

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 69,202

AFM CORPORATION, a Florida corporation,
Plaintiff-Appellee,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH
COMPANY, a New York corporation,
Defendant-Appellant.

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

APPELLANT'S REPLY BRIEF

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KHC462a/lm(4)

INTRODUCTION

The parties and record will be cited as in Southern Bell's initial brief ("IB"). AFM's Answer Brief will be cited "AB". The Amicus Curiae Brief of the Academy of Florida Trial Lawyers ("the Academy") will be cited "AC". Unless otherwise stated, all emphasis herein is supplied.

AFM expounds at length, initially for some nine (9) pages with subsequent sprinklings throughout, on the purported facts. Much of what is stated is irrelevant to this proceeding, however. The Yellow Pages errors (AB, pp. 1-3, 5-8, 37, 40-41), for example, should never have been admitted because: (1) they occurred months or even years after the call reference service that formed the basis of AFM's suit, indeed after AFM had ceased operations and been dissolved (R6-19-24; 2SR-26-32); (2) they were expressly excluded by the trial judge as a basis for compensatory damages (R6-20-22), and thus cannot support punitive damages (IB, pp. 43-45); and (3) call reference and directory listing are logically and operationally separate and distinct (R6-29-37, 41-42; SR2-27-28). Likewise irrelevant are the initial delay of two days and the first interruption in service in November 1980 (AB, pp. 3-4), for, as AFM concedes and the Eleventh Circuit found (Appendix at 4945), AFM sought no damages for these incidents.

Much else is inaccurate or misleading. Three examples will suffice. First, Southern Bell did have procedures to prevent reassignment of business phone numbers, which were the same as those applicable to residential numbers (R6-61-62, 111; 1SR2-1-9, 18-22). AFM's assertions to the contrary (AB, pp. 6-7) are based on testimony that there were

no procedures exclusively for business numbers. ^{1/} Second, although Landsea may not have recognized other variables than the call reference problem impacting on sales (AB, p. 29), AFM's own President and Vice-President clearly did (R6-105, 114-115; SR-66; IB, pp. 13-14). Third, AFM states that Broward sales increased and Dade sales dropped during the time that the reference service was discontinued (AB, p. 29), while precisely the opposite is true: Broward sales decreased almost 50% from April to June 1981 (R6-114-116), and Dade sales increased from \$20,000 in March to \$50,000 in June (IB, pp. 13-14).

ARGUMENT

I. There Was No Independent Tort.

AFM asserts that its claim sounds in tort (AB, pp. 11-19), first because Southern Bell, prior to trial, denied the existence of any contract. While this latter statement is true, it means nothing. This Court need not determine whether AFM proved a valid contract. It probably did ^{2/}, though it later disavowed the contract theory and now

^{1/} AFM is correct, however, that Southern Bell lacked procedures for notifying clients of an inadvertent service lapse (AB, pp. 6-7), for the obvious reason that Southern Bell could not give notice of a problem it did not know about.

^{2/} Southern Bell contended before trial, for a variety of reasons including lack of consideration, that there was no valid contract to provide the call reference service. Indeed, Southern Bell contended that AFM's claim was not viable under any known legal theory. At trial, however, the evidence developed otherwise. AFM introduced evidence of an oral agreement to supply the service, which, although free of monetary charge, was nonetheless supported by consideration in the form of detrimental reliance, forbearance, or mutual promises. The testimony established that AFM decided not to keep its 944 number when it moved to Hollywood, only because Southern Bell agreed to refer calls from the 944 number to the new number. AFM could have kept the old number, in which case no call reference would have been necessary (See AB, pp. 2-3).

denies the contract's validity (AB, pp. 11-15). Instead, the issue is whether AFM proved an independent tort.

AFM's own description of the nature of the transaction belies any assertion that its claim was not properly in contract: "Southern Bell agreed to provide the reference of calls service"; "AFM relied on this promise" (AB, p. 15). These are classic words of contract, not tort. Indeed, absent this agreement by Southern Bell, there could be no claim at all, as it is undisputed that Southern Bell had no other obligation whatever, apart from this agreement, to provide call references to AFM (AB, pp. 12-15). Thus, the consequence of there being no contract is not, as AFM would have it, that there is a tort, but rather that there is no cause of action at all. If Southern Bell did not agree to provide the service, its failure to do so to AFM's liking has no legal effect.

