**Case No. 4D2023-2061**

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**

**FOURTH DISTRICT**

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**MARIA SANTORO,**

Appellant,

vs.

**THERAPIES FOR KIDS, INC.,**

Appellee.

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An Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

LT. No. CACE20007355

# INITIAL BRIEF ON APPEAL

Respectfully submitted,

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

### CASES

**RULES**

## STATEMENT OF JURISDICTION

The jurisdiction of this Court was invoked pursuant to Florida Rule of Appellate Procedure 9.110(b) through the filing of a timely Notice of Appeal (R.8395-8397).

This appeal is of a Final Judgment entered on August 7, 2023 (R.8384-8394).

## STATEMENT OF ISSUES

### POINT I

**WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE SUMMARY JUDGMENT?**

### POINT II

**WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE ADDUCED AT TRIAL ESTABLISHED APPELLANT LIABLE FOR PLAINTIFF'S CLAIMS?**

### POINT III

**WHETHER THE TRIAL COURT'S AWARD OF $4,482,992.00 IN DAMAGES AND $350,000.00 IN PUNITIVE DAMAGES IS AGAINST THE WEIGHT OF THE EVIDENCE ADDUDICED AT TRIAL?**

**POINT IV**

**WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR REHEARING?**

**POINT V**

**WHETHER THE FINAL JUDGMENT AND TRIAL COURT'S AWARD OF $4,482,992.00 IN DAMAGES AND $350,000.00 IN PUNITIVE DAMAGES TO PLAINTIFF SHOULD BE VACATED DUE TO THE CUMULATIVE EFFECT OF MULTIPLE TRIAL RELATED ERRORS?**

## STATEMENT OF THE CASE

### A. Preliminary Statement

#### 1. The Parties

Maria Santoro will be referred to by name, as "Defendant" or as "Appellant" throughout this brief.

Therapies for Kids, Inc. will be referred to as "Plaintiff" or as "Appellee" throughout this brief.

#### 2. Record References

References to the Record on Appeal are cited as "R.__" or to the 784-page of Record transcripts as "T._" throughout this brief.

### B. Course of Proceedings in the Court Below

#### 1. Complaint, Answer, Affirmative Defenses, Counterclaim

On April 30, 2022, Plaintiff filed an initial complaint (R.82-154).

On May 8, 2020, Plaintiff filed a First Amended Complaint for Damages and Injunctive Relief (R.297-408).

On June 10, 2020, Defendant filed an Answer and Affirmative Defenses that contained a two-count Counterclaim: Breach of Oral Agreement (Count I, ¶¶ 18-23) and Promissory Estoppel (Count II, ¶¶ 24-29) (R.897-941).

On June 7, 2020, Plaintiff filed a Motion to Dismiss Defendant's Counterclaim (R.1311-1317).

On December 15, 2020, Defendant served her Response in Opposition to Plaintiff's Motion to Dismiss (R.3573-2576).

On December 18, 2020, the trial court denied Plaintiff's Motion to Dismiss Maria Santoro's Counterclaim (R.2585-2587.

On January 6, 2021, Plaintiff filed an Answer and Affirmative Defenses to Defendant's Counterclaim (R.2600-2605).

On December 15, 2021, Defendant filed her supplement to her Affirmative Defenses to Plaintiff's First Amended Complaint (R.3710-3718).

On January 10, 2022, Plaintiff moved for leave to file a Second Amended Complaint (R.3802-3899).

On January 18, 2022, the trial court entered an Order denying Plaintiff leave to file a Second Amended Complaint (R.3900-3902).

On August 8, 2022, the parties entered into an agreed order to permit Plaintiff to file a Second Amended Complaint (R.7881-7883).

On August 29, 2022, Appellant filed a Motion to Dismiss the Second Amended Complaint (R.7906-7911).

On August 29, 2022, Appellant filed her Answer and Affirmative Defenses and Counterclaim to Plaintiff's Second Amended Complaint (R.7912-7936).

