

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM  
BEACH, FL 33401

TIMLEE COMMERCIAL,  
INVESTMENTS, INC., SEAWAY  
SMOKEHOUSE, LLC, and MARTIN  
MULDERRIG,

Appellant,

V

JEFFREY NIELSEN,  
Appellee,

Case No.: 4D2023-2178

Lt No – No 502020CA000108

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Appeal from the Circuit Court of the Nineteenth Judicial Circuit, in and for  
Saint Lucie County, Florida

**Appellants, Timlee Commercial Investments, Inc., and Seaway  
Smokehouse, LLC Initial Brief**

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## **SUMMARY**

The instant case began with the filing of the initial complaint on January 20, 2020. R. 24-28. The complaint was amended on two occasions with the second amended adding additional parties. R. 127-128. The case devolved into a discovery battle where ultimately on February 17, 2022, the Trial Court took the extraordinary step of striking the Appellant's pleading, defaulting the Appellants, and ordering monetary sanctions. R. 301-303. No further discovery except for a Request for Admissions was sought by the Appellee following this order and no further motions to compel were filed. No further discovery except for a Request for Admissions and discovery in aid of execution was sought by the Appellee following this order and no further motions to compel were filed. App. Docket Summary. The case then proceeded to a bench trial on damages. R. 513-516. Two witnesses testified at the trial. The Appellee called an expert witness, Mr. Ferraro, a CPA, who testified to alleged damages. The Appellants' called one of the Defendants, Martin Mulderrig, and sought to have him declared an expert as he was an accountant by trade and prepared all the financial and tax documents for the Appellants. App. P. 82 Lns. 22-25, P. 85 Lns. 16-22. The Trial Court declined to consider Mr. Mulderrig as an expert. R. 770. At the end of the proceedings, the Trial Court entered a written judgment against

the Appellants for all damages sought by the Appellee through its expert's testimony. R. 775-780. This appeal followed the entering of the judgment. R. 897-900.

## **INITIAL BRIEF**

### I. Standard of Review.

The standard of review to vacate a final judgment is abuse of discretion *Silva v. De La Noval*, 307 So. 3d 131 (Fla. 3d DCA 2020) “An appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion.” *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013). If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. *Id.* at 135.

Florida's Supreme Court has found that, “the appellate standard of review generally applied to all trial court orders [is] that an appellate court properly applies a de novo standard of review to a trial court's conclusions of law in an order granting a new trial based on the manifest weight of the evidence, giving no deference to the trial court's legal conclusions.” However, although a trial court's conclusions of law are not entitled to deference, its findings of facts and determinations of credibility are still

entitled to deference because of the trial court's superior vantage point of having been present during the entire trial. *Van v. Schmidt*, 122 So. 3d 243 (Fla. 2013).

A trial court's ruling on a motion for directed verdict is reviewed de novo. *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009). "When an appellate court reviews the grant of a directed verdict, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Frenz Enters., Inc. v. Port Everglades*, 746 So. 2d 498, 502 (Fla. 4th DCA 1999).

II. The Trial Court abused its discretion by making findings of fact contrary to the evidence.

As noted above, the standard of review of this issue is abuse of discretion. *Silva* at 134.

This Court has found, "When a default is entered, the defaulting party admits all well-pled factual allegations of the complaint." *Phadael v. Deutsche Bank Trust Co. Ams.*, 83 So. 3d 893, 895 (Fla. 4th DCA

2012) (citing *Donohue v. Brightman*, 939 So. 2d 1162, 1164 (Fla. 4th DCA 2006),” *Kotlyar v. Metro. Cas. Ins. Co.*, 192 So. 3d 562, 565, (Fla. 4th DCA 2016). “Likewise, a default terminates the defending party’s right to further defend, except to contest the amount of unliquidated damages.” *Id.*

(citing *Donohue*, 939 So. 2d at 1164). “We have consistently held that, “[a] default admits a plaintiff’s entitlement to liquidated damages under a well-pled cause of action, but not to unliquidated damages.” *Talbot*, 142 So. 3d at 967 (quoting *BOYI, LLC v. Premiere Am. Bank, N.A.*, 127 So. 3d 850, 851 (Fla. 4th DCA 2013); *Minkoff v. Caterpillar Fin. Servs. Corp.*, 103 So. 3d 1049, 1051 (Fla. 4th DCA 2013); *Bodygear Activewear, Inc. v. Counter Intelligence Servs.*, 946 So. 2d 1148, 1150 (Fla. 4th DCA 2006).

Furthermore, “[i]t is well-settled that “[a] defaulting party has a due process entitlement to notice and an opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial interpretation of the amount of unliquidated damages.” *Bodygear* at 1150 (quoting *Asian Imports, Inc. v. Pepe*, 633 So. 2d 551, 552 (Fla. 1st DCA 1994). In other words, while entry of a default terminates the defendant’s right to contest liability or the plaintiff’s entitlement to liquidated damages, entry of a default does not deprive the defendant of the right to a hearing to determine damages which are unliquidated.” *Id.*

A judge's finding of fact in a nonjury case will be affirmed where there is competent and substantial evidence to support those findings. *Morales v. Rosenberg*, 919 So. 2d 476, 479 (Fla. 3rd DCA 2005). “A finding of fact by a judge in a nonjury case will be affirmed where there is competent and substantial evidence to support those findings. *Abreu v. Amaro*, 534 So. 2d 771 (Fla. 3d DCA 1988) *Abreu*, 534 So. 2d at 772 (citing *Laufer v. Norma Fashions, Inc.*, 418 So. 2d 437 (Fla. 3d DCA 1982)).” *Silva v. De La Noval*, 307 So. 3d 131, 134, (Fla. 3rd DCA 2020). The inverse then is true and in a non-jury trial where there is not competent and substantial evidence to support a finding, there must be a reversal.