AFM's discussion of the tort liability of a volunteer (AB, pp. 15-19) is inapposite. The duty, as AFM quotes Prosser, is to "exercise reasonable care to avoid physical harm to persons and property of others" (AB, p. 16). The cited cases thus involve personal injury - Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932)(burning of plaintiff's head and scalp in the course of administering a permanent wave), Kaufman v. A-1 Bus Lines, Inc., 416 So.2d 863 (Fla. 3d DCA 1982)(slip and fall injury while on a tour) - or property damage, Fidelity & Casualty Co. of New York v. L.F.E. Corp., 382 So.2d 363 (Fla. 2d DCA 1980)(suit for damages to a revenue control system caused by lightning strike), Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2d DCA 1979)(suit against architects and contractors for negligent supervision, construction and repair of a roof resulting in

damage to the roof, damage to the exterior and interior walls and loss of rent). These injuries, of course, are well within the traditional ambit of tort law. ^{3/} None of them involve, as this case does, a purely economic injury divorced from physical damage to people or things.

Thus, while there is a distinction between misfeasance and non-feasance, it is not the one urged by AFM (AB, pp. 16-19). To use Banfield's facts by analogy, nonfeasance of the contract for giving a permanent wave is simple breach, e.g., applying a solution which fails to make curls in the hair or failing to apply any solution of any kind. Misfeasance, which the case concerned, is the burning of plaintiff's scalp during the course of attempting to perform. The former is the "breach of an ordinary contract which involves no element of tort", 140 So. at 895; the latter is a "wrongful act, outside of the letter of the contract", for the "breach of a collateral duty, the gist [of which] is a personal tort." Id. at 896. Obviously, plaintiff would have the right to sue for

^{3/} Indeed, the torts therein are independent acts which would constitute torts absent any contractual relationship between the parties. One may sue for this type of tort "irrespective of any contract" to perform the services which occasioned its commission or "whether the undertaking...was for hire or merely gratuitous." Banfield, 140 So. at 897. "Where a transaction complained of has its origin in a contract for service...[and] in attempting to perform the promised service a tort is committed, then the breach of the contract is not the gravamen of the suit brought to recover damages for the tort. And in such case the contract is considered mere inducement, creating the state of things which furnishes the occasion of the tort, but not the basis of recovery for it, and in all such cases the remedy is an action ex delicto on the case." Id. at 896, quoted in Fidelity & Casualty, 382 So.2d at 368. The omission to perform a mere contract duty may not be a tort, unless a "legal duty arises independently of or concurrently with the contract." Banfield at 896; Woodbury v. Tampa Waterworks Co., 57 Fla. 243, 49 So. 556, 561 (Fla. 1909) (cited at AC, p. 12).

the head injuries even without a contract, ^{4/} because the "tort charged is not a mere nonfeasance, but a positive act of misfeasance." Id. at 897.

In this case, AFM has proven only nonfeasance -- simple failure to provide the agreed service. No other act or conduct constituting the requisite "something more than mere nonfeasance in the performance" has ever been asserted. Id. at 897. If, for example, Southern Bell had trespassed upon and destroyed AFM's premises or assaulted one of its employees in the course of providing services, that would be misfeasance. In sum, misfeasance does not involve mere negligent performance, i.e., performance which is unsatisfactory in light of the performance promised, but rather an additional act, which, although it occurs during the course of a contractual relationship, would be tortious under any circumstances. Southern Bell therefore agrees with AFM that Splitt v. Deltona Corp., 662 F.2d 1142 (5th Cir. Unit B 1981) clearly

^{4/} The Academy mentions several old cases holding that one may elect to sue in contract, tort or both for the breach of a duty stemming from contract (AC, pp. 11-16). This is without doubt true in a proper case - where the breach is also an independent tort coincidentally committed in a contract context. The cases cited by the Academy, like those cited by AFM, all involve personal injuries actionable without any grounding in contract. Doyle v. City of Coral Gables, 159 Fla. 802, 33 So.2d 41 (Fla. 1947), Parrish v. Clark, 107 Fla. 598, 145 So. 848 (Fla. 1933), Holbrook v. City of Sarasota, 58 So.2d 862 (Fla. 1952). In the instant case, however, there was no duty or "positive tort", Parrish, 145 So. at 850, apart from the contract. Assuming arguendo that there was such a tort, however, contrary to the Academy's implication (AC, p. 14), AFM was allowed to plead both contract and tort and to elect at trial which one it wished to pursue to collection. It opted for tort where no tort claim existed, jettisoning the contract not only as a legal theory of recovery but also as the source of the purported duty which was breached. Thus, the Academy's argument regarding duties arising from contract is of no moment, as AFM declared that this was not such a duty.