On September 19, 2022, Plaintiff moved to strike and dismiss Appellant's Answer, Affirmative Defenses and Counterclaim (R.7961-8000).

On January 16, 2023, Defendant filed her reply to Plaintiff's motion to strike and dismiss (R.8063-8071).

On February 15, 2023, the trial court entered an order granting Plaintiff's motion to strike and dismiss (R.8184-8188).

**2. Summary Judgment**

On February 8, 2022, Plaintiff moved for summary judgment as to Defendant's Counterclaim (R.4236-4257).

On February 8, 2022, Defendant moved for summary judgment as to Plaintiff's First Amended Complaint (R.4628-4652), to which on March 11, 2022, Plaintiff filed an omnibus response (R.5995-6362).

On March 14, 2022, Defendant served a Response opposing Plaintiff's MSJ (R.6599-6702).

On April 19, 2022, the trial court entered an Order styled as

"Omnibus Order on April 30, 2022 Hearing" (R.7492-7495).

On April 20, 2022, the trial court entered an Order styled as "Omnibus Order on March 30, 2022 Hearing" (R.7496-7499).

In the two orders, the trial court ruled that,

> "Plaintiff's Motion for Summary Judgment on Defendant, Maria Santoro's Counterclaim is GRANTED. The Court finds that Defendant, Maria Santoro's Counterclaim is barred by the Statute of Frauds. Accordingly, final summary judgment is hereby entered in favor of Plaintiff as to all counts of Defendant, Maria Santoro's Counterclaim."

Orders, April 19, 2022 (R.7492-93) and April 20, 2022 R.7496-97).

**3. Rehearing of Summary Judgment**

On May 4, 2022, Appellant moved the trial court for rehearing of the orders entered April 19, 2022 and April 20, 2022 (R.7504-7519).

On May 9, 2022, the trial court denied rehearing (R.7522).

**4. Trial Order**

On October 17, 2022, the trial court entered an order setting trial (R.8031-8038).

On February 13, 2023, the trial court entered an amended order setting trial (R.8176-8183).

The parties submitted their exhibit and witness lists (R.8325-8346; 8356-8377; 8381-8383.

**5. Motion for Default and Default Final Judgment**

On December 2, 2022, Plaintiff moved for a default against the co-defendants, Victoria Sobrino-Sanchez, Connecting the Puzzle, LLC, and Palm Beach Autism Specialists, LLC (R.8051-8057).

On January 6, 2023, the trial court entered a Default Final Judgment on Liability in Favor of Plaintiff and against Victoria Sobrino-Sanchez, Connecting the Puzzle, LLC and Palm Beach Autism Specialists, LLC order setting trial (R.8058-8062).

**6. Trial Proceedings**

Trial commenced June 26, 2023, and ended June 29, 2023.

Prior to opening statements, the trial court stated for the record that the matter was a trial on liability and damages as to Appellant (T. 5-6) and the co-defendant, Maria Santoro VP, LLC (T.6), and that the matter was a nonjury trial (T.15).

The parties each tendered opening statements. In his opening statement, Counsel for Plaintiff set forth that T4K was founded by Eileen De Oliveira (T.15), and provides,

> "…therapy for children with neurological conditions including cerebral palsy and autism. And some of these children unfortunately require a lot of therapy. And this therapy could be very time consuming. It can last several years, and it's also very expensive. And the evidence in this case will show that in some instances the therapies can cost as much as $3,500 a day or as much as $20,000 a week" (T.16).

In speaking about defendants and their roles in the company, Counsel for Plaintiff stated:

Victoria Sobrino-Sanchez's role was --she was a board certified assistant behavioral analyst. She became responsible for all ABA services (T.19). Maria Santoro was employed since 2009 and her primary responsibility was to handle billing (T.25). And she became responsible eventually for all billings in the company, and she took out a vice president role (T.25). So, Sobrino-Sanchez who's the executive dealing with the patients, and you've got Santoro dealing with the billings. (T.25).