In the instant case the Trial Court made findings of facts that were clearly contrary to the facts in evidence. The Trial Court’s Final Judgment for Plaintiff Awarding Damages Against Timlee Commercial Investments (Hereafter “Timlee”), Inc., Martin Mulderrig (Hereafter “Mulderrig”), Cliff Johnson, Seaway Smokehouse, LLC. (Hereafter “Seaway”), Tillman’s International Group, Inc. and San Miguel Archangel Treasure Tours, Inc., and Seaway Smokehouse, LLC a Florida Limited Liability Company, (Hereafter “Final Judgment”), states in part, “The Court finds and determines that Mr. Ferraro calculated damages using 2018 as a base year for calculations even though he had information from which to base his

calculations from 2019. Ferraro testified that despite having financial documents for 2019, said documents would have resulted in a higher loss to the Plaintiff, JEFFERY NIELSEN and he therefore chose to use a more conservative approach by utilizing and considering the 2018 tax year for his calculations.” R. 675-698.

This finding of fact is contrary to the facts in evidence. All the Trial Court needed to do was to look at the report the Appellee’s expert provided that was entered into evidence as Plaintiff’s exhibit 1. R. 675-698. Page twelve (12) of the report shows Net Profits and Loss from Seaway, the restaurant generating income for all the Appellants. R 688. Nielsen’s share was determined by the income of Seaway which passed through Timlee. App. P. 48. Lns. 13-15, P. 90 Lns. 17-20.

The formula to determine Mr. Nielsen’s share is simple and is agreed upon by both parties. Mr. Ferraro, the Appellee’s expert (hereafter “Ferraro”) Ferraro, testified,

“Q. Okay. So, we can take the profit and he [Nielsen], gets a third of the profits.  
Correct.” App. P. 48. Lns. 13-15.

Mulderrig’s testimony confirms this formula. He testified,

“Q. You take the profits of the entity, and you take a third of that and that’s what Mr. Nielsen is entitled to right?  
A. Yes” App. P. 90 Lns. 17-20.

The profit for 2018, “the representative year”, was \$168,733.00. The Profit for 2019 was \$40,938.00. As the Appellee’s distribution is based on profits, the Appellee was due less, not more, in 2019 than in 2018. This evidence, provided by the Appellee, shows definitively that the Trial Court’s finding that, “Mr. Ferraro testified that despite having financial documents for 2019, said documents would have resulted in a higher loss to the Plaintiff...” is contrary to the facts. This finding grossly overstates the actual damages, making the Trial Court’s finding of fact clearly wrong on its face requiring a remand.

Ferraro went on in this same analysis of profits to examine 2020. R. 664-673. In 2020, the net profit for Seaway was \$31,145.00, much less than 2018’s, \$168,733.00 “the representative year,” used by Ferraro. 2020 is another example of the Trial Courts’ findings being unquestionably contrary to the evidence. The Trial Court’s finding in this regard is contradicted by the Appellee’s own expert who, on cross examination admitted the truth,

“Q. And is it just coincidence that 2008, if we stick with those numbers, would give Mr. Nielsen the highest damages?

A. Did you say 2008?

Q. 2018, excuse me.

A. 2018. I don't know what's -- if it's a coincidence. We used that as basically the base year, you know, it's but for the

– you know, but for the separation or the breakup, we would think that 2018 would be a normalized representation year.” P.45 L. 25, P. 26 Lns. 1-9.

As the Trial Court made this finding, which is unarguably inconsistent with the undisputed evidence, it abused its discretion which dictates a remand to determine actual damages.

There is another clear instance of the Trial Court not following the facts, an inconsistency on its face of the Final Judgment. The Final Judgment also states in part, “The Court finds and determines that Mr. Ferraro did not have access to all of the books and records of the various Defendant corporations and LLC’s due to the lack of production and failure to produce by the individual and business entities defendants which is adequately documented throughout the court file by numerous Orders granting Motions to Compel and Order Granting sanctions.” This finding is inconsistent with the finding just discussed, where the Trial Court found that from Ferraro’s testimony, as to “having financial documents for 2019.” This fact established by the Appellee clearly shows that Final Judgment itself is wrong on its face, requiring remand.

An explanation as to how the Trial Court could, with the testimony given at trial, find that the records necessary for Ferraro to do his job were not provided, can be found in a unprompted statement by the Trial Court. In

responding to an objection, the Trial Court talked about how it would “figure out what’s competent, credible evidence and what isn’t’ competent, credible evidence. App. P. 93, Lns. 14-16. The Court goes on to talk about what it termed the “800-pound gorilla ...”, problems with discovery. App. P. 93 Lns. 17-21. The Trial Court then goes through the default and other sanctions that were imposed upon the Appellant. App P. 93 Lns. 22-25, App. P. 94 Lns. 1-19. The Trial Court then refers to a transcript of a hearing held on January 28, 2022, and reads part of it into the record. App. P. 94 Lns. 20-25, 95-96 Ln 17. Trial counsel for the Appellant points out to the Court that the statements made by Attorney Burns, a former attorney for the Appellant, were not under oath and should not be considered. Id. App. P. 93-97 Lns. 1-25. The Trial Court responded “It’s not evidence in this case because all I’m trying today is damages. It has nothing to do with liability.” App. P. 96 Lns 15-17. Despite this statement the Court clearly had this transcript on top of its mind.

The Appellants contend that this transcript is highly prejudicial as again, it is unsworn statements by an attorney who is attempting to save himself from being held responsible for his discovery violations and blaming it on his clients who were not present to defend themselves. R. 264-299. Mulderrig did give unprompted trial testimony before the Trial Court made

the above cited comments about Mr. Burns and his involvement in the discovery violation. Mulderrig testified,

“Q. So the documents you produced were extensive?

