IN THE SUPREME COURT OF FLORIDA

FERGUSON TRANSPORTATION, INC., f/k/a Murray Van & Storage, Inc. and Award Winning Murray Van and Storage, Inc.

Petitioner,

v.

NORTH AMERICAN VAN LINES, INC., a foreign corporation,

Respondent.

_____/

CASE NO.: 84,156

NORTH AMERICAN VAN LINES, INC., a foreign corporation,

Petitioner,

v.

FERGUSON TRANSPORTATION, INC., f/k/a Murray Van & Storage, Inc. and Award Winning Murray Van and Storage, Inc.,

Respondent.

_____/

CASE NO.: 84,167

Certified Question Of Great Public Importance From The District Court Of Appeal, Fourth District

Answer/Initial Brief On The Merits Of North American Van Lines

MARK E. HADDAD
DONALD H. SMITH
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C 20006
(202) 736-8000

and

MARJORIE GADARIAN GRAHAM
Florida Bar No. 142053
Marjorie Gadarian Graham, P.A.
Northbridge Centre, Suite 1704
515 North Flagler West Drive
Palm Beach, FL 33401
(407) 655-9146

Attorneys for North American Van Lines, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

PREFACE

This is a certified question of great public importance from the District Court of Appeal, Fourth District. The Fourth District, in an appeal from a final judgment awarding compensatory damages of $1,300,000 for breach of contract and tortious interference and punitive damages of $13,000,000 against North American Van Lines, reversed the award of compensatory and punitive damages for tortious interference, and affirmed the award of compensatory damages. On rehearing, the court certified a question of great public importance to this court. Both North American Van Lines and Ferguson Transportation, Inc. f/k/a Murray Van & Storage, Inc. and Award Winning Murray Van and Storage, Inc. filed notices to invoke the discretionary jurisdiction of this Court. This Court, by order dated September 15, 1994, consolidated the cases.

This case was tried by a jury in the Fifteenth Judicial Circuit before the Honorable Edward Fine. North American Van Lines was a defendant before the trial court and was the appellant before the Fourth District Court of Appeal. Ferguson Transportation, Inc., f/k/a Murray Van & Storage, Inc. and Award Winning Murray Van and Storage, Inc., was the plaintiff in the trial court and the appellee before the Fourth District Court of Appeal. Advance Relocation and Storage of Florida, Inc., T. James Molloy, William Grochowski, B. Nilsson Moving and Storage, Inc., a Florida corporation, and Wilkinson Transfer and Storage, Inc., a Florida corporation, were co-defendants before the trial court. The State of Florida was an intervenor. In this brief, the parties will be referred to as "North American" or "NAVL," "Ferguson

referred to as "North American" or "NAVL," "Ferguson Transportation" or "plaintiff," "Advance Relocation," Molloy, Grochowski and the State of Florida.

The following symbols will be used in this brief:

(R. ____) record on appeal

(P.Ex.) plaintiff's exhibit

(D.Ex.) defendant's exhibit

(A. ___) appendix accompanying this brief.

STATEMENT OF THE FACTS

North American is well aware of the principle announced by this Court in Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984) that an answer brief should omit the statement of the case and of the facts unless there are areas of disagreement. Nevertheless, in Seaboard Airline R.R. Co. v. Hawes, 269 So.2d 392 (Fla. 4th DCA 1972), cert. denied, 272 So.2d 816 (Fla. 1973), the court explained that in an appellate brief, the factual situation should never be portrayed to the appellate court as unqualifiedly established by the record where the record contains conflicting evidence. The court emphasized that because of the heavy work load of the appellate courts, it is essential that those who present cases for appellate review accurately portray the state of the record as developed in the trial court. North American is also aware that in reviewing entitlement to a directed verdict, the facts must be viewed in a light most favorable to the party opposing the motion. However, this general rule does not give a party license to state the facts in an argumentative and biased manner, nor does it permit a party to make unsupported assertions. In its brief, Ferguson Transportation has stated the facts in an argumentative manner and as though unqualifiedly established without conflict. Ferguson Transportation has failed fully to present the facts as developed in the trial court. In addition, Ferguson Transportation has made numerous outright misrepresentations regarding the record and unsupported statements of "fact." For these reasons, North American has restated the facts as follows.

This lawsuit arises out of claims for breach of contract and tortious interference with a business relationship. The suit was brought by Ferguson Transportation, a former North American agent with its principal place of business in Ft. Lauderdale. Joe Ferguson, the president and principal owner of Ferguson Transportation, and Bill Murray formed Murray Van & Storage in Ft. Lauderdale in 1963. (R.87-88) Murray was the principal owner. Joe Ferguson owned a small interest in the business. (R.88)

By 1970, Murray Van & Storage had grown significantly and wanted to be associated with one of the top van lines in the country. (R.99) A small local agent who associates with an international company is able to offer a full range of services including storage, local, intrastate, interstate and international moving. (R.88)

North American had a fine reputation in the moving and storage business. (R.100) At the time it had two agents in Broward County. (R.100) Bill Murray and Joe Ferguson flew to Atlanta and met with North American's top staff to discuss a potential agency relationship. (R.101) North American was initially reluctant to give Murray Van & Storage an exclusive contract. Nevertheless, on March 27, 1970, North American and Murray Van & Storage entered into an agency agreement. (R.102) Paragraph 16(2) of that contract provided that North American would not "during the term of this Contract, appoint any individual, corporation, partnership or other business or organization to act as an agent for or on behalf of Company in Broward County, Florida...." (R.2155)

When Murray Van & Storage became a North American agent, Joe Ferguson "felt [they] had finally arrived" and were "with the best." (R.104) North American had an outstanding quality control program, training programs, driver training, assistance for clerical claims, sales films. (R.104) Murray Van & Storage's goal upon becoming a North American agent was to receive a top quality agent award. Joe Ferguson wanted to book a million dollars of line haul business out of Broward County. Both goals were achieved. (R.105-106)

In 1973, North American's chairman of the board arranged a dinner meeting with Bill Murray and Joe Ferguson. (R.107) At that meeting, North American's chairman advised Murray and Ferguson that there had been a technical violation of their contract. (R.107) North American had entered into an agency agreement with a New York moving company called Molloy Brothers, which had purchased a moving company in Miami (Morris Moving and Storage) and a company in Palm Beach County (Briggs Moving and Storage). (R.108) As a part of the agreement, North American granted Molloy Brothers advertising and solicitation rights in Dade, Broward and Palm Beach County. (R.108-109) North American's chairman told Murray and Ferguson that North American knew it had hurt Murray Van & Storage and wanted to make it right. (R.110) Bill Murray, the principal stockholder of Murray Van & Storage, agreed to settle any claim it might have against North American for the sum of $65,000. (P.Ex.52i) A total of $77,000 was ultimately paid by North American to Murray Van & Storage. (R.117)

An agreement, release and covenant was entered into between North American and Murray Van & Storage on April 24, 1974. (P.Ex.52i) At the same time, North American entered into an agreement with Murray Van & Storage and its operations in Tampa, Palm Beach, Orlando and Gainesville which extended their agency contracts for a period of ten years from April 17, 1974. (P.Ex.52h) The agreement specified that Molloy Brothers could solicit and advertise in the areas of Broward County and Boca Raton. (P.Ex.52h) Molloy was prohibited from establishing a business domicile, office or physical locations as an agent for North American in Broward County or Boca Raton. As a result of these additional agreements, Murray Van & Storage had exclusive contract rights in Broward County, with an exception carved out for Molloy Brothers. (R.117) The Orlando, Gainesville and Tampa agencies did not have exclusive contracts. (R.119)

Murray Van & Storage operated under this arrangement for approximately the next ten years. (R.117-119) Its business grew each year, and it controlled 25 to 30 percent of the market share. (R.118) From 1974 on, the company was among the top 15 income-generating North American agents in the country. (R.118) Of North American's 850 agents, fewer than 20 had exclusive agency agreements. (R.2498)

In 1983, Ferguson renegotiated and renewed for ten years the contract for the Broward County facility. (R.120) North American paid Ferguson $100,000 to act as a North American agent for that period. An addendum to the contract provided that Murray Van & Storage would act as North American's exclusive agent in

Broward County. To avoid ambiguity, Ferguson asked North American specifically to identify in the addendum the other North American agents -- Molloy Brothers and their affiliates -- who were allowed to advertise and solicit in Broward County. (R.120) That was done. (P.Ex.52B; D.Ex.1 & 2) In 1986, the contract was modified to reflect the change in company name from Murray Van & Storage to Ferguson Transportation. (D.Ex.2)