Plaintiff's Counsel then presented a theory of liability:

> "So, the scheme in this case was to divert revenues from Therapies 4 Kids. And we know later now through discovery and the records that they began the scheme as early as 2016, and they ramped it up over time. And what they would do is Santoro would use T4K's provider number with the insurance companies, but then she figured out how to route the billings and the money to this business, (T.26), Connecting the Puzzle that her and Sobrino-Sanchez were receiving revenues from (T.27).

**a) Nole C. Pace**

Nole C. Pace testified for Plaintiff (T.38-172).

Mr. Pace is an attorney (T.40). He began working with Therapies For Kids (T4K) at Chapman and later joined T4K. Mr. Pace identified a flow chart, that included key positions in the company and who held those positions:

> "Yeah. Well, you can see the CEO and president, that was the married couple of Ms. De Oliveira and her husband, Leo; senior vice president, Maria Santoro; administrative director of ABA highlighted in yellow there and vice president of ABA services, that was Ms. Sobrino-Sanchez. And then, you know, that really covered you know, from a revenue standpoint about 60 percent of the business."

T.70, Lines 17-25.

While cleaning out the Weston office, (T.102), Pace located "a profit and loss statement and a transaction record for Connecting the Puzzle" (T.103). According to Pace, the document listed payments to Appellant for "consulting fees" (T. 105).

On cross-examination, Pace stated that he does not consider himself an accountant (T.117).

Pace admitted he could not confirm the information concerning payments to Appellant from the profit and loss statement, and that he had no personal knowledge of the document (T.123-125).

In addressing the desk containing the profit and loss statement, Pace could not account for "any number of other employees in the course of the time that [he was not] there [who] would have had access to that same desk over a 90-day period" (T.151) ("I don't know." *Id.*, at Line 8).

Pace also admitted he was not familiar with the billing systems used ("I don't know about the billing system. I do know about…the general computers that were in the offices") (T.154).

When questioned about "[a]ny moneys that are apparently missing" (T.162, Line 16), Pace testified that he was "not necessarily

sure that millions of dollars disappeared directly from Therapies 4 Kids. What I think is being asserted here is that the clients and the revenue that came along with them are what disappeared" (T.162, lines 19-23)

**b) Eileen De Oliveira**

Eileen De Oliveira testified for Plaintiff (T.173).

Mrs. Oliveira testified that T4K opened in 2005 (T.184), that she hired Maria Santoro in 2009 after a telephone conversation and an interview (T.194-195).

Mrs. Oliveira required Santoro to learn and pursue insurance billing for the company (T.196), as part of the process of providing services is being able to bill the insurance companies (T.197).

Mrs. Oliveira testified that Santoro was not the only person handling billing. There was "a team of few people" (T.198, Line 15).

Mrs. Oliveira testified that as the company grew, Santoro received promotions and higher compensation (T.198, Lines 23-25).

In discussing Santoro's employment agreement, Mrs. Oliveira testified that at the time of hiring, Santoro signed a "noncompete, non-circumvent, nondisclosure contract that I had asked a few

attorneys to work on and to make for us" (T.202, Lines 21-23).

She also testified that funds were "were being diverted" to two companies, Connecting the Puzzle and Palm Beach Autism (T.206), and claimed that "there were other times where they would actually take the patient or steal the patient from us towards the end and bill them through Connecting the Puzzle" (T.206, Lines 19-22).

When asked to identify revenues, Mrs. Oliveira testified as to the following amounts:

2017: $526,296.05 in advertising (T.245, Lines 12-16).

2018: $887,994.49 in advertising (T.246, Lines 9-12).

2016-2017: $10,359,780 in tax revenues (T.247).

2018: $13,680,781 in tax revenues (T.248).

2020: $5,101,615 (T.251).