A. I know the first production produced over 10,000 documents. It filled Charles Burns, our first attorney’s trunk, the records.” App. P14 Lns 2-4.

As the final order mentions, the Trial Court’s finding that the Appellee did not have the documents needed to prove damages, it must have disregarded sworn statements of Mr. Mulderrig in favor of unsworn statements by a former lawyer. The fact that the Trial Court raised the issue of Mr. Burn’s statements without being prompted shows a bias on its part that existed prior to the trial. This bias explains why the Trial Court, despite its claim, ignored Mulderrig’s testimony.

Since the Trial Court made finding that are clearly contrary to the evidence, it abused its discretion, requiring a remand with instruction for a new trial.

III. The Trial Court abused its discretion by considering the opinions of an expert witness not supported by the facts or evidence.

As noted above, the standard of review for this issue is abuse of discretion as to the findings of fact and the de novo standard for review of

conclusions of law. *Van* at 246.

“It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data. See *Martin v. Story*, 97 So.2d 343 (Fla. 2d DCA 1957)” *Husky Indus. v. Black*, 434 So. 2d 988, 992, (4th DCA 1983). “An expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.” *Id. Martin v. Story*, 97 So. 2d 343 (Fla. 2d DCA 1957) (opinion based on incomplete information is not admissible). Further, Section 90.507, Florida Statutes (1989), states that if a “party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.” *Young-Chin v. Homestead*, 597 So. 2d 879, 882, (Fla. 4th DCA 1992). The “opinion of an expert witness cannot be used to form the basis for a conclusion in the absence of evidence.” *Kelly v. Kinsey*, 362 So. 2d 402, 404 (Fla. 1st DCA 1978).

The Trial Court allowed and considered the testimony of Ferraro, even though his testimony made it clear his opinions were not supported by competent facts. As an overview of the relevant testimony, because it is too voluminous to be reproduced here, in seventy-three (73) pages of

testimony, Ferraro used the words assume, assumed, assuming, assumption, and assumptions twenty (20) times. App. P.15 L. 25, P. 48 L. 19, P. 17 L. 23, P. 26 L.15, P. 43 L. 1, P. 52 L.18, P. 70 L. 2, P. 75 L. 20, P. 76 L. 22, P. 17 L. 18, P. 71 L. 4, P.18, L. 10, P. 44 L.13, P. 30 L. 5, P.54 L.6.

Ferraro's testimony is replete with assumptions not facts to prove the Appellee's damages. A good example is his testimony regarding the Covid -19 period, which in no way proves the Appellee's damages as it does not contain a single fact.

"Q. Now, Mr. Ferraro, I know that because you did not have certain documents available to you, you had to make certain assumptions, and I'd like you to educate the Court on why you believe that these numbers were true and correct and represented valid numbers through the COVID-19 period when many restaurants failed and some succeeded.

A. Well, again, we did not have -- we did not have complete records, again, to basically analyze, but one of the things that's happened, based on my experience, is, you know, COVID, there was PPP loans that were basically forgiven. There was, you know, local state loans that were also basically provided, and the business -- the restaurant business, you know, survived on takeout business, which reduced the cost of labor significantly. So I've actually had experiences where the entity actually did better in COVID, the restaurants did actually better in COVID. So I did not use -- again, because we did not have the detailed information, I did not, you know, negatively impact it because of COVID." App. P. 18 Lns. 21-25, P 19 Lns. 1-12.

Ferraro makes this statement with the knowledge that the restaurant

was out of business in 2022. App. P. 70 Lns 1-20. Despite this knowledge Ferraro claims the pandemic has no effect on Seaway Smokehouse. App. P. 19 Lns 1-15. The fact that Ferraro did not have facts to support his opinion about the pandemic is clear. Id. However, Ferraro's lack of foundation may be best shown in his evaluation of the value of the business. His testimony in this regard follows:

“Q. Have you ever gone to Seaway Smokehouse?

A. I've driven by it.

Q. When was the last time you drove by it?

A. I believe in November of '22.” (P. 67 Lns. 22-25, Pgs. 68-70, P. 71 Lns. 1-9)

Q. Was it open?

A. Not when I drove by.

Q. Has it been open since November 22?

A. Quite honestly, I'm not sure.

Q. When you're valuating the worth of a business, do you take into consideration whether that is a going concern and operating business.

A. Absolutely. But the premises we're using on this is but for. In other words, we're basically saying but for, in this case, you know, the actions of the defendant, that this is what would have happened but for, and so in that context it doesn't make any difference.

Q. So going to this Bizcomps that you put in your report, why are you using a sit-down restaurant? This isn't a sit-down restaurant, is it?

A. No. I understand.

Q. Then why are you using that in your numbers?

A. I believe -- I believe it's the same industry, and I believe the same metrics hold true.

Q. Okay. But here you're confident in the valuation of the business by using -- you used actual revenue numbers for 2019, 2020, 2021 here? Or did you just use 2018?

A. I used 2018.

Q. Okay. So you did not take into consideration anything that was going on in the business in 2019?

A. No

Q. 2020 ?

A. No.

Q. 2021 ?

A. No.

Q. 2022 ?

A. No.

Q. Do you agree that a restaurant is more valuable if it's an up and running enterprise?

A. Yes. " App. P. 67 Lns. 22-25, Pgs. 68-70, P. 71 Lns. 1-9 P 68 Lns 1-25, P 69 Lns 1-11

This testimony makes it clear that Ferraro did not have a basis for his opinion. On this issue there can be no claim for lack of documents due to default. This is an instance of an expert not doing the work and demonstrates the misguided impression of the law, despite the defaults the Appellee needed to prove its damages. What is clearly indicated by Ferraro's lack of efforts in doing a proper evaluation. He sat on his laurels with the default, expecting as he received, a rubber stamp from the Trial Court.

