECEMBER, 1994, to: MARJORIE GADARIAN GRAHAM, ESQ., Oakpark, Suite D129, 11211 Prosperity Farms Road, Palm Beach Gardens, FL 33410; and MARK E. HADDAD, ESQ. and DONALD H. SMITH, ESQ, 1722 Eye Street, N.W., Washington, D.C. 20006.

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