Mrs. Oliveira then testified as to the totals of ledger payments to Connecting the Puzzle, "a date of 12-30, 2019. So, that captures now all of 2018 and all of 2019 of payments that went to Maria Santoro."

Q: What's the total?

A: The total is $1,262,645. (T.258, Lines 3-10).

Q: If you add both the consulting and the additional fees with sub accounts to Maria Santoro? What's the total?

A: $2,092,916.35 (T.259, Lines 1-5).

The discussion returned to the employment agreement (T.312).

Q: Let me show you what' s been given to me as my copy of what purports to be the employment agreement --comprehensive, it's the employment agreement, the noncompete (T.335). "[W]here does it say that she has a geographic limitation if she decides to leave you, she can't work within 100 miles, within 50 miles, within three counties?" (T.336, Lines 22-25).

A: "I -I don't know" (T.337, Line 1).

When asked if she knew if there was a geographic limitation in the employment agreement, Mrs. Oliveira stated:

A: "No, I do not" (T. 337, Lines 9 -11).

In discussing patient choice, the following discussion ensued:

Q: By the way, did the patients at any time ever sign a form with your company restricting their transfer of their child to a different company for treatment?

A: "Not that I recall" (T.347, Lines 18-21)

Q: "There's nothing to prevent them from doing that, right?" (T.347, Lines 23-24).

A: "…not that I know of, no" (T.347, Lines 25 - T.348, Line 1).

**c) Tammy Sue Kahler**

Tammy Sue Kahler, an employee of Cigna Healthcare, testified (T.398-417) as to the records produced by Cigna.

**d) Mary Montero**

Mary Montero, CFO of T4K testified (T.417-472).

Mrs. Montero testified that she began her employment in 2018 with T4K (T.418).

When asked if other people had access to billing, Mrs. Montero testified that "four" or "six" different people worked on billing (T.469, Line 6).

**e) Alana Fallucca**

Alana Fallucca testified for Plaintiff (T.530-609). Fallucca was employed with Above and Beyond Therapy? (T.531, Lines 9 -10). In 2016 she was working at T4K as a behavior technician (T.533). At that time Victoria Sobrino-Sanchez was her boss (T.534). Mrs. Fallucca testified to having knowledge of a lawsuit filed by Cigna

against Ms. Sobrino-Sanchez, Connecting the Puzzle and Palm Beach Autism (T.587-589). She admitted to reaching a settlement in that case as to her liability (T.590):

Q: And is it true that as part of that agreement to get you off the hook, you agreed to testify on their behalf in this case, right?

A: I agreed to testify truthfully (T.590, lines 14-17).

**f) Maria Santoro**

Deposition segments were played for the trial court (T.613).

**g) Michael Pakter**

Michael Pakter testified as a damages expert (T.628-685). He is a forensic accountant (T.629, Lines 16-18).

Mr. Pakter "prepared a report in February of 16 2022 including spreadsheets that calculated Therapies 417 Kids' economic damages" (T.630, Lines 15-17).

In preparation for his report, Mr. Pakter "interviewed Eileen De Oliveira, the president of Therapies 4 Kids and Mary Montero, the chief financial officer" (T.634, Lines 2-4).

Mr. Pakter's "initial view" of damages "at a macro level was that Therapies 4 Kids had loss approximately $15 million of lost profits

and other economic damages" (T.634, Lines 7-9).

According to his testimony, Pakter based his "initial view" on the "T4K's own financial statements" from "2018 through 2022" (T.634, Lines 12-17).

Mr. Pakter's calculation also was derived from only "six patients that went from Therapies 4 Kids to Defendants' companies" (T.655, Line 25 - T.656, Line 1). Mr. Pakter also "evaluated whether there was any impact of Covid on profitability" (T.636, Lines 14-15).

In address Appellant's pay from Connecting the Puzzle, Mr. Pakter's "schedule 4.3 shows that she received a little over $2.1 million from 2017 to 2021" (T.648, Lines 23-25).