Ferraro was so confident in his position that he need not prove damages that he makes this ultimate misguided assumption testifying,

"Q. So you made the assumption that nothing changed from 2018 through 2022?

A. Correct." P. 57 Lns. 16-18

Not only is that opinion incredibly broad and not supported by the facts, but it is also obviously wrong as the restaurant went out of business while controlled by its current owner, non-defendants although since Ferraro did not do even this most basic research he did not know. App. P. 67 Lns. 22-25, Pgs. 68-70, P. 71 Lns. 1-9 P. 68 Lns 1-25, P 69 Lns 1-11

To note another inconsistency in Ferraro's opinion he earlier testified that the costs, including labor went up not down during the COVID period. App. P. 20 Lns. 7-11. This is of course a clear contradiction to the testimony reproduced above where he stated the PPP loans "reduced the cost of labor significantly. App. P. 18 Lns. 21-25, P 19 Lns. 1-12. Ferraro's testimony regarding damages contains clear contradictions. He testified about the valuation of the business stating, In the answer to one question testifies that the most reliable number is the price to revenue multiple, he then testifies without any foundation, I thought the seller's discretionary earnings was a better multiple." In the answer to one question Ferraro testifies that the most reliable number is the price to revenue multiple, he then testifies without any foundation, "I thought the seller's discretionary earnings was a better multiple." App. P. 26 l. 25, P.27 Lns. 1-17.

Ferraro, when claiming he was unable to explain increased costs recognized the reality, that things change such as inflation, while failing to apply in the instant case. He testifies,

“Q. Do you keep track of interest rates going up and down or other financial conditions in the country?

A. I'm aware that they go up and down.

Q. So you're aware that inflation has gotten out of hand and we're increasing interest rates to try to reduce inflation?

A. And increasing prices, but the --

Q. Correct. You increase costs; right? That's what the Federal Reserve is doing to slow down the economy, let's increase costs. Is that not true?”

A. Right. P. 60 Lns. 16-25, P. 61 L. 1.

Since the Trial Court relied on the testimony of Ferraro which lacked foundation, it abused its discretion, the Appellee's case should be dismissed as to not give the Appellee a second bite at the apple to prove damages, or in the alternative, a remand with instructions for a new trial.

The Appellant biggest challenge with the Appellee expert Ferraro was to try to get him to testify as to what records he relied on. This lack of clarity began with direct examination when he testified that he was provided with a “mishmash of things” and does not point to a single document. P.13 Lns. 20-25, P. 14 Lns. 1-5. Ferraro lacked a foundation for his opinion as he could not, even with his notebook to refresh his memory, what documents, with any specificity, he relied on. App. P. 16, Lns 6-15. P. 42 Lns. 14-25, P.43 Lns. 1-21. It is mystifying and prejudicial to the Appellant, as they could not perform a proper cross, why Ferraro was unable to identify with any sort of precision, on direct examination, what documents he relied on. Ferraro goes

on to testify on direct examination that, we used a lot of -- you know, a lot of the documents, we created a notebook, of some of the primary documents, tax returns, financial statements, some of the agreements, some of the payroll tax returns an example of a Clover sales report, and some other information that “we pulled relative to databases.” *Id.*

Ferraro testified repeatedly when asked to support his opinion that he did not have all the records necessary to determine the facts and therefore based his opinions on assumptions. Ferraro repeated questions about supporting document, which came from a leading question from Appellee’s trial counsel, “Now Mr. Ferraro, I know because you did not have certain documents available to you, you had to make certain assumptions...” App. P. 18 Lns. 21-23. Ferraro repeated very similar answers throughout his testimony. He seems to indicate that the Appellee and the Trial Court misunderstood the law. The burden of proving damages rested solely with the Appellee. *Montage Grp., Ltd. v. Athle-Tech Comput. Sys., Inc.*, 889 So. 2d 180, 195 (Fla. 2d DCA 2004). *Phadael* at 895, *Donohue* at 1164, *Kotlyar* at 565.

Ferraro makes his misunderstanding of law clearly known as he explains what he did and what his goal was.

“Q. Is your goal here to tell the Court what the actual damages are

or is your goal here to make an assumption that you can get the maximum amount that's due?

A. Okay. My goal is to basically give my opinion as to what I think the damages are sustained by Mr. Nielsen in this case based on assumptions that had basically been ..”( P. 55 Lns 20-25

Ferraro makes assumptions based on the defaults entered and therefore seems to relieve himself of the requirement to prove damages. The following are some examples of this testimony:

“Q. Did you actually use these or did you just stick with 2018?

A. I used 2018 because we -- you know, our assumption was that income was siphoned off or expenses were increased after 2018, and a more normalized year would be to use 2018.” App. P.37 Lns. 20-25, P.38 Lns. 1-7.

Ferraro’s testimony, upon which the Trial Court relied, shows that he had no actual knowledge of the discovery process and could not provide a detailed explanation of what documents were available to him. App. P. 13 Lns. 19-25, App. P 14 Lns. 1-6, App. P. 16 Lns. 1-16, App. P. 23 Lns. 12-25, App. P. 34 Lns. 22-25, App. P. 35 L 1. App P. 33 Lns. 14-21, App 40 Lns. 1-4, App. P. 45 Lns. 3-18, App P. 56 Lns. 1-8. Ferraro’s lack of knowledge as to what documents he had available to him is contrasted by Mr. Mulderrig’s clear statements as to the production of over 10,000 documents, that he provided or attempted to provide all documents requested, that the records

filled three banker boxes, and that the financials of the Appellant entities could be determined by using the documents produced. App. P. 87 Lns. 10-25.