In 1985, James Molloy and William Grochowski of Advance Relocation, a North American agency in New York, approached North American about opening a North American agency in Palm Beach County. (R.2383, 2637) Molloy (a nephew of one of the "Molloy Brothers") and Grochowski called Michael Kranisky, director of corporate strategic planning. (R.2336, 2383) They told Kranisky that they had an opportunity to purchase a moving company in Palm Beach County from their uncle and that they wanted to be a North American agent in West Palm Beach. (R.2383) Kranisky advised them that Ferguson had an exclusive contract for neighboring Broward County. He discouraged them from going forward with the deal and told them that he would not approve an agency contract. (R.2384) Several weeks later the two called Kranisky again, advised that negotiations were proceeding and asked Kranisky to approve an agency contract for them. (R.2384) Once again, Kranisky told them about Ferguson Transportation's exclusive rights and refused to approve a contract. (R.2384) Molloy and Grochowski asked Kranisky for his permission to seek approval from his superior. He agreed. (R.2384)

In the fall of 1985, Molloy and Grochowski sought approval from Joe Ruffolo, the vice president and general manager of North American's relocation division. (R.2384-2385) Ruffolo was opposed to their proposal. (R.999-1000)

Jack McTeague, a North American area vice president, discussed Molloy and Grochowski's proposal with others at North American, including Tony Norcia, eastern area vice president, and Dennis Koziol, vice president of sales and marketing. (R.2567-2569) McTeague opposed the proposal because he feared that northeast agents were overly aggressive and would cause difficulties with Ferguson Transportation. (R.2567-2568; 2570) McTeague thought he had convinced Koziol to reject Molloy and Grochowski's proposal. (R.2569)

When Joe Ferguson learned of Grochowski and Molloy's proposal in 1985, he wrote, telephoned and visited Kenneth Maxfield, the president of North American, to object. (R.470; 558-559; 2473-2475) Joe Ferguson recognized and conceded that North American had the right to appoint Advance Relocation to act as its agent in Palm Beach County. (R.411; 414; 469; 471) His fear was that Advance Relocation would advertise and act as a North American agent in Broward County. (R.412-414)

North American's agency manual, which was incorporated by reference into all agency contracts, specified that an agent could not advertise in another market area if it would encroach on another agent's territory. (R.2525; 2527) In addition, Kranisky personally told Molloy about Ferguson Transportation's exclusive rights in Broward County. (R.2541) Kranisky specifically warned

Molloy that Ferguson Transportation had the exclusive right to establish a physical location in Broward County and that Molloy could not advertise or have a physical location in Broward County. (R.2542) Jack McTeague also told Molloy about Ferguson Transportation's exclusive agreement prior to the time that Advance Relocation was awarded a contract. (R.2603) Molloy promised that he would not advertise in Broward County. (R.2524-2525)

In late 1985, Molloy and Grochowski's Advance Relocation purchased the assets of Wilkinson Transfer and Storage in West Palm Beach. (R.2644) Advance Relocation did not become a North American agent until January 31, 1986. (D.Ex.3) The agency contract appointed Advance Relocation & Storage of Florida, Inc., d/b/a Wilkinson Moving and Storage Co., to act as a North American agent at 1201 Frederick Street in West Palm Beach. (D.Ex.3)

Before Advance Relocation became a North American agent in West Palm Beach, North American was aware that, even though nothing in Ferguson Transportation's contract prohibited opening of a North American agency in West Palm Beach, there might be problems. Jack McTeague told Dennis Koziol in an in-house memo dated November 4, 1985, that he "doubt[ed]" that Molloy "would agree not to advertise or solicit in Broward County." (P.Ex.77) To prevent such problems, McTeague and Kranisky instructed Bell South that Advance Relocation could not advertise as an agent for North American in any phone books in Broward County or Boca Raton. A memorandum dated November 20, 1985 from Jack McTeague to Greg Summy with North American's law department memorialized the steps

taken by North American to prevent Advance Relocation from violating Ferguson Transportation's exclusive contract. (P.Ex.78)

Unbeknownst to North American Van Lines, Advance Relocation placed an advertisement in the Donnelly yellow pages for Broward County. The advertisement, which appeared in February, 1986, used the North American logo, identified Advance as a North American agent and listed a Ft. Lauderdale phone number. (P.Ex.54) North American was unaware of this until June, 1986, when Mr. Ferguson wrote Ken Maxfield, the president of North American. He enclosed a copy of the Donnelly advertisement, and asked what North American planned to do to correct the situation. (P.Ex.55)

Jack McTeague immediately contacted Molloy and Grochowski and threatened them if they did not withdraw the advertisement. (R.2575-2577) Both McTeague and Tony Norcia of North American emphatically told Molloy to stop advertising in Broward County. (R.2577; 3777; 3785-3786) Everyone at North American agreed that Advance Relocation's Broward telephone line must be disconnected. (R.2577) An in-house memorandum dated July 3, 1986 from Jack McTeague to Dennis Koziol confirmed these actions. (P.Ex.79) North American convinced Advance Relocation to disconnect the telephone line. (R.2577; 1009-1011) Jack McTeague monitored the phone and verified that it was indeed disconnected. (R.2578)

On July 24, 1986, Ken Maxfield of North American, wrote Joe Ferguson and confirmed that Advance Wilkinson's Broward phone number had been removed from service on July 18th. (P.Ex.57) North American continued to monitor the phone to be sure it was not returned to service. (P.Ex.57) Susan Kraft, of Advance Reloca-

tion, testified that Jim Molloy instructed her to disconnect that phone in July or August. (R.657-658) According to her, the phone line remained inoperative for at least a year. (R.658) To get Molloy to disconnect the phone, North American reimbursed Advance Relocation for the cost of the advertisement. (P.Ex.68; 73) North American confirmed in two letters sent to Grochowski and Molloy that Advance could not solicit or advertise in Broward County. (P.Ex.68; 73) North American reiterated in those letters that its commitment to existing agents prevented it from allowing Molloy to solicit or advertise in Broward County. (R.190-193) North American also promised to keep the lines of communication open regarding any future sales solicitations by Molloy outside Palm Beach County. (R.191)

On January 15, 1987, Molloy advised North American that Advance Relocation intended to place an advertisement in the Broward County yellow pages. (P.Ex.80; R.1011-1012) Upon receipt of that letter, Joe Ruffolo of North American immediately wrote to Bell South advertising, Donnelly Information Publishing, Homeowners Guide of Florida, Inc., Transwestern Publishing, Community Marketing Concepts, Inc., Southern Bell Yellow Pages and others. North American told them that Advance Relocation was not permitted to advertise in Broward and Dade County as a North American agent (D.Ex.12,13,14,15,16,17,18,19) As a result of these efforts, the ads that Advance Relocation placed in the Ft. Lauderdale area in 1987 made no reference to North American or its logo. (R.1020; 1087) Legally, North American could only control use of the trademark "North American" and its logo. (R.1020; 1087)

On May 19, 1987, Joe Ferguson wrote Greg Summy of North American's law department, sent him copies of various ads, and advised him that Molloy had lied to North American. (P.Ex.58) Shortly thereafter, Rich Ferguson, Joe Ferguson's brother and vice-president of Ferguson Transportation, called Joe Ruffolo to see if he could talk to Molloy and Grochowski and resolve the problems. (R.3732) Ruffolo promised to do so. (R.3733) Ferguson Transportation filed this lawsuit before that occurred. (R.3731-3732)

Ferguson Transportation filed a two-count complaint against North American Van Lines, Advance Relocation and Storage of Florida, Inc., T. James Molloy, William Grochowski, B. Nilsson Moving and Storage, Inc., a Florida corporation, Wilkinson Transfer and Storage, Inc., a Florida corporation, Chris Gallacher and Sue Kraft. The claims against Gallacher and Kraft were dropped by the plaintiff after these two witnesses testified at trial. (R.1752-1756, 265) Count I sought recovery against North American for breach of the agency contract. (R.1753-1754) Count II sought recovery of compensatory and punitive damages from all defendants for tortious interference with advantageous business relationships. (R.1754-1756) North American answered the complaint, and asserted affirmative defenses including that count I did not state a claim for tortious interference because breach of contract does not constitute tortious interference, and that plaintiff was precluded from recovery of economic losses under the guise of a tort claim. (R.1781-1784; 1869)

North American counter-claimed against Ferguson Transportation for a declaratory decree regarding construction and interp-

retation of the agency contract. (R.1829-1830) The relevant contract language provided:

> "Company shall not, during the term of this Contract, appoint any individual, corporation, partnership or other business or organization to act as an agent for or on behalf of Company in Broward County, Florida...." (R.2155)

North American argued that the contract did not prohibit telephone or door-to-door solicitation or yellow page advertising in Broward County by agents not physically located in Broward County. (R.1829-1830) Ferguson Transportation asserted that North American's appointment of Advance Relocation in Palm Beach, together with Advance Relocation's solicitations in Broward County, established a breach of contract by North American. The court rejected both arguments. It ruled that while the contract could be breached by the actions of agents located outside of Broward County, the fact that such agents solicited in Broward County "does not mean that the Company appointed them to so act." (R.2166)

Prior to trial, North American sought an order precluding any mention of the financial worth of North American. (R.2222-2223) At a pretrial hearing, plaintiff's counsel agreed not to discuss the specific net worth of North American during opening statement. (R.2234-2236)