For his services Mr. Pakter was paid $67,000 by Plaintiff (T.682) and expected to receive additional compensation.

**h) Andrew Reisman**

Andrew Reisman testified for Plaintiff as an expert in digital forensics (T.687).

Mr. Reisman created a forensic image of the computer alleged to have been used by Appellant (*ibid.*). He created three spreadsheets (T.688) consisting of activity as to files opened, email activity and

other email activity (T.688-689).

Mr. Reisman did not have the computer files or emails because he admitted that the hard drive had been wiped or scrubbed clean by a common program identified as "CCleaner." Mr. Reisman explained that "the evidence would be unrecoverable" (T.697).

On cross-examination, Mr. Reisman admitted he that had no personal knowledge that the computer he examined belonged to Appellant, and that it was conveyed to him by another (T.706).

## 7. Final Judgment

On August 7, 2023, the trial court entered a Final Judgment in favor of Plaintiff (R.8384-8394). As to Appellant's liability, the trial court awarded Plaintiff $4,482,992.00 (held Appellant jointly liable) and awarded Plaintiff to recover $350,000.00 in punitive damages from Appellant. The trial court also found Plaintiff was entitled to claw back some of the funds paid to Appellant, $321,622.00 (50% of the salary Plaintiff paid to Appellant in 2017-2019).

## 8. Notice of Appeal

On August 23, 2023, Appellant filed a Notice of Appeal (R.8395-8397). This Initial Brief on Appeal follows.

## STANDARD OR SCOPE OF REVIEW

A trial court's order granting summary judgment is reviewed de novo. *Geico Indem. Co. v. Muransky Chiropractic P.A.*, 323 So. 3d 742, 745 (Fla. 4th DCA 2021); *Orozco v. McCormick 105, LLC*, 276 So. 3d 932, 935 (Fla. 3d DCA 2019); *Craven-Lazarus v. Pennymac Holdings, LLC*, 199 So. 3d 1029, 1030 (Fla. 4th DCA 2016); *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

The standard of review of a lower court's application of Florida law is de novo. *Gilliam v. Smart*, 809 So. 2d 905, 907 (Fla. 1st DCA 2002); *Anthony v. Gary J. Rotella & Assocs*, 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005). Mixed questions of law and fact are reviewed de novo, as are questions of law. *Jacobs v. Singletary*, 952 F.2d 1282, 1288 (11th Cir. 1992).

A finding of fact by the trial court in a nonjury case that is not supported by competent and substantial evidence to sustain it is subject to reversal on appeal. *Emerald v. Commercial*, 978 So. 2d 873 (Fla. 4th DCA 2008). When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence

or that the trial court has misapplied the law to the established facts, the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety. *Holland v. Gross*, 89 So. 2d 255, 258–59 (Fla. 1956).

"A denial of a motion for rehearing is reviewed under the abuse of discretion standard." *J.J.K. Intern*, 985 So. 2d at 68. "If reasonable [persons] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 4th DCA 1980). "[W]hen the motion only addresses issues of law the standard of review is de novo." *Bank of Am. N.A. v. Eastridge*, 253 So. 3d 722, 728 (Fla. 5th DCA 2018).

"Abuse of discretion, for the purpose of appellate review, means serious error of judgment, such as reliance on forbidden factor or failure to consider essential factor." *Election Com'rs of the City of Chicago*, 814 F.2d 332 (7th Cir. 1987). "When analyzing a trial court's exercise of its discretion, the appellate court is to determine whether 'reasonable persons could differ as to the propriety of the action taken by the trial court.'" *Ingorvaia v. Horton*, 816 So. 2d 1256, 1259 (Fla.