Ferraro's conflicting testimony as to what documents he had available to him could not have been foreseen by the Appellant. Out of frustration Counsel for the Appellant moved to enter into evidence a listing of documents produced to the Appellants, by the Appellee, documents that were unquestionably available to Ferraro. The Court admitted the document list into evidence. R. 716-722. Many of the documents claimed not to be available are listed on this document showing that in fact these documents were available to Ferraro. An example of what was actually produced by the Appellee are: "2019 partnership return seaway smokehouse" (R 717). "2019 tax return" (R. 719). "2020 SS tax return" (R.719). "2019 Timlee and ss balance sheets" (R. 718). "2019 tax return Timlee" (R. 717). "2020 tax return Timlee" (R. 717). "Profit & Loss, December 2019" (R. 721). "Profit & Loss, December 2020" (R.721). "Profit & Loss, December 2021" (R. 721).

Ferraro had no explanation for why if records were not produced and despite the Trial Court's orders, no further attempts were made to secure the necessary information. App. 2020CA000108 – Case Docket. The

Appellee failed to even take the deposition of Mulderrig who was not only a party but was also the accountant that prepared all financial records for the Defendant entities. *Id.* Docket info. It is evident that the Appellee was operating under a misunderstanding of law as he made no effort to get the necessary evidence to prove damages believing that the allegation in the complaint that records were not provided, admitted by default, relived him from the requirement to prove damages. Which is contrary to the law. The burden of proving damages rested solely with the Appellee. *Montage* at 195.

Ferraro's testimony about key categories of damages, tax returns, bank statement and Clover reports, changed when confronted by the fact that he had access to them or when he required them to support his reliance on only 2018 business records. Ferraro after testifying that had to rely on the 2018 tax returns to form his opinion then admits he had looked at the 2019 tax return, but he did not "believe the tax returns." P.51 Lns. 6-14. Yet when Ferraro was attempting to authenticate a document the tax returns were reliable, App. P. 66 Lns. 1-15.

Ferraro initially testified about the role of bank statements in creating his opinion, then when confronted with the fact that they were available through the Appellee, as a signatory of the accounts, as he claimed they

were not available to him his testimony changed. He testified, “ I believe we -  
- I believe he said the accounts -- I don't recall. I don't recall whether I asked  
him that or not... Well, the bank accounts aren't necessarily what -- you know,  
in other words, we -- to recreate the books -- we weren't charged with basically  
recreating the books. Books were already in existence. They just weren't  
produced. And if we would have had books, we would have basically been  
able to ask intelligent questions, you know, to be able to analyze the  
expenses.” App. P. 41 Lns. 4-19.

Ferraro, through his testimony shows that his claim that he did not  
have complete banking records to identify revenue and expenses for all the  
years in question is a red heron as the Appellee had access to these  
records. Ferraro testified that he had the clover reports which he describes as  
“**essentially the cash register**, the system they use to control the sales of the  
business.” Emphasis added. App. P. 23 Lns. 1-8. Only on cross examination  
did Ferraro admit he had the 2019 clover reports for which to determine and  
confirm the profit on the tax returns. App. P.63 Lns. 20-23. He was in fact so  
familiar with the 2019 Clover report, that after he admitted he had it said he  
could have it emailed during trial. App. P. 67 Lns 13-15. As demonstrated  
above, Ferraro had the clover reports which he describes as “essentially the  
**cash register**, the system they use to control the sales of the business.”

Emphasis added. App. P. 23 Lns. 1-8. Only on cross examination did Mr. Ferraro admit he had the 2019 clover reports stating,

“Q. Okay. But you did -- because you had the 2019 Clover reports that’s where the tips are coming from; right?  
A. Right.” App. P.63 Lns. 20-23.

He goes on to testify,

“Q. Can you get the Clover reports from 2019 emailed to us?  
A. Sure.” App. P.67 Lns. 13-15.

The fact that Ferraro had multiple years of Clover reports demonstrates that he did not need to make assumptions as to 2019 and the following years as he had the underlying evidence to make a precise determination of damages. The fact that Ferraro had, but did not use, the clover reports for 2019 definitely shows that he based his opinion on an unnecessary assumption, the 2018 base year, as he had the necessary evidence to determine actual damages in 2019 and on.

Ferraro when pressed, ultimately stated that he had no evidence to support his opinion that the Appellee was entitled to distributions in excess of what he received along with showing he had the records through 2021 as he was able to determine what distributions were made. App. P. 53 Lns. 4-25, P. 54 Lns. 1-7.

The Trial Court could not have reasonably found the assumptions made by Ferraro to be reasonable and further, it could not have reasonably found that Ferraro's lack of documents necessary to do his work making any assumptions unnecessary. Therefore, the Trial Court abused its discretion requiring a reversal and a remand.

IV. The Trial court abused its discretion by considering impermissible testimony and finding damages which are contrary to the law.

As noted above, the standard of review for this issue is abuse of discretion as to the findings of fact and the de novo standard for review of conclusions of law. *Van* at 246. The burden of proving damages rested solely with the Appellee. *Montage* at 195. Also, "The plaintiff bears the burden of proving an entitlement to lost profits.");

A category of damages Ferraro testified to is the Appellee's loss of tips. R. 699-707. Ferraro testified that the tips were distributions to owners. App. P.22 Lns. 12-19. In addition to his opinion that lost tips can be damages for someone who did not work and Seaway following 2018, the inclusion of these damages is legally improper.