In opening statement, plaintiff's counsel told the jury about the 1974 settlement between North American and Murray Van & Storage and argued that "...for a period of more than 18 years" Ferguson has "tried to defend his contract rights against North American." (R.8;18-19) Over North American's repeated objections, the court permitted plaintiff to introduce the prior settlement

agreement in evidence, to offer testimony about the matter and to emphasize it in closing argument. (R.109-114; 2872-2880; 3025-3029) In closing argument, plaintiff also urged the jury to award punitive damages commensurate with North American's net worth. (R.1501-1502)

At trial, the evidence showed that Ferguson Transportation's annual revenues grew each year for twenty-seven years. (R.542) Ferguson contended that by 1984, his business was worth approximately $1.3 million. (R.377-385) Despite increasing revenues, in 1985 the company began to lose money. (R.922-929; 949-953; 1137-1139; 1147-1155; D.Ex.31, 32, 33, 34, 35, 36, 37, 38, 39) The deregulation of the trucking industry in the early 1980's caused losses in the industry as a whole. (R.789-791) In 1984, Ferguson Transportation built a $6 million facility, which substantially increased its operating expenses. (R.1139; 1152) In 1985-86, Murray Van & Storage changed its name to Ferguson Transportation, thereby losing name recognition. (R.813) The company had no business plan, no management plan, no budget and inadequate financial mechanisms to measure its profitability. (R.813-814) Ferguson's former vice president of finance testified that Ferguson Transportation's books were not kept in accordance with generally accepted accounting principles, and that Ferguson Transportation itself was responsible for its financial difficulty. (R.949-959) Ferguson Transportation's own auditors testified that despite an increase in its business, Ferguson Transportation's increased expenses, coupled with the name change, bookkeeping and record keeping errors, lack of control over client files, and increases in

borrowing and insurance premiums, caused them to write "memos of going concerns" for the period from 1985 through 1987. (R.1133; 1137-1141; 1138; 1149-1166; 1150-1151; 1154; 1156; 1163-1164) By the end of 1985, North American sent a consultant to Ft. Lauderdale to help Ferguson Transportation overcome these problems. (R.1004) In 1989, Ferguson sold his company for no profit. (R.377-385)

Ferguson Transportation contended that its financial losses were due to defendants' breach of contract and tortious interference with its relations with the community at large. The evidence showed that Advance Relocation had booked relatively few interstate moves in Broward County. (R.359-365; 546-549) Ferguson Transportation also contended that defendants were responsible for its lost IMX or storage-in-transit business and high-value-products business. There was no evidence that Ferguson Transportation had an exclusive right to that business or that Ferguson's IMX business was given to Advance Relocation. (R.961-963; 1121)

Contrary to its claims in this Court, Ferguson Transportation did not present any evidence that the Broward customers who booked moves with Advance Relocation would have booked the moves with it, but for the actions of Advance and North American. Not one of those customers was called to testify at trial. Ferguson Transportation's brief states, "Ferguson testified that 99% of the moves represented by the bills of lading had gone to Advance Relocation as the result of the tortious interference of NAVL and Advance Relocation." (Petitioner's Brief on the Merits ("Pet.Br.") at 27-28, citing R.518, 520-521) What Joe Ferguson actually said was that because of Ferguson Transportation's exclusive contract

rights, North American should have told 99 percent of Advance's Broward County customers that they needed to use Ferguson. He testified:

> Q: Even though the customer has already selected Advance, North American should then tell that customer, no, sir, you have to ship with Ferguson Transportation regardless of why they selected Advance; am I correct, that's your answer?
>
> A: I would say that answer would be 99 percent true. The one percent in Advance's favor would be perhaps someone living in Palm Beach, the next door neighbor of one of the Advance people recommended or asked that Advance assist them to come out of Broward County. (R.518)
>
> * * *
>
> 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. Is it 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 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. (R.520-521)

Joe Ferguson then admitted that he had not specifically identified any prospective customer whose potential relationship with Ferguson Transportation was allegedly disrupted by Advance Relocation. (R.522-525) Ferguson concluded this testimony as follows:

> Q: All I'm asking you, Mr. Ferguson, you had these bills of lading regarding the household goods and there are a certain

number of shipments and you went through and told us that number of shipments that were booked by Advance, and my question back again is: You have not identified any of these people as a person that Ferguson had previously given an estimate; am I correct?

A: You're correct.

Q: Thank you. Before the lawsuit was filed did you know the identity of any of these prospective customers that you were referring to, the specific identity?

A: No, I did not. (R.525)

North American moved for a directed verdict on the punitive damages claim and on the claims for tortious interference and breach of contract. The trial court denied those motions. (R.1311-1320) In explaining his refusal to dismiss the tort claim, the judge stated that "if you have a contract and it's breached in a sufficiently outrageous manner, it can turn into a tort." (R.859; see also R.3351) The plaintiff's motion for a directed verdict on both counts was also denied. (R.1320-1326) The jury returned a verdict for plaintiff and against North American on the breach of contract claim, assessing damages as $1,300,000. (R.3225-3227) The jury returned a verdict on the tortious interference claim against all defendants, and again assessed damages as $1,300,000. (R.3226-3227) Pursuant to an agreement by the parties, the court struck one of the compensatory awards as duplicative and entered a joint and several judgment for $1.3 million compensatory damages. (R.1419-1420; 3228-3229) The jury also awarded punitive damages of, and judgment was entered for, $13,000,000 against North American, $500,000 against Advance Relocation, and $100,000 each against Molloy and Grochowski. (R.3225-3229)

North American then filed timely motions to alter or amend the final judgment, for remittitur, for new trial and to vacate the verdict and judgment and to enter judgment in accordance with the defendant's motions for directed verdict. (R.3230-3236; 3237-3239; 3240-3243) North American also asked the court to review the punitive damages award in accordance with the decision of the United States Supreme Court in Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991).

Post-verdict, the State of Florida sought to intervene, contending that it was entitled, pursuant to Section 768.73, Florida Statutes (1987) to a portion of the punitive damages award. (R.3516-3518) The trial court denied all defendants' post-trial motions, permitted the State of Florida to intervene, and held that Section 768.73 was inapplicable. (R.3548-3552; 3637-3638; 3639-3640) Although the trial judge refused to reduce the award of punitive damages, he specifically found, "The punitive damages awarded do not bear a reasonable relationship to the amount of compensatory damages proved and the injury actually suffered...." (R.3550) The defendants and the State of Florida each filed notices of appeal. (R.3641-3654; 3657-3665; 3605) The three cases were consolidated in the Fourth District Court of Appeal for record purposes only.

North American presented seven issues on appeal to the Fourth District. Those issues were:

I. Whether the court erred in admitting evidence pertaining to the 1974 settlement agreement.

II. Whether the court erred in denying North American's motion for directed verdict on the tortious interference claim.

III. Whether the compensatory damages award was excessive and was supported by legally sufficient evidence.

IV. Whether the jury's verdict awarding punitive damages against North American must be reversed because the record lacks proof of particularly reprehensible conduct sufficient to justify punitive damages.

V. Whether under Florida's established standards, the award of punitive damages must be vacated as excessive.

VI. Whether the award of punitive damages violated North American's right to due process under the Fourteenth Amendment of the United States Constitution and under Article I, § 9 of the Florida Constitution.

VII. Whether the award of 12 per cent post judgment interest violates North American's right to due process under the United States Constitution and the Florida Constitution. (A.i-ii)

The Fourth District did not, as Ferguson Transportation asserts at footnote 3, reject all of North American's contentions, except the argument that plaintiff had to prove a business relationship with an identifiable customer. Indeed, the Fourth District never addressed issues IV, V and VI because the reversal of the award for tortious interference mandated a reversal of the punitive damages award.[1]

In the appeal taken by the State of Florida, the Fourth District held that the issue raised regarding the applicability of Section 768.73(2)(b) (1993) was moot and did not address the issue.

---

[1] Thus, even if this Court were to conclude that Ferguson Transportation had stated a viable tort claim, it would need to remand to the Fourth District Court of Appeal for consideration of issues IV, V, and VI. Hall v. Billy Jack's, Inc., 458 So.2d 760 (Fla. 1984), appeal after remand, 478 So.2d 471 (Fla. 2d DCA 1985).

(A.76-77) The Fourth District affirmed the judgment entered against Molloy, Grochowski and Advance Relocation & Storage of Florida. (A.78)

QUESTIONS PRESENTED

I. 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?

II. Whether admission of evidence and argument concerning North American's net worth and prior settlement with Ferguson Transportation requires retrial of the contract claim?

SUMMARY OF ARGUMENT

This case concerns a breach of contract. Plaintiff's contract with North American precluded North American from appointing Advance Relocation to act as its agent in Broward County. Apart from the contract, there is nothing wrong with multiple agents soliciting and advertising in the same geographic region. Thus, apart from the contract, none of the conduct at issue in this case is independently tortious.