expresses the "distinction between misfeasance and nonfeasance" (AB, p. 18). The Court there held, however, that plaintiff pled no claim for misfeasance, i.e., negligence:

To find negligence a duty must be breached....What duty did Deltona breach? Plaintiffs respond that it was the duty to complete performance specified in the contract: the duty to perform on time and advise plaintiffs when that became impossible. Under plaintiff's theory every breach of contract would be an act of negligence and the general rule of punitive damages distinguishing tort and contract would be meaningless.

Id. at 1147. AFM's assertions herein are virtually identical: Southern Bell undertook a duty "to perform or provide the reference of call system and...[was] negligent in so providing the service" (AB, pp. 18-19). This is not "a separate independent tort of negligence" (AB, p. 19), but an ordinary breach of contract. ^{5/} Hence no punitive damages may be awarded. The rule and its underlying policy, as expressed in the seminal case of Lewis v. Guthartz, 428 So.2d 222, 223 (Fla. 1982), remain valid today: compensatory damages "as substituted performance" are an adequate remedy for breach of contract, and the award of punitive damages, even for a flagrant, unjustified and oppressive breach, would inject "uncertainty and confusion into business transactions."

II. AFM Cannot Recover Lost Profits.

A. The Law

Southern Bell does not quarrel with the general notions that injury should be justly compensated with damages proximately resulting from

^{5/} The Academy cites Nicholas v. Miami Burglar Alarm Co., Inc., 339 So.2d 175, 177-178 (Fla. 1976) (AC, p. 16). To the extent it has anything to do with this appeal, it supports Southern Bell's position, as the negligent failure to perform the contract there was expressly held not to be an independent tort.

the wrongful act (AB, pp. 18-19), or that tort duty may sometimes arise from a contract (AC, pp. 11-14). If AFM had not waived both the contract cause of action and any claim that the duty it asserted derived from the contract, Southern Bell would not challenge AFM's right to seek lost profits. By its own actions, however, AFM has chosen to remove all contract vestiges from the case. The issue, accordingly, is whether lost profits are an item of damage properly recoverable for a tort claim having no contract basis. No Florida case which has squarely considered the question has ever so held, and the cases cited by AFM (AB, pp. 18-19) do not discuss the question at all. ^{6/}

The discussion of "election of remedies" (AB, pp. 20-22) is inapposite. This case does not involve different remedies (e.g., rescission v. damages v. replevin) but only different causes of action (breach of contract v. tort). The remedy for either cause of action is the same -- damages. The issue here is the proper measure of damages for the respective causes of action, not election between mutually exclusive remedies.

The discussion of "privity" (AB, pp. 23-25) is likewise irrelevant. "Privity" was, of course, replaced by "foreseeability" as the limit upon

^{6/} Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984) and Safeco Title Insurance Co. v. Reynolds, 452 So.2d 45 (Fla. 2d DCA 1984) had both tort and contract claims. Lucas Truck Service Co. v. Hargrove, 443 So.2d 260 (Fla. 1st DCA 1983) is not a tort case at all, and its only reference to lost profits is for breach of contract and related violation of statute. City of Lake Worth v. Nicolas, 416 So.2d 886 (Fla. 4th DCA 1982) involved a claim for "lost profits" admitted only because it concerned plaintiff's claim for past and future loss of income and earning capacity in a personal injury action. Taylor Imported Motors, Inc. v. Smiley, 143 So.2d 66 (Fla. 2d DCA 1962) disallows lost profits in a tort case as too remote.

third-party recovery for negligence in certain kinds of cases. See, e.g., A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973). There is no issue as to the existence of privity between AFM and Southern Bell, however. AFM has merely opted to waive the source of that privity -- the contractual relationship -- as a basis for recovery and attempted to substitute in its place a cause of action entirely in tort having no reference to contract.