This Court in *State Dept. of Transp. V. Manoli* 645 So. 2d 1093, 1094

(Fla. 4th DCA 1994) found that where salaries paid to business owners were not deducted before calculating lost profits the expert's testimony was based on misconception of the law and was inadmissible. Also see *FU Sheng Indus. Co., Ltd. V. T/F Systems, Inc.* 690 So. 2d 617, 623 (Fla. 4th DCA 1997) *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 75, 80 (Fla. 4th DCA 2010) (reversing lost profits award and remanding for entry of defense judgment because plaintiff introduced evidence of only some fees it would have incurred but failed to deduct general overhead expenses); *Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc.*, 619 So. 2d 6, 8 (Fla. 5th DCA 1993) (holding that plaintiff failed to carry burden of proving costs and expenses that it had to deduct from income when calculating lost profits); *Physicians Reference Lab., Inc. v. Daniel Seckinger, M.D. & Assocs., P.A.*, 501 So. 2d 107, 109 n.1 (Fla. 3d DCA 1987) (rejecting nonbreaching party's argument that breaching party's failure to present evidence warranted affirmance of damages award because nonbreaching party bore burden of proving lost profits). Because they introduced no evidence of the costs they would have incurred in servicing and collecting the disputed loans, they failed to carry that burden, and the trial court should have granted AMH's motion for an involuntary dismissal. See Fla. R. Civ. P. 1.420(b); *Allard v. Al-Nayem Intern., Inc.*, 59

So. 3d 198, 201 (Fla. 2d DCA 2011) "Involuntary dismissal is proper where there is inadequate proof at trial on the correct measure of damages."); *St. Petersburg Hous. Auth. v. J.R. Dev.*, 706 So. 2d 1377, 1377 (Fla. 2d DCA 1998) (reversing order granting rehearing, entered after court had originally found that plaintiff failed to introduce sufficient damages of expenses to support lost profits, because "[t]his procedure improperly allows appellee a 'second bite at the apple' at proving damages, an element of proof that should have been proven at trial"); *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 830 (Fla. 4th DCA 1999) (reversing damage award, remanding for entry of defense judgment because plaintiff failed to prove expenses in support of claim of lost profits, and rejecting approach that would have "allow[ed] a second bite at the apple when there has been no proof at trial concerning the correct measure of damages"). *Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Invs., LLC*, 42 Fla. L. Weekly D2216 (Fla. 2d DCA October 18, 2017). The Appellee through his expert presented evidence of loss of income that impermissible failed to deduct all expenses, including distributions the owners, and or managers, and the increase cost in his calculation of lost profits. Ferraro testified as to increased cost, claiming that the increase in costs was by judicial default money siphoned off by Neilsen partners. App. P. 61 Lns 2-20. When asked, Ferraro testified that he

has no facts to support a claim that money was siphoned off. App. P. 49 Lns. 1-5.

Ferraro testified and the Trial Court accepted testimony as to lost profits and the value of the Seaway. Ferraro in his reports page, shows the amount of damage claimed which equals what the Appellee received in the Final Judgment. R. 676. The awarding of these two categories of damages by the Trial Court is legally insufficient. If a business is completely destroyed, the proper total measure of damages is the market value of the business on the date of the loss. *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) . If the business is not completely destroyed, then it may recover lost profits. *Aetna Life & Cas. Co. v. Little*, 384 So. 2. 213, 216 (Fla. 4th DCA 1980). A business may not recover both lost profits and the market value of the business. *Montage* at 180,192, *Sostchin v. Doll Enters., Inc.*, 847 So. 2d 1123, 1128 n.6 (Fla. 3d DCA), review denied, 860 So. 2d 977 (Fla. 2003); *Trailer Ranch, Inc. v. Levine*, 523 So. 2d 629, 631 (Fla. 4th DCA 1988) .

A party seeking lost future profits based upon a wrong, the party must prove that the lost profits were a direct result of the defendant's actions and that the amount of the lost profits can be established with reasonable certainty. Difficulty in proving damages or uncertainty as to the amount will

not prevent recovery as long as it is clear that substantial not merely nominal damages were suffered as a result and the competent evidence is sufficient to satisfy the mind of a prudent, impartial person as to the amount. However, an award of lost profits cannot be based on mere speculation or conjecture. *James Crystal Licenses* at 73, *Whitby v. Infinity Radio Inc.* 951 So. 2d 890, 898 (quoting *Forest's Mens Shop v. Schmidt*, 536 So. 2d 334, 336 (Fla. 4th DCA 1988)) .

In *Aetna* at 213, this Court found, "Lost profits and loss of use may be a proper item of damages if the property or business is not completely destroyed See *Hillside Van Lines, Inc. v. Matalon*, 297 So.2d 848 (Fla. 3d DCA 1974). However, where the property or business is totally destroyed we hold the proper total measure of damages to be the market value on the date of the loss, *Allied Van Lines, Inc. v. McKnab*, 331 So.2d 319 (Fla. 2d DCA 1976)." This Court must also consider the facts, as presented by Ferraro, Seaway, was not a proven business. R. 688. Seaway went out of business in November of 2022.

As the Court considers impermissible testimony and awarded damages contrary to the law, it abused its discretion requiring a reversal and remand.

V. The Trial Court abused its discretion by denying the Appellants' motion directed verdict.

A trial court's ruling on a motion for directed verdict is reviewed de novo. *Meruelo* at 247, 250. "When an appellate court reviews the grant of a directed verdict, it must view the evidence and all inferences of fact in a light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Frenz Enters.*, at 502.

After the Appellee rested the Appellant moved for a directed verdict based on the argument that the Appellee through his only witness, Ferraro, had failed to prove damages by presenting opinions which had no basis in fact. App. P. 87 Lns. 16-25. The entirety of the discussion regarding the Appellants move for a directed verdict follows:

"MR. CRICKENBERGER: Your Honor, I believe that we can be done now. I'd move for a judgment at this point that there's been no evidence presented supported by actual facts to show any damages. THE COURT: You don't even need to respond to that. I've got a forensic accountant who's testified and has a written detailed report, so I'll deny the motion." App. P. 87 Lns. 16-25.

As detailed above a directed verdict in favor of the Appellant should have been entered for the following reasons.