This fact requires affirmance of the judgment below. It also demonstrates that the question certified to this Court is not one of great public importance. Under Florida law, "[i]t is well-established that breach of contractual terms may not form the basis for a claim in tort." Ginsberg v. Lennar Florida Holdings, Inc., 19 Fla. L. Weekly D2117, 2118 (Fla. 3d DCA Oct. 5, 1994) (emphasis added) (citing cases). Instead, a valid claim for tortious interference must be founded on conduct that is tortious separate and

apart from a breach of contract. See Lewis v. Guthartz, 428 So.2d 222 (Fla. 1982). In the first part of the certified question framed by the plaintiff, Ferguson Transportation seeks to have this Court rule that its claim for tortious interference can be based on its contractual rights. Under settled law, this part of the certified question must be answered "no."

The second part of the certified question also does not raise an important issue. It also is long-settled that an essential element of tortious interference is proof that defendant interfered with an existing business relationship with attendant legal rights. See pages 31-32 and note 3, infra (citing cases). Plaintiff failed to show that it had existing relationships with any of the Broward County customers with which Advance Relocation did business. Instead, it asserted a relationship with the community at large (R.1752-1756), and claimed that Advance's customers should have been told to deal with plaintiff. (R.520-521) This is insufficient evidence of existing business relationships with attendant legal rights to prove tortious interference. Southern Alliance Corp. v. City of Winter Haven, 505 So.2d 489, 496 (Fla. 2d DCA 1987). The tort claim also should have been dismissed for the independent reason that North American was an essential party to the alleged business relationship.

This Court therefore ought not accept jurisdiction over the certified question. If it does accept jurisdiction, however, it should consider the separate question raised by North American. We submit that this case should be remanded for a new trial on the contract claim, because the jury's consideration of both liability

and damages was severely prejudiced by the introduction and extensive use of evidence concerning North American's net worth and a prior settlement with Ferguson Transportation.

ARGUMENT

I. 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?

A. An Exclusive Agency Agreement Between A Moving Company And Its Local Agent Does Not, By Itself, Create Legal Rights In Business Relationships Between The Agent And Potential Customers For Purposes Of Tort Law

The first issue raised by the certified question is whether the exclusivity provision in plaintiff's contract with North American establishes a business relationship with Broward County customers protectible in tort. It does not. Plaintiff's reliance on its contract as the source of its rights in tort conflicts with established principles of Florida law and is unsupported by any Florida case law.

1. Plaintiff's Theory Conflicts With The Basic Florida Rule That A Breach of Contract May Not Form the Basis for A Claim In Tort

In its certified question, plaintiff proposes to rely on its contract as the source of its legal rights for tort purposes. Under Florida law, however, "[i]t is well-established that breach of contractual terms may not form the basis for a claim in tort." Ginsberg v. Lennar Florida Holdings, Inc., 19 Fla. L. Weekly D2117, 2118 (Fla. 3d DCA Oct. 5, 1994) (emphasis added). As this Court

has held, it is "well-settled" that parties alleging a breach of contract may not recover damages in tort, including punitive damages, unless they plead and prove a tort that is separate from and "independent" of any breach of contract. Lewis v. Guthartz, 428 So.2d 223 (Fla. 1982).

In Guthartz, this Court held that evidence that a defendant "acted intentionally, willfully, and outrageously as to the breach of contract does not by itself create a tort where a tort otherwise does not exist." Id. at 224. Thus, the "true question in any case involving tort liability is, 'Has the defendant committed a breach of duty apart from the contract?'" Weimar v. Yacht Club Point Estates, Inc., 223 So.2d 100 (Fla. 4th DCA 1969).[2] The requirement of an independent tort rests on "an unwillingness to introduce uncertainty and confusion into business transactions as well as the feeling that compensatory damages as substituted performance are an adequate remedy for an aggrieved party to a breached contract." Lewis v. Guthartz, 428 So.2d at 223 (citation omitted).

Reliance on a contract as the source of protected rights in tort is irreconcilable with the rule that "breach of contractual terms may not form the basis for a claim in tort." Ginsberg, 19 Fla. L. Weekly at 2118. Such reliance creates a tort that is

---

[2] See e.g., Taylor v. Kenco Chem. & Mfg. Corp., 465 So.2d 581, 589-90 (Fla. 1st DCA 1985) ("In order to recover punitive damages in a suit on a contract, the tort action must arise from conduct that is independent of the conduct which constitutes a breach of contract"); Richard Swaebe, Inc. v. Sears World Trade, Inc., 639 So.2d 1120, 1121 (Fla. 3d DCA 1994) (absent a separate and independent tort, even flagrant breach of contract could not be converted into tort).

entirely dependent upon a contract and that duplicates a breach of contract remedy.

The duplication of remedies is inherent in the plaintiff's theory. Unless the court would permit an exclusive franchisee to sue any third party that solicited in its exclusive area (thereby allowing the franchisee to leverage its private franchise into a court-granted monopoly), the only party who could interfere with these newly announced rights would be the franchisor and its agents. But there is no need to provide the franchisee with a tort remedy, because the same conduct will give rise to a viable claim for breach of contract.

This case well illustrates the point. Plaintiff describes the tort as assisting Advance to "masquerade as its authorized agent" in Broward County, and as having "essential and intimate involvement" in serving the "stolen customers." (Pet.Br. at 45) In particular, plaintiff asserts that North American tortiously interfered by pre-approving each move of a Broward County customer by Advance, providing documentation, authorizing use of North American's bills of lading and ICC registration number, accepting money collected by Advance, retaining a portion and remitting a portion to Advance, and by providing sales brochures to Advance. (Pet.Br. at 47)

This is the conduct on which plaintiff relied to show that North American, despite its efforts to stop Advance from advertising in Broward County, in fact had appointed Advance to act in Broward County. (R.2166; 1619; 1587-88). It is plain that this conduct is not independently tortious. If North American had never

agreed to grant Ferguson Transportation an exclusive agency in Broward County, Ferguson Transportation would have had no basis -- in contract or in tort -- for complaint. See, e.g., Wackenhut Corp. v. Maimone, 389 So.2d 656, 658 (Fla. 4th DCA 1980) ("Competition for business is not per se an actionable interference even though it is intentional"). Furthermore, as Joe Ferguson admitted (R.518, 520-21), even the exclusivity provision did not preclude Advance from accepting business from Broward County customers. The contract created no per se rule against Advance handling such moves, and indeed a contract that tried to impose such restrictions could raise significant antitrust concerns. North American's processing of Advance's Broward County moves thus in no way constitutes tortious conduct.

Plaintiff never asserted, at any stage of this litigation, that its tort claim was separate or independent from its contract claim. The complaint used identical language to describe the recovery sought on its contract and tort claims. (R. 1754-1755.) The jury was instructed that if Advance's "business was acquired by representing Advance to be a North American Van Lines agent in Broward County, such act is a tortious interference." (R.1623) The only reason the tort claim went to the jury was because the trial judge made a plain error of law. The trial judge refused to strike the tort claim on the mistaken view that a breach of contract, if sufficiently outrageous, can turn into a tort. Specifically, the court stated:

> "[I]f the breach rises to a certain level it becomes a tort, if it's got the outrageous, etc. In other words,

> if you have a contract and it's breached in a sufficiently outrageous manner, the breach can turn into a tort." (R.859; see also R.3351).

This is directly contrary to Florida law. This Court has held that even a finding that defendant "acted intentionally, willfully, and outrageously as to the breach of contract does not by itself create a tort where a tort otherwise does not exist." Lewis v. Guthartz, 428 So.2d 222, 224 (Fla. 1982). See also Electronic Sec. Sys. Corp. v. Southern Bell Tel. & Tel. Co., 482 So.2d 518 (Fla. 3d DCA 1986); G.M. Brod Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985). Accordingly, under prevailing law, Ferguson's tort claim should have been dismissed.

The lack of any proof of a separate and independent tort in this case is further illustrated by the damages awarded. The jury returned identical verdicts of $1.3 million each on plaintiff's tort and contract claims. Pursuant to stipulation, and in express recognition of the fact that the identical verdicts represented a double recovery, the trial court struck one of the two identical compensatory damage awards. (R.1419-1420). The duplicative damages awards leave no doubt that the breach of contract and the tort claims in this case were one and the same.

Indeed, the failure to plead and prove separate and independent damages on the tort and contract claims is yet another reason to affirm the judgement below. "Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing a claim in tort." Ginsberg v. Lennar Florida Holdings, 19 Fla. L. Weekly at

2118 (citing numerous cases); see Rosen v. Marlin, 486 So.2d 623 (Fla. 3rd DCA), review denied, 494 So.2d 1151 (Fla. 1986); Rolls v. Bliss & Nyitray, Inc., 408 So.2d 229 (Fla. 3rd DCA 1981), dismissed without opinion, 415 So.2d 1359 (Fla. 1982).