AFM has wholly failed to refute, even to confront, the only relevant cases in Florida. ^{7/} Lost profits are contract damages which may not be recovered in a pure tort action, and having abandoned any reliance on contract theory or duty (R2-128; 1SR2-95; R6-164-165, 167), AFM may not recover contract damages.

B. The Proof

AFM's argument as to proof of profits is in two parts. First, it argues (AB, pp. 25-28) that there was some damage in fact. Whatever

^{7/} Sprayberry v. Sheffield Auto and Truck Service, Inc., 422 So.2d 1073 (Fla. 1st DCA 1982) and Greater Coral Springs Realty, Inc. v. Century 21 Real Estate of Southern Florida, Inc., 412 So.2d 940 (Fla. 3d DCA 1982).

The Academy restates the certified question (AC, pp. 6-7). Southern Bell, of course, agrees that lost profits are recoverable for negligent breach of duty arising from contract. This is not the issue here, however, because AFM expressly withdrew any assertion that the duty arose from contract. The Academy further questions the ancestry of Greater Coral Springs Realty and Sprayberry (AC, pp. 7-11). Southern Bell accepts the analysis of Ashland Oil, Inc. v. Pickard, 269 So.2d 714 (Fla. 3d DCA 1972), cert. denied, 285 So.2d 18 (Fla. 1973), but submits that, despite the apparent confusion engendered by the courts' reliance on Ashland, the holding of Greater Coral Springs Realty and Sprayberry is nonetheless valid. The true genesis of these cases is McCormick on Damages. (Greater Coral Springs Realty at 941). Even if Ashland is suspect as authority, the treatise is not. As Professor McCormick has noted, there is, and logically should be, a (Footnote continued on next page.)

may be the law elsewhere, ^{8/} however, it is clear in Florida that lost profits resulting from erroneous directory listings will not be presumed. Instead, the proof must be: (1) of net rather than gross profits; (2) of particular customers lost; and (3) that the loss resulted from the company's alleged breach. Augustine v. Southern Bell Telephone & Telegraph Co., 91 So.2d 320 (Fla. 1956). AFM's proof fails all three tests, and its brief makes not a pretense at justifying those failures or distinguishing Augustine.

Second, as to the amount of alleged lost profits, AFM argues, in reliance solely on non-Florida cases, that it need only satisfy some nebulous standard of fairness or accuracy (AB, pp. 28-33). It is undeniably the law in this state, however, that past profitability (proof of profits for a reasonable time prior to the breach) is a prerequisite to lost profits damages (IB, pp. 20-23). It is likewise true that net profits must be proved, as distinguished from gross profits (IB, pp. 23-24), and in determining net profits, officers' salaries must be deducted (IB, pp. 24-25). AFM apparently believes these rules unjust (AB, pp. 30-33), but has nowhere denied that they control in Florida or that it failed to meet them. The stringent requirements for proof of lost profits reflect the fact that such damages are inherently speculative and

(Footnote continuation from previous page.)
distinction between the damages recoverable in a tort case and a contract case, because of the different aims served.

^{8/} Citing telephone cases from other jurisdictions, AFM implies that such damages are presumed from the fact that the companies sell advertising on the premise that it enhances business. That advertising may improve sales does not necessarily mean that it improves profits.

conjectural. Sound policy thus supports the necessity for reasonable certainty in the proof of such damages (IB, pp. 12-13).

III. AFM Cannot Recover Punitive Damages.

A. The Law

AFM concedes, though the Academy does not, that the Eleventh Circuit's second question, whether a negligent or willful breach of contract alone can constitute an independent tort, must be answered in the negative (AB, p. 42; AC, pp. 15-16). The leading case, of course, is Lewis, 428 So.2d 222, which held that even a flagrant and oppressive breach (much less the negligent one certified as at issue here by the Eleventh Circuit) cannot support punitive damages. See also Merrill Lynch, Pierce Fenner & Smith, Inc. v. Anderson, 12 FLW 40 (Fla. 1st DCA, December 22, 1986) (where there was no tortious conduct independent of the conduct constituting a breach of the parties' agreement and the only duty owed arose out of the contract, there was no conduct constituting an independent tort). AFM further admits that Southern Bell Telephone & Telegraph Co. v. Hanft, 436 So.2d 40 (Fla. 1983) is controlling (AB, p. 42). ^{9/} The other cases cited are irrelevant. ^{10/}