A reading of the trial transcript is an ideal way for this Court to truly see that Ferraro's opinions were not based on actual facts, as he could not at any point, even with a notebook to refresh his memory, provide clear testimony regarding what documents he had available to him and what documents he considered. App. P. Lns 9-25, P. 16 Lns 6-13. When he did speak about categories of documents, whether they were useful depended on the context of the testimony.

On direct examination he spoke about how tax returns were useful in determining profits and that he used 2018's tax returns as a basis for his opinion. R. 674-673. Then when confronted with the fact that he had available to him the tax returns for the years 2019 through 2021 tax returns he said they did not believe them. App. P. 51 Lns 6-14. Then when referring to a tax return as a basis to authenticate a document the tax returns were again dependable. App. P. 166 Lns 1-15. It was the same with the bank statements. On direct examination, Ferraro testified as to the importance of bank statements and how he used the 2018 records to form his opinion. App. P. 14 Lns 3-5. When confronted with the fact that the Appellee, as a signatory on the account, had access to those records, they became

unhelpful. App. P. 41, Lns 4-19. The same thing is true for Clover Reports, the “cash register” records as described by Ferraro. App. P. 23 Lns 1-8. These were important tools for Ferraro in direct examination, but here again when confronted with the fact he has at least 2019 in addition to 2018, they could not be used to prove damages. App. P. 51 Lns 6-14.

What became clear after the rendering of the Final Judgment is that the Trial Court, like the Appellee, misunderstood the law as to its requirement to prove damages. The burden of proving damages rested solely with the Appellee. *Montage* at 195, *Phadael* at 895, *Donohue* at 1164, *Kotlyar* at 565.

The Appellant’s expectation was that the Trial Court understood that the repeated testimony of Ferraro, that because of a default, he could have an opinion not based on the actual facts, but on assumptions was not admissible testimony. The law is well settled. “It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.” See *Martin* at 343, *Husky Indus.* at 992 “An expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data.” *Id.* (opinion based on incomplete information is not admissible).

Further, Section 90.507, Florida Statutes (1989), states that if a "party

establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data." *Young-Chin* at 882. The "opinion of an expert witness cannot be used to form the basis for a conclusion in the absence of evidence." *Id.* at 882, *Kelly* at 404.

The Appellants do not understand how the Trial Court could have missed the obvious unfounded assumptions that existed in Ferraro's testimony. As mentioned above the most blatant of these unfounded assumptions is his testimony that "nothing changed from 2018 through 2022." App. P. 57 Lns 16-18. This was in addition to Ferraro's testimony that some restaurants thrived because of lower costs during Covid, insinuating the same was true for Seaway, despite his testimony that costs increased at Seaway and with the knowledge that Seaway is out of business. App. P. 67 Lns. 22-25, Pgs. 68-70, P. 71 Lns. 1-9, P 68 Lns 1-25, P 69 Lns 1-11. He also testified that when valuing Seaway, he plugged it into his computer program as a sit-down restaurant when it wasn't, claiming that was correct. *Id.* Of course, the big two ones in this respect were the fact he never visited Seaway and he did not take into consideration that the restaurant was closed in determining a value. *Id.* The above details are not

the only issues with defects in Ferraro's testimony leading to a lack of proving the Appellee's damages.

A review of the instant case de novo demonstrates that the Trial Court erred by not granting the Appellants a directed verdict, requiring a reversal and remand.

VI. The Trial Court erred by not considering Martin Mulderrig to be an expert witness.

As noted above, the standard of review for this issue is abuse of discretion. *Silva* at 134.

The Appellants had only one witness available to them Mulderrig. At the beginning of his testimony Mulderrig testified as to his qualifications. He testified that he is a public accountant and has been one for 42 years. App. P. 84 Lns. 22-25, P.85 L.2. Thirty-six of those years he worked in private practice for Delta Management Group, an accounting and tax business. He has experience in both the preparation of individual and business tax returns, having done more than seven thousand, and more than four thousand respectively. App. P. 85 Lns. 7-15. Mulderrig also testified as to his experience in doing business evaluations having done at least twenty of them. App. P.85 Lns. 16-22. He goes on to testify that he has never had a

valuation, tax return, or any other documents rejected by a court, that he has never been rejected by a court as an expert witness, and never had a bank reject or question a business evaluation he has done. App. P. 85 Lns. 23-25, P. 86 Lns. 1-6. Most importantly, however, he testifies as to his knowledge of bookkeeping and accounting records as he created them. App. P. 86 Lns. 7-11. Counsel for the Appellant asked that Mulderrig be considered an expert. The following excerpt is the complete discussion regarding this issue.

“MR. CRICKENBERGER: Your Honor, at this point I would ask, based on Mr. Mulderrig's experience in accounting and experience with these records, that he be considered an expert for his testimony.

THE COURT: I have told you, never ask that for Judge Schack because Judge Schack said that would be me commenting on the credibility or qualifications of a witness, and that's not my job. I will listen to what he has to say, but I don't declare people. Did you hear me declare Mr. Ferraro an expert?

MR. CRICKENBERGER: No, Your Honor.”

The Trial Court, despite what it declared in open court did consider Ferraro, to be an expert. The Trial Court in its Final Judgment in paragraph four (4) finds, “At the aforementioned trial on damages, the Court heard testimony from the Plaintiff's Expert witness, Frank Ferraro, CPA and from the Defendant Martin Mulderrig. Although the Defendant Martin Mulderrig testified, he was an accountant by trade, he was not permitted to testify as

an Expert witness. After hearing the testimony, the Court finds and determines that it accepts the testimony of the Plaintiff's expert Frank Ferraro, CPA. Mr. Ferraro is a Certified Public Accountant with designations in forensic accounting and business valuations." R. 770.