Plaintiff argues that proof of "direct" interference is sufficient to prove an independent tort. (Pet.Br. 42) Not only is this contrary to Florida law, but even in the out-of-state cases that Ferguson Transportation cites, the defendant was alleged to have engaged in conduct that was tortious separate and apart from any breach of contract. See, e.g., Bolz v. Myers, 651 P.2d 606, 610-11 (Mont. 1982) ("In addition to breaching his contract to sell the business of KHAC, [defendant] went far out of his way during and after the transfer of the business to destroy Bolz's business relationships with customers: interference with Bolz's mail, denying to others that Bolz had an interest in KHAC, false advertising, misrepresenting Bolz's credit record, declaring Bolz to be an impostor to others, denying Bolz's competency, using his position . . . to harass Bolz and much else"); George A. Davis, Inc. v. Camp Trails Co., 447 F. Supp. 1304, 1311-12 (E.D. Pa. 1978) (allegations that defendant made false statements to customers precluded a finding that the claimed interference "amounts to nothing more than a breach of contract"); Western Fireproofing Co. v. W. R. Grace & Co., 896 F.2d 286, 291 (8th Cir. 1990) (defendant "did much more than merely appoint a Zonolite competitor. [It] provided preferential pricing and unfairly lobbied past customers to move their business away from Western").

In short, the "tortious interference" claimed here is neither separate from nor independent of the breach of contract. If there had been no exclusivity provision, there could have been no tortious interference. Plaintiff's attempt to ground its tort claim in the exclusivity provision is barred by the principles of Lewis v. Guthartz and numerous analogous Florida cases cited above.

2. Plaintiff's Theory Also Conflicts With The Economic Loss Rule

Recognition of plaintiff's novel tort theory would also conflict with the economic loss rule. This Court has held that contract principles, not tort principles, must govern claims for "economic loss" where the loss flows from a breach of contract and there is no accompanying physical injury or damage to property outside the contract. See Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899 (Fla. 1987); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So.2d 180 (Fla. 1987); Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993).

In Casa Clara, for example, the homeowners brought a tort claim against a concrete supplier for structural damage to the condominium buildings caused by defective concrete. This Court held that because there was no damage to "'other' property" and nothing more than "economic loss" was involved, the plaintiff had no tort claim against the concrete supplier. See 620 So.2d at 1247-48.

In AFM, this Court applied the economic loss rule to a contract for telephone services and advertising. The Court

reaffirmed the principle that in cases involving a breach of contract, the appropriate measure of damages is found in contract law principles, not in tort remedies, stating "[w]e conclude that without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." 515 So.2d at 181-2.

Notably, Casa Clara and AFM do not invalidate claims for tortious interference that result purely in economic loss. They merely require that such claims be founded on independently tortious conduct, and not flow simply "from a contractual breach." AFM, 515 So. 2d at 182.

In this case, the "economic loss" rule precludes the expansion of tort liability to permit a tort claim that depends entirely upon breach of contract. This is plainly a case where the damages were for purely economic loss and where they flowed not only principally -- but entirely -- from a breach of contract. Plaintiff's theory, if adopted, would ensure that every time an exclusivity contract was breached, the plaintiff would be permitted to seek recovery for economic losses both in contract and in tort. Such a result is irreconcilable with the economic loss doctrine. For this reason, too, this Court should decline the invitation to expand Florida tort law.

3. Plaintiff's Theory Lacks Any Case Support

Given the prohibition against duplicative tort and contract claims and against tort claims where only economic loss

flows from a breach of contract, the utter lack of any case support for plaintiff's position is not surprising. Plaintiff has not cited a single Florida case in which an exclusivity provision in a contract was held to create rights protectible in tort. The most plaintiff can do is to attempt to distinguish Southern Alliance as "totally different" because it did not involve an exclusive contract. (Pet.Br. 33-34) A moment's reflection reveals the emptiness of this distinction -- the presence of an exclusivity provision would not have changed the outcome in that case at all.

In Southern Alliance, the owner of a lounge claimed that the city interfered with the lounge's relationships with customers in the community when it improperly closed the lounge for alleged health and safety code violations. The court dismissed the tortious interference claim, holding that a relationship with the community at large is insufficient proof of a business relationship with attendant legal rights. 505 So.2d at 496.

The flaw in plaintiff's purported distinction of Southern Alliance is best illustrated by an example. One need only assume that the lounge was the franchisee of a national chain, which had been granted the exclusive right by its franchisor to operate in the city of Winter Haven. Under plaintiff's theory, the lounge would then have "protectible rights" in its geographic area. The existence of such contractual rights would not have dictated a different result in Southern Alliance. The propriety of the city's decision to enforce health and safety codes against a particular entity cannot be made to depend on whether that entity has an exclusive area contract with a parent company or franchisor. An

exclusive franchise agreement establishes contractual duties governing the parties to the agreement; it does not, and cannot, create duties binding on third parties. Thus, the presence -- or absence -- of an exclusivity provision would have made no difference to the result in Southern Alliance.

Even the out-of-state cases on which plaintiff relies do not support its position. In American Sanitary Services v. Walker, 554 P.2d 1010 (Or. 1976), the interference was with a government-granted monopoly for garbage collection in areas outside city limits. In that case, the defendant, a trash removal service, interfered by moving the monopolist's garbage containers and collecting the garbage itself.

American Sanitary Services is not on point because a monopoly franchise is not analogous to purely private contracts between private parties. A monopoly franchise, by its nature, limits the public to a single service provider and thereby creates a mandatory relationship. North American had no power to convey to Ferguson Transportation a monopoly franchise to serve anyone in Broward County. Furthermore, the defendant in American Sanitary Services interfered with previously existing, established relationships with identifiable customers, and with the existing contractual relationship between the plaintiff and the county. 554 P.2d at 1013. Notably, the plaintiff did not sue the county, nor did it advance any novel theories regarding the creation of business relationships with potential customers.

Similarly, while plaintiff cites Conoco Inc. v. Inman Oil Co. 774 F.2d 895 (8th Cir. 1985) for the proposition that a 20-year

non-exclusive relationship establishes a "protectible business expectancy" (Pet.Br. at 38 n.14.) the Court plainly did not hold that an exclusive agency agreement establishes protectible business relationships with the community at large. The plaintiff in that case had maintained a relationship with the same customer for 20 years. The court stated that this specific relationship could be protected because the defendant "knew or was substantially certain" that its acts "would result in interference with [that] relationship." 774 F.2d at 907. Ferguson Transportation's remaining cases simply confirm that competition for, and solicitation of, business from a party who has a non-exclusive agency agreement does not establish tortious interference. See International Expositions, Inc. v. City Of Miami Beach, 274 So.2d 29 (Fla. 3d DCA 1973); Kennametal v. Subterranean Equip. Co., 543 F. Supp. 437 (W.D. Pa. 1982).

In summary, to allow an "exclusive contract" to create "a business relationship with all prospective customers within that territory, which is protectible against tortious interference," as plaintiff proposes, would create a tort remedy that is inherently and entirely duplicative of the pre-existing contract remedy for breach of that exclusivity provision. The net effect of such a decision would be to allow parties to recover punitive damages for a breach of contract. Such a result squarely conflicts with Guthartz and the other authorities cited above, and should be rejected.

B. Plaintiff's Failure To Prove Interference With Business Relationships With Identifiable Customers Precludes Recovery For Tortious Interference With Business Relationships

The second part of the certified question asks whether a plaintiff must prove a business relationship with identifiable customers. Given the absence of any independent tort, the Court need not reach this question. Moreover, the answer to the question is already well-settled. Florida courts have long held that such proof is an essential element of a valid tortious interference claim. This case, with its overlapping tort and contract claims, provides no compelling reason to revisit this rule.

The elements of a claim for tortious interference with business relationships are well-established. This Court stated in Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla. 1985), that a plaintiff must show: (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.

Every district court of appeal has held that plaintiff must show that the business relationship in question was one in which the plaintiff had "legal rights." See, e.g., Water & Sewer Util. Constr., Inc. v. Mandarin Utils., Inc., 440 So.2d 428,429 (Fla. 1st DCA 1983); Fearick v. Smugglers Cove, Inc., 379 So.2d 400, 403 (Fla. 2d DCA 1980); Ethyl Corp. v. Balter, 386 So.2d 1220, 1223 (Fla. 3d DCA 1980), petition denied, 392 So.2d 1371 (Fla. 1981), cert. denied, 452 U.S. 955 (1981); Lake Gateway Motor Inn,

Inc. v. Matt's Sunshine Gift Shops, Inc., 361 So.2d 769, 772 (Fla. 4th DCA 1978), cert. denied, 368 So.2d 1370 (Fla. 1979); Insurance Field Servs., Inc. v. White & White Inspection and Audit Serv., Inc., 384 So.2d 303, 306 (Fla. 5th DCA 1980).[3] Similarly, no Florida court has held that a business relationship with legal rights can exist in the absence of identifiable parties to the relationship.

In order to prove a business relationship with attendant legal rights, a plaintiff is not limited to proving interference with a valid contract. For example, a contract that is technically voidable may still provide certain legal rights if the parties perform in accordance with its terms. Such a contract is within the types of relationships that are protected from tortious interference. See, e.g., United Yacht Brokers, Inc. v. Gillespie, 377 So.2d 668, 672 (Fla. 1979).