^{9/} Jewelcor Jewelers & Distributors, Inc. v. Southern Ornaments, Inc., 11 FLW 2487 (Fla. 4th DCA, November 26, 1986) is not conflicting. In reliance on Lewis, the court held that "gross negligence" under a sublease could not sustain punitive damages, because the "negligence is inherent in the breach of contract action" and thus "it is not an independent tort as required under Lewis." 11 FLW at 2487. Curiously, neither AFM nor the Academy even mention Lewis in their briefs.

^{10/} These cases concern circumstances, not applicable here, where punitive damages are awardable even absent compensatory damages: Nales v. State Farm Mutual Automobile Insurance Co., 398 So.2d 455 (Fla. 2d DCA 1981) (specific jury finding of liability but no compensatory damages solely because plaintiff had not met the (Footnote continued on next page.)

B. The Proof

Despite AFM's conclusory attempt to miscast Southern Bell's conduct at pp. 33-41 of its brief, AFM concedes elsewhere that what happened was "inexplicable" and the result of "routine" (AB, p. 4). Mistakes were made, human errors occurred, and AFM's promised call reference service lapsed twice, for a total period of four months. On both occasions, the service was promptly restored when Southern Bell was notified. For the remaining eight months of the year that the service was originally to run, AFM registered no complaints at all. This hardly smacks of deliberate wrongdoing, malicious intent, or even reckless indifference. See American Cyanamid Co. v. Roy, 11 FLW 544 (Fla. October 23, 1986). As the Academy concedes, this case "does not involve allegations of willfulness on the part of Southern Bell" (AC, p. 4). Notwithstanding AFM's conclusion to the contrary (AB, p. 37), Southern Bell did try to rectify the problems. Indeed, it succeeded in doing so, fully performing the agreement at least two thirds of the time. ^{11/} See Hanft, 436 So.2d at 43 (total and twice repeated omissions of plaintiff's name from directory listing; that efforts were ineffective and failure unexplained did not support punitive damages but rather showed absence of willful and malicious conduct);

(Footnote continuation from previous page.)

"no-fault" threshold); Eglin Federal Credit Union v. Curfman, 386 So.2d 860 (Fla. 1st DCA 1980)(special verdict form with express finding of liability); Lassitter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976) (nominal damages).

^{11/} As at trial, AFM also argues that subsequent Yellow Page errors may be considered on the question of punitive damages (AB, pp. 40-41). This is plainly what the jury did, as this evidence was expressly excluded for purposes of compensatory damages. The prejudice is manifest (See IB, pp. 43-45).

Ten Associates v. Brunson, 492 So.2d 1149 (Fla. 3d DCA 1986) (punitive damages improper as a matter of law where defendant apartment owner, although negligent as to security systems, made an attempt to provide security and a security guard was on duty at the time of the incident).

IV. AFM's Closing Argument Was Improper.

AFM asserts that Southern Bell failed to timely object to AFM's arguments, and thus the motion for mistrial was properly denied due to the lack of contemporaneous objection (AB, p. 44). ^{12/} The cases cited are distinguishable and inapplicable -- distinguishable because the objection there was not made until after the jury retired, while the objection here was made immediately upon closing before the jury retired (1SR2-159-160), and inapplicable because the contemporaneous objection rule in the federal system means that objection to improper closing should be made "at the close thereof and before the case is submitted to the jury." See, e.g., Thomson v. Boles, 123 F.2d 487, 496 (8th Cir. 1941), cert. denied, 315 U.S. 804 (1942).

^{12/} Strangely, AFM does not anywhere defend the propriety of its closing but urges only that the remarks were not "so inflammatory as to warrant a new trial" (AB, p. 45).

CONCLUSION

For the foregoing reasons, the certified questions should be answered "No."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been mailed this 29th day of January, 1987 to: Christopher Lynch, Esquire, Adams, Hunter, Angones, Adams, Adams & McClure, 66 West Flagler Street, Miami, Florida 33130; and Wayne C. McCall, Esquire, Ayres, Cluster, Curry, McCall & Briggs, P.A., Post Office Box 1148, Ocala, Florida 32678.

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