Importantly nowhere in the record is a rational for why the testimony of Ferraro was taken, without any apparent reservations, while Mulderrig, who has similar educational background and experience who had the most knowledge as to the records of the entities involved testimony was ignored. This is demonstrated by the fact that the Trial Court's Order gives the Appellee everything that it sought through Ferraro. R. 676, R. 769-774.

Fla. Stat. §90.702 controls testimony of experts. It reads, "If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: 1. Testimony is based upon sufficient facts or data; 2. The testimony is the product of reliable principles and methods; and 3. The witness has applied the principles and methods reliably to the facts of the case.

Mulderrig's testimony was the only testimony given that was based in fact as it was supported by the actual records of the entities. App. P. 91

Lns. 16-23. Mulderrig's testimony is the only testimony that is based on reliable principals and methods as they must as they were created in compliance with the rules and procedures of the Internal Revenue Service. The principals and methods used by Mulderrig in creating these documents complied with the IRS rules. He is not only able to apply them to the facts of the case, but also the best witness to do so as he created them. It should be noted also that at least the 2019, tax return was prepared and filed before this lawsuit was brought.

It is clear from the Final Judgment that the Trial Court found Ferraro testimony as to what documents were available to him, when he could not testify as to what documents he has, was somehow more reliable than that of Mulderrig who could testify to all documents produced, as he produced them and created them. In this instance it is Mulderrig that is motivated to rely on the actual records of the entities, because as demonstrated above the damages are dramatically higher if Ferraro's assumptions are used. It is Ferraro, the witness that received \$21,633.00 for his testimony. R. Page 4 of the Final Judgment that was motivated to depend on assumptions not the facts as the facts would show no actual damages were suffered by the Appellee.

The Trial Court went as far as not considering testimony of Mulderrig that was uncontested. Maybe the best example of this is the Trial Court ignoring the testimony from Mulderrig, that is undisputed that Seaway was out of business as of 2022. App. P. 109 Ln 22. The Trial Court could not have taken Ferraro's valuation as reliable when he failed to consider that Seaway was out of business in his valuation, evidence that should have stuck in the Trial Court's mind as it came in conjunction with the bomb shell that Ferraro did not visit Seaway and classified Seaway as a takeout restaurant in doing his valuation.

VII. The Trial Court abused its discretion in not allowing the Appellant to present rebuttal evidence.

The Court did not declare or give any notice to the Appellants that these motions to compel and orders the motions to compel were going to be considered, or that judicial notice was going to be taken of these documents. App. P. 93 Lns 17-21. As such the Appellants did not have an opportunity to present rebuttal evidence and in fact when the Appellant raised questions about issues the court consider to be evidence concerning

the default, they were met with dissatisfaction by the Trial Court. App. P. 79  
Lns. 2-24.

The actions of the Trial Court in on its own initiative to take portions of the record under consideration as a surprise to the Appellants, denying them an opportunity to proper cross examine and to present rebuttal evidence is an abuse of the Trial Court's requiring a reversal. *Probkevitz v. Velda Farms, LLC*, 22 So. 3d 609, 616, (Fla. 3rd DCA 2009). Also see *Gerber v. Iyengar*, 725 So. 2d 1181, 1185 (Fla. 3d DCA 1998).

The same holds true for the transcript raised by the Trial Court. The Appellants, of course, had no possible reasons to think the Trial Court would raise the issue of Attorney Burns so they did not have available to them at trial, the proof that in fact Mr. Burns is a disgraced and disbarred attorney. App Member Profile – P. 3-4. The Trial Court's actions in injecting this issue into the trial created a situation where the Appellants were unable to rebut.

Also, if the Trial Court took judicial notice about motions to compel and the orders derived from them, just out of fairness it should have recognized that after the Appellee secured the default and other sanctions, he did nothing to get any further records to prove his damages. The Appellee is required to prove his damages through competent evidence.

The Appellee made a conscious decision to not seek evidence to prove actual damages and instead hand pick the most beneficial records. This fact would have been clear to the Trial Court if it decided to look at all of the file instead of raising, on its own initiative, those beneficial to the Appellee.

The Trial Court decision to ignore the record with respect to discovery issues, especially in light of the fact that the Trial Court surprised the Appellant with an unprompted review of the Court file to buttress the Appellee's position that a default relieves the Appellee from proving damages by competent evidence is an abuse of discretion. As the Trial Court abused its discretion a reversal with a remand is proper.

### **CONCLUSION**

If this Court is in agreement with the argument of the Appellants in section II, the Appellants request and pray this Court reverse the Final Order and remand for a new trial.

If this Court is in agreement with the argument of the Appellants in section III, the Appellants request and pray that this Court enter a dismissal with prejudice as to not give the Appellee a second bite at the apple to prove damages, or in the alternative, reverse the Final Order and remand for a new trial.

If this Court is in agreement with the argument of the Appellants in section IV, the Appellants request and pray that this Court enter a dismissal with prejudice as to not give the Appellee a second bite at the apple to prove damages, or in the alternative, reverse the Final Order and remand for a new trial.

If this Court is in agreement with the argument of the Appellants in section V, the Appellants request and pray this Court reverse the Final Order and remand for a new trial.

If this Court is in agreement with the argument of the Appellants in section VI, the Appellants request and pray this Court reverse the Final Order and remand for a new trial.

If this Court is in agreement with the argument of the Appellants in section VII, the Appellants request and pray this Court reverse the Final Order and remand for a new trial.

**CERTIFICATE REGARDING SIZE AND STYLE OF FONT**

I HEREBY CERTIFY that the size and style of the font utilized in preparation of the foregoing is 14-point, Ariel and the Word Count is 9886.

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that on February 17, 2024, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties through the Courts Electronic Case Filing System.

Michael Grant – [delphian@att.net](mailto:delphian@att.net)

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Respectfully submitted,

**G.C. Law**

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