At the same time, however, a plaintiff is required to show that its relationship with a particular third party -- even if prospective -- was sufficiently concrete and defined to give rise to at least some legal rights between the parties. Where there is no existing business relationship, or where the relationship is too preliminary or indefinite to provide any legal rights to either party, no claim for tortious interference may be maintained.

---

[3] Florida appellate courts have noted the "legal rights" requirement in at least 40 reported cases, and federal courts applying Florida law have applied the same standard in at least two dozen more. (See A.79-82) While this Court did not mention the term "legal rights" in Tamiami, this element of the tort was not at issue in that case, which nevertheless did involve existing business relationships. See 463 So.2d at 1129 n.1.; 432 So.2d at 150.

For example, in Lake Gateway Motor Inn, Inc., supra, 361 So.2d at 772, the operator of a gift shop in a motel had begun negotiations to sell the business to a third party. Before he entered into a definite contract, the motel terminated his lease in accordance with its terms and agreed to rent the premises directly to the same third party. The former operator sued for tortious interference, winning jury verdicts against both the motel and the successor operator. The appellate court reversed both awards, finding no evidence that an advantageous business relationship "ever actually existed" between the former operator and his successor. 361 So.2d at 771. The court stated:

> We are aware that a valid advantageous business relationship may exist without the presence of an actual enforceable contract. However, there must be some attendant legal rights. We do not find any evidence of any legal rights in existence between the two operators. A mere offer to sell a business which the buyer says he will consider, does not by itself give rise to legal rights which bind the buyer or anyone else with whom he deals.

Id. at 771-72 (citations omitted).

Numerous cases are to the same effect. In Water & Sewer Utility Construction, Inc. v. Mandarin Utilities, Inc., 440 So.2d 428 (Fla. 1st DCA 1983), a real estate developer proposed to use a particular contractor to construct water and sewer facilities. The utility company refused to certify the construction company to do the work, stating that it was not qualified. The court rejected the construction company's claim of tortious interference, stating that it "failed to allege a cause of action by its failure to allege any business relationships under which it had legal rights."

440 So.2d at 430. In Bernstein v. True, 636 So.2d 1364, 1366 (Fla. 4th DCA 1994), the plaintiff signed a contract to purchase real estate, and subsequently assigned the purchase rights to defendants. The purchase contract expired before the sale was consummated, and the owners later sold the property directly to the defendants in a separate transaction. The court rejected plaintiff's tortious interference claim, stating "Even though a valid contract is not necessary for a claim of tortious interference, [plaintiff] failed to prove that he had any legal rights . . . with which the [defendants] interfered." (Id.)[4]

The question of precisely when, and under what circumstances, a particular business relationship is sufficiently concrete to give rise to "attendant legal rights" for purposes of this element of the tort, can and should be decided on a case-by-case basis. One point, however, is clear. At the very least, a plaintiff must be able to identify the other party to the alleged business relationship and show that the parties were aware of each other and had some form of communication at the time the alleged interference occurred. The very element of a business relationship with attendant legal rights presupposes the existence of two identifiable, mutually aware parties.

---

[4] See also MD Associates v. Friedman, 556 So.2d 1158, 1159 (Fla. 4th DCA 1990) (a "mere offer to sell, does not, by itself give rise to sufficient legal rights to support a claim of intentional interference with a business relationship"); Wells v. Marton, 794 F. Supp. 1092, 1097 (S.D. Fla. 1991) ("the existence of a business relationship in which plaintiff has legal rights [is] an essential element to which plaintiff would have the burden of proof at trial").

Ferguson Transportation does not cite a single Florida case -- and North American is aware of none -- in which a Florida court has upheld a claim of tortious interference with business relations where the plaintiff was not aware of the identities of the other parties to the business relationship at the time the alleged interference took place. To the contrary, in the one case where such a claim was raised, the court rejected it. Southern Alliance Corp. v. City of Winter Haven, 505 So.2d 489, 496 (Fla. 2d DCA 1987) (rejecting the argument that a plaintiff's claim of tortious interference could be based on its relationship with the community at large).[5] The reason is plain: Inherent in the very concept of a business relationship with attendant legal rights is -- at a minimum -- two mutually aware parties who intend to deal with each other. Given this settled case law, the Fourth District, citing Southern Alliance, correctly rejected Ferguson's tort claim because Ferguson failed to show interference with any existing, identifiable business relationship.

None of Ferguson Transportation's arguments to the contrary has merit. Ferguson Transportation's principal claim is that proof of a "prospective" business relationship, or of an

---

[5] In another case currently before this Court, the plaintiff attempted to claim damages based on its potential profits from its expectancy of continued dealings with its prior customers. See Georgetown Manor v. Ethan Allen, Inc., 991 F. 2d 1533 (11th Cir. 1993). In this case, by contrast, Ferguson Transportation has not identified even one Advance customer with whom it had any prior dealings. Therefore, Ferguson Transportation's claim is far more remote and speculative than the plaintiff's claim in Georgetown Manor.

"expectancy" of a business relationship, is sufficient to satisfy the first element of the tort. Pet.Br. at 31-32.

The Florida cases it cites, however, do not hold that a plaintiff has protected rights generally in future business relationships with unspecified parties. Indeed, any such holding would conflict with the well-established requirement that a plaintiff prove an existing business relationship under which it has legal rights. For example, in Smith v. Ocean State Bank, 335 So.2d 641, 644 (Fla. 1st DCA 1976), on which Ferguson Transportation chiefly relies, the plaintiff had an ongoing relationship with a specific party (a silver dealer) who had purchased silver on his behalf. The plaintiff alleged that the defendant bank interfered with that existing relationship by persuading the dealer not to sell the silver and advance him the proceeds. Id. at 642-43. The court did not dismiss the claim, noting that Florida did not require proof of "an enforceable contract" in order to prove the existence of a business relationship. Id. at 644. Nothing in that decision even remotely suggests that the plaintiff would have alleged a valid tort claim if he had simply alleged that the bank had interfered generally with his ability to deal in the future with silver dealers.

In Register v. Pierce, 530 So.2d 990, 993 (Fla. 1st DCA 1988), the count referred broadly to "existing or prospective legal or contractual rights," but did not address what type of "prospective" rights could suffice to support a claim for tortious interference. Instead, the court simply stated that the "complaint does not allege any facts to demonstrate that the business relationship

between Register and the other eleven members of the Association afforded Register any legal rights that have been substantively damaged." Id. Thus, Register merely confirms that the first element of a tortious interference claim in Florida is the existence of a business relationship under which the plaintiff has legal rights.

The federal cases plaintiff cites are similarly inapposite. While there are dicta in Doft & Co. v. Home Federal Savings & Loan Ass'n, 592 F.2d 1361, 1363 (5th Cir. 1979), suggesting that the tort of intentional interference encompasses prospective relationships, the only supporting authority cited is Smith v. Ocean State Bank, which, as discussed above, does not support Ferguson Transportation's position. While in Merlite Land, Sea & Sky, Inc. v. Palm Beach Investment Properties, Inc., 426 F.2d 495, 4697-98 and n.2 (5th Cir. 1970), the Fifth Circuit did state that the tort of interference with business relationships encompasses prospective as well as current customers, it did not resolve whether that holding is based on Florida or New York law, and it cited no authority from either jurisdiction.

Plaintiff's further argument that the Fourth District's decision has done away with the tort of interference with "prospective" business relations is also incorrect. The Fourth District's ruling plainly leaves open the possibility of protection for prospective relationships. It simply requires that such prospective relations involve -- at a minimum -- identifiable parties with whom there are sufficient indicia of an existing relationship to give rise to legal rights. See, e.g., Azar v. Lehigh Corp., 364

So.2d 860, 861, 862 (Fla. 2d DCA 1978) (defendant who persuaded "prospective purchasers" to rescind their purchase contracts liable for tortious interference with prospective relations); Barnett & Klein Corp. v. President of Palm Beach-A Condominium, Inc., 426 So.2d 1074, 1075 (Fla. 4th DCA 1983) (condominium association liable for interference with contract to rent unit to "prospective" tenant).

Finally, Ferguson Transportation's argument in the alternative that it did show business relationships with identifiable customers also lacks merit. All plaintiff can point to is Joe Ferguson's allegation at trial that 99 percent of the customers who moved with Advance should have been told to move with Ferguson Transportation. Even accepting this allegation, it simply does not suffice to show that Ferguson Transportation (rather than Advance) ever had or would have had a business relationship with these customers. Plaintiff failed to present evidence that it had previously served any of Advance's customers; that it had prepared cost estimates for any of them; that it had contacted these customers; that these customers chose Advance because it was a North American agent rather than for some other reason; that these customers would have preferred Ferguson Transportation to the other North American agents authorized to operate in Broward County, let alone to any other Broward County mover; or even that any of these customers had heard of Ferguson Transportation.[6] To allow a

---

[6] Indeed, Ferguson offered evidence about only one identifiable business relationship. In that case, the customer ultimately booked the move with Ferguson Transportation. (R.200)
(continued...)

plaintiff to prove the first element of tortious interference by pointing to customers it has never dealt with and who have never approached it would be tantamount to eliminating that element.

Furthermore, even if Ferguson Transportation could be found to have a business relationship with Advance's customers (or with Broward County customers generally), that relationship would not give rise to "legal rights" enforceable through a tort claim. Joe Ferguson conceded that Advance could move Broward County customers so long as the relationship was not the product of Advance's advertising in Broward County. (R.518, 520-521) He had no legal right to compel any potential customer in Broward County to use Ferguson Transportation. Each of plaintiff's potential customers, including those that moved with Advance, were free to move with the other North American agents authorized to move customers in Broward County, or with an agent of any other national moving company. Where, as here, the alleged relationship does not convey any legal rights, no claim for tortious interference may be maintained. Lake Gateway Motor Inn, Inc. v. Mott's Sunshine Gift Shop, Inc., 361 So.2d at 772; Water & Sewer Util., 440 So.2d at 429; MD Assoc. v. Friedman, 556 So.2d at 1159; Greenberg v. Mount Sinai Medical Ctr., Inc., 629 So.2d 252, 255 (Fla. 3d DCA 1993); Brown v. Larkin & Shea, P.A., 522 So.2d 500, 501 (Fla. 1st DCA 1988).

---

6 (...continued)
Unsuccessful interference cannot support a tort claim. American Medical Int'l Inc. v. Scheller, 462 So.2d 1, 9 (Fla. 4th DCA 1984), review denied, 471 So.2d 44 (Fla.), cert. denied, 474 U.S. 947 (1985).

C. Plaintiff's Proposed Expansion Of Tort Law Is Unnecessary And Unsound

Even apart from the doctrinal conflicts discussed above, plaintiff's proposed expansion of tort liability should be rejected as unnecessary and unwise. As plaintiff itself points out, "'[t]he tort action for interference with business relations which are prospective or potential developed at an early date, in cases having to do with physical violence or threats thereof to drive away customers from the plaintiff's market.'" Pet.Br. 31 (quoting 45 Am.Jur.2d Interference § 50). Whatever proof of identifiable customers a court might require in a case involving "physical violence or threats thereof," it seems plain that there is no cause for expanding the scope of tortious interference in this case, which involves solely an economic, contractual dispute. Numerous commentators have recommended against expanding the scope of tortious interference with business relations, particularly where contract remedies are available. The broader the tort, the greater the risk of stifling legitimate competition, to the detriment of the public interest.[7]

---

[7] See, e.g., G. Myers, The Differing Treatment Of Efficiency And Competition In Antitrust And Tortious Interference Law, 77 Minn. L. Rev. 1097, 1100 (1993) (imposing liability for interference with voidable and prospective relations "gives excessive protection to tenuous contractual relationships at the expense of competition and efficiency," and "often leads to litigation and may chill legitimate business practices that potentially would benefit consumers"); H. Perlman, Interference With Contract And Other Economic Expectancies: A Clash Of Tort And Contract Doctrine, 49 U. Chi. L. Rev. 61, 79 (1982) (endorsing an approach that restricts liability for tortious interference to cases where defendant's act is independently wrongful); Sales, The Tort Of Interference With Contract: An Argument For Requiring A "Valid

(continued...)

These risks are particularly great here. The essence of competition is the right to compete for prospective customers. Notably, Florida courts have expressly and repeatedly held that interference is permissible even with an existing contractual relationship where the contract is terminable at will, on the theory that such contracts create only a mere "expectancy" that the relationship will continue. See, e.g., Greenberg v. Mount Sinai Medical Ctr., Inc., 629 So.2d 252, 255 (Fla. 3d DCA 1993); Brown v. Larkin & Shea, P.A., 522 So.2d 500, 501 (Fla. 1st DCA 1988) (because the contracts at issue were terminable at will, there was "only a bare expectancy, rather than a legal right, that the relationship would continue"). Florida law thus recognizes the need to limit the scope of tortious interference claims in order to "preserve the competitive free enterprise system which forms the basis for the American economy." Wackenhut Corp. v. Maimone, 389 So.2d 656, 657 (Fla. 4th DCA 1980); see Lake Gateway Motor Inn, supra, 361 So.2d 769, 772.

The expansion of tort liability which Ferguson Transportation urges conflicts with these principles. At a minimum, the prospect that violation of an exclusive agency agreement could lead to a massive punitive damages award would reduce the willingness of

---

7 (...continued)
Existing Contract" To Restrain The Use Of Tort Law In Circumventing Contract Law Remedies, 22 Texas Tech L. Rev. 123, 152 (1991) ("the expanding tort of interference must be constrained"); Note, J. Danforth, Tortious Interference With Contract: A Reassertion of Society's Interest In Commerical Stability and Contractual Integrity, 81 Colum. L. Rev. 1491, 1515 (1981) ("[t]he extension of tortious interference liability to include interference with prospective contracts is a long-standing and fundamental error in many jurisdictions").

parties to enter into such agreements, thereby artificially restricting use of one approach by which national chains compete. Moreover, plaintiff's rule would create a strong disincentive to competition among agents of one entity -- a result directly contrary to consumer and economic welfare.

Against these costs, plaintiff's proposed expansion of tort liability offers no compensating benefits. A tort remedy is not needed to make Ferguson Transportation whole. It is evident from the duplicative damages awards that contract law provided Ferguson Transportation with comprehensive compensatory relief. The only effect of expanding this tort would be to allow the recovery of punitive damages for breach of contract -- a step that this Court has already explicitly refused to take. Lewis v. Guthartz, 428 So.2d at 223.

Finally, Ferguson Transportation's novel tort theory is inherently unsound. This theory, if accepted, could create "business relationships" between Ferguson Transportation and potential Broward County customers who had never heard of the company, or who preferred to deal with another agent or with another moving company. Furthermore, only parties to the contract would be capable of interfering with the newly created business relationships. If exclusivity provisions were held to create general business relationships protectible against interference from any competitor, then attempts by agents for other moving companies to compete for Broward County business would be tortious. That result is obviously unacceptable. But by limiting enforcement

of the tort to the contracting parties, one is left with a tort claim that simply duplicates a pre-existing contract remedy.

In summary, neither precedent, policy nor logic supports plaintiff's novel theory. This Court should reaffirm the rule that plaintiffs must prove all the elements of a separate and independent tort, including the existence of business relationships under which they have legal rights, in order to recover for tortious interference.

D. North American Was An Essential Party To Plaintiff's Relationships With Customers

The judgment below should be affirmed on yet another basis. Under Florida law, a cause of action for tortious interference does not exist against one who is himself a party to the business relationship allegedly interfered with. Ethyl Corp. v. Balter, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980), petition denied, 392 So.2d 1371 (Fla. 1981), cert. denied, 452 U.S. 955 (1981); Genet Co. v. Anheuser-Busch, Inc., 498 So.2d 683, 684 (Fla. 3d DCA 1986).[8]

North American was an indispensable party to any possible relationship between Ferguson Transportation and its potential Broward county customers. The evidence showed that North American was a party on the bill of lading governing any shipment moving out of Broward County, whether handled by Ferguson Transportation or

---

[8] See also Rabren v. Gulf Towing Co., 434 So.2d 340, 341 (Fla. 2d DCA 1983); Covert v. Terri Aviation, Inc., 197 So.2d 12, 13 (Fla. 3d DCA 1967); Days v. Florida East Coast Ry. Co., 165 So.2d 434 (Fla. 3d DCA 1964).

Advance. (R.537) Thus, North American would have been a party to any business relationships upon which plaintiff's tort claims could be based.

Furthermore, North American's contract with Ferguson Transportation expressly provided that the relationship between the parties was that of principal and agent. (R.1761) Florida courts have recognized that an agent "cannot be considered to be a separate entity outside of the contractual relationship" for purposes of tortious interference. Abbruzzo v. Haller, 603 So.2d 1338, 1340 (Fla. 1st DCA 1992); citing Cedar Hill Properties Corp. v. Eastern Fed. Corp., 575 So.2d 673, 676 (Fla. 1st DCA 1991); West v. Troelstrup, 367 So.2d 253, 255 (Fla. 1st DCA 1979). Although these cases involve alleged interference by the agent, the underlying rationale applies a fortiori to an agent's claim that a principal party has tortiously interfered in the relationship.

Plaintiff argues that North American would not be a party to the relationships between it and potential customers because "the contract and the business relationships created under the contract are separate and distinct."[9] A similar distinction was rejected in Genet Co. v. Anheuser-Busch, Inc., supra. The court

---

[9] Pet.Br. at 42, citing Scheller v. American Medical Int'l., Inc., 502 So.2d 1268, 1272 (Fla. 4th DCA 1987), corected on reh'g, 12 Fla. L.Wekly 815 (Fla. 4th DCA 1987), review denied 513 So.2d 1060 (Fla. 1987) and Fasco Indus. v. Armbruster Prods., 19 Fla. Weekly D1537, 1538 (Fla. 4th DCA July 20, 1994). As discussed below, Scheller did not involve alleged interference by an essential party to the relationship. In Fasco Industries, the concurring opinion makes clear that the defendant sought to justify his interference with a contract between the plaintiff and another party by referring to a separate contract, involving a different patent, between the plaintiff and defendant. These cases do not support Ferguson's position.

held that a manufacturer could not be held liable for tortious interference for refusing to approve the transfer of ownership of a liquor wholesale business. Even though Anheuser-Busch was not a party to the purchase contract, the court held that Anheuser-Busch "was not a disinterested third party to plaintiffs' agreement." 498 So.2d at 684. See also id. (tortious interference "does not exist where the defendant was the source of the business opportunity allegedly interfered with"); citing A.R.E.E.A., Inc. v. Goldstein, 411 So.2d 310 (Fla. 3d DCA 1982).[10] Not only is North American not a "disinterested third party" to Ferguson Transportation's relationships with its customers, it is actually a party to any completed transaction, as well as the source of Ferguson Transportation's ability to represent itself as an agent of a national company.

Plaintiff has previously argued that Genet is inconsistent with Scheller v. American Medical Int'l., Inc., supra, 502 So.2d 1268, 1272.[11] Unlike the defendant here and in Genet,

---

10 See also Ryan v. Brooklyn Eye & Ear Hosp., 46 A.D.2d 87, 91, 360 N.Y.S.2d 912, 916 (App. Div. 1974) ("[t]he plaintiff may not assert a cause against the [contracting party] for inducing the breach of a contract right which could only have come from the [contracting party] in the first place").

11 Amended Answer Brief of Ferguson Transportation, Inc. (filed May 31, 1993 in Fourth District Court of Appeal) at 43. Ferguson Transportation also argued that the manufacturer in Genet had a contractual right to approve or disapprove the transfer, while in this case the contract between North American and Ferguson does not give North American the "right to interfere." Id. at 43. This argument, however, merely serves to highlight the recurrent fact that Ferguson Transportation's real complaint in this case arises directly from the terms of the contract between North American and Plaintiff. Under Florida law, the terms of the contract, and any breach thereof, cannot serve as the basis for liability for tortious interference.

however, in Scheller the defendant was not an essential party to the relationships between the plaintiff and other third parties. Plaintiff also argued that parties to a contract can be liable if they "directly" interfere with the relationship. None of the cases it cites so hold. In Action Orthopedics v. Techmedica, Inc., 759 F. Supp. 1566, 1572 (M.D. Fla. 1991) the Court did not dismiss the tort claim because "the facts surrounding the breach of contract and the separate and distinct tort are not interlaced. . . ." In Nordyne v. Florida Mobile Home Supply, 625 So.2d 1283 (Fla. 1st DCA 1993), no breach of contract was alleged or proved, nor was it established that the defendant manufacturer was a party to contracts between the distributor and its customers. In GNB, Inc. v. United Danco Batteries, Inc., 627 So.2d 492 (Fla. 2d DCA 1993), separate tortious conduct was proven and separate damages were awarded. Finally, in AFS v. Lewis, 519 So.2d 26 (Fla. 5th DCA 1987), the defendant was not a party to any contractual relationship with the plaintiffs.

E. Vicarious Liability Provides No Basis For Reversal

Plaintiff also claims that North American may be held vicariously liable for the tortious acts of Advance. This argument lacks merit.

Plaintiff's initial argument, that North American must be held vicariously liable for Advance's actions based on Section 10934 of the Interstate Commerce Act, 49 U.S.C. § 10934, was not raised below. That statute is irrelevant here, because there is no evidence that Congress intended Section 10934 to preempt or modify

state tort law. See e.g., 49 U.S.C. § 10934(a) (scope limited to services "subject to the jurisdiction of the Commission").

Plaintiff's remaining arguments regarding vicarious liability fail because the tortious conduct alleged here is entirely dependent upon and duplicative of the breach of contract claim. The essence of the breach of contract in this case was that Advance, acting as North American's agent, solicited in Broward County. Imposing vicarious liability in tort on North American based on Advance's actions as its agent in Broward County would be nothing more than a double recovery for the breach of contract claim. Moreover, nothing Advance did in competing for business with Ferguson Transportation would have been wrongful apart from the exclusive agency agreement. Thus, Ferguson Transportation's claim of vicarious liability does not establish a tort that is independent of its contract claim.

There is no inconsistency with the decision affirming the tort judgment against Advance. Advance could have been found to have interfered with the contractual relationship between Ferguson and North American. The record shows that Advance persisted in soliciting in Broward County after North American had made Advance aware of Ferguson's contract and ordered Advance to stop soliciting. Of course, North American may not be held vicariously liable for tortiously interfering with its own contract. Finally, even if there were any inconsistency, it should be resolved against Advance, which did not present oral argument before the Fourth District and failed to seek further review.

II. WHETHER ADMISSION OF EVIDENCE AND ARGUMENT CONCERNING NORTH AMERICAN'S NET WORTH AND PRIOR SETTLEMENT WITH FERGUSON TRANSPORTATION REQUIRES RETRIAL OF THE CONTRACT CLAIM?

If this Court accepts jurisdiction in this case, its review is not limited to the certified question. See Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012, 1014 (Fla. 1977). Thus, if jurisdiction is accepted, this Court should vacate the judgment with respect to the contract claim and remand for a new trial. The contract claim must be retried, for two reasons.

First, the trial court permitted plaintiff, over North American's objection, to introduce evidence of North American's net worth prior to the jury verdict on liability. At the time of trial, North American's net worth was $198,479,144. Counsel for North American objected to admission of this evidence on the ground that "if it is ultimately determined it [punitive damages] is not an issue in this case then that information is highly prejudicial[.]" (R.247-248; 1268-1272). This Court has now held, in W.R. Grace & Co. - Conn. v. Waters, 638 So.2d 502 (Fla. 1994), that evidence of a defendant's net worth may be introduced only after the jury decides that punitive damages are warranted. This error alone requires a remand and retrial on compensatory damages. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

Second, the trial judge permitted plaintiff to introduce evidence concerning a prior breach of contract and settlement agreement that was utterly irrelevant and severely prejudicial to the breach of contract claim at issue in this case. North American moved in limine to preclude the introduction of evidence pertaining

to the 1974 contract infringement and settlement agreement, and was granted a continuing objection. (R.1883-1884; 2222-2223; 78; R.111-112) Nevertheless, the trial court not only admitted the settlement documents but permitted Ferguson Transportation to make the prior breach of contract the theme of its entire lawsuit. From opening to closing argument, plaintiff repeated the claim that this case involved breaches of contract over an 18-year period. (R.18-19; R.67-68; R.106-117; R.1457-1459; R.1580; R.1613).

Plaintiff argued that this evidence was relevant to the assessment of punitive damages. Even if plaintiff were correct, the tort claim should never have gone to the jury, for the reasons discussed above. The prior settlement evidence could not properly have been admitted had the issue been solely one of breach of the 1983 exclusive agency provision. There was no disputed issue regarding the 1983 contract to which the earlier settlement documents and events were relevant. (R.2938) Evidence of a prior breach, remote in time, must be excluded as irrelevant and unfairly prejudicial. Section 90.403, Florida Statutes; United States v. King, 713 F.2d 627, 631 (11th Cir. 1983), cert. denied, 466 U.S. 942 (1984); Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949); Johnson v. Girtman, 542 So.2d 1033 (Fla. 3rd DCA 1989); Ehrhardt, Florida Evidence (1992) § 404.3. Because the admission of the settlement evidence severely prejudiced North American's defense of the breach of contract claim, the award of compensatory damages on that claim should be reversed and remanded with instructions for a new trial on both liability and damages.

CONCLUSION

For the foregoing reasons, if the Court accepts jurisdiction, the first part of the certified question should be answered "No"; the second part of the certified question should be answered "Yes"; the judgment of the Fourth District Court of Appeal reversing the judgment on the tort claim and the award of punitive damages should be affirmed; and the final judgment entered on the breach of contract claim should be reversed and remanded for a new trial.

Respectfully submitted,

MARK E. HADDAD
DONALD H. SMITH
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C 20006
(202) 736-8000

MARJORIE GADARIAN GRAHAM
Florida Bar No. 142053
Marjorie Gadarian Graham, P.A.
Northbridge Centre, Suite 1704
515 North Flagler West Drive
Palm Beach, FL 33401
(407) 655-9146

Attorneys for North American
Van Lines, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand this **2nd** day of November, **1994**, to: **Jack Scarola, Esq.,** P.O. Drawer 3626, West Palm Beach, FL 33402-3626; and to **Edna L. Caruso, Esq.,** Suite 3-A/Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401.

Respectfully submitted,

MARJORIE GADARIAN GRAHAM
Marjorie Gadarian Graham, P.A.
Northbridge Centre, Suite 1704
515 N. Flagler Drive
West Palm Beach, FL 33401
(407) 655-9146

By: Marjorie Gadarian Graham
Marjorie Gadarian Graham
Florida Bar No. 142053