2d DCA 2002) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

## SUMMARY OF THE ARGUMENT

Point I: The trial court committed reversible error in granting Plaintiff a summary judgment on Defendant's Counterclaim for Breach of Oral Agreement (Count I, ¶¶ 18-23) and Promissory Estoppel (Count II, ¶¶ 24-29). Here, Defendant pleaded that the oral contract was capable of being performed within one year; and that Plaintiff and Defendant annually reaffirmed the agreement. Accordingly, it was error for the trial court resolve the counterclaim in a summary setting.

Point II: The Final Judgment is due to be vacated because the evidence adduced at trial was insufficient to establish Appellant liable for any of the claims Plaintiff sued upon. The trial court's factual findings to equate Appellant's conduct to that of liability for the claims presented by Plaintiff are not supported by competent substantial evidence. When we consider every witness who testified at trial (Nole C. Pace, Eileen De Oliveira, Tammy Sue Kahler, Mary Montero, Alana Fallucca, Michael Pakter and Andrew Reisman), the

collective sum of that testimony does not even come close to liability.

Point III: The Final Judgment contains the trial judge's determination of an award to Plaintiff of $4,482,992.00 in damages and $350,000.00 in punitive damages. The problem with these amounts is that they far exceed the testimony adduced at trial of $2,092,916.35. In this way, the award exceeds the testimony by more than $2,000,000.00. The damages awarded by the trial court also do not comport with a reasonable scrutiny of the evidence, and appear to include damages awarded based upon speculation or guesswork rather than damages as measurable and quantifiable.

Point IV: The trial court reversibly erred in denying Appellant's Motion for Rehearing, as a rehearing should have been permitted, and vacatur of the order granting summary judgment.

Point V: The trial was riddled with a litany of errors, which when viewed cumulatively are not in the aggregate harmless, and which reveal the prejudice to the defense. The excessive damages award ($4,482,992.00 in damages and $350,000.00 in punitive damages) should be vacated with a remand for a new trial.

## ARGUMENT AND CITATION TO AUTHORITY

## POINT I

## WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE SUMMARY JUDGMENT?

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## INTRODUCTION

The trial court committed reversible error in granting Plaintiff a summary judgment on Defendant's Counterclaim for Breach of Oral Agreement (Count I, ¶¶ 18-23) and Promissory Estoppel (Count II, ¶¶ 24-29). Here, Defendant pleaded that the oral contract was capable of being performed within one year; and that Plaintiff and Defendant annually reaffirmed the agreement. Accordingly, it was error for the trial court resolve Defendant's counterclaim in a summary setting.

## RULE OF LAW

A motion for summary judgment under Fla. R. Civ. P. 1.510 is weighed under the standard of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The party moving for summary judgment must identify the pleadings, evidence on file and affidavits, if any, which demonstrate

the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"The party moving for summary judgment has the burden to prove conclusively the nonexistence of any genuine issue of material fact." *City of Cocoa v. Leffler*, 762 So. 2d 1052, 1055 (Fla. 5th DCA 2000) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)); see e.g., *Sierra v. Shevin*, 767 So. 2d 524 (Fla. 3d DCA 2000); *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Duarte v. Wetzel*, 682 So. 2d 1200 (Fla. 4th DCA 1996).

The substantive law will identify which facts are material and which are irrelevant. *Anderson*, 477 U.S. at 248. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.[1] The summary judgment procedure is "not a substitute for a trial." *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264 (Fla. 4th DCA 1971).

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[1] Once a party tenders competent evidence in support of the motion demonstrating the nonexistence of any disputed issue of material fact, the opposing party must come forward and present counter-evidence sufficient to show that a question of fact exists. *Buitrago v. Rohr*, 672 So. 2d 646, 648 (Fla. 4th DCA 1996). Here, the plaintiff failed to introduce the competent evidence to show that there was not a contract capable of being performed in less than one year.

## ANALYSIS

On June 10, 2020, Defendant filed an Answer and Affirmative Defenses that contained a two-count Counterclaim: Breach of Oral Agreement (Count I, ¶¶ 18-23) and Promissory Estoppel (Count II, ¶¶ 24-29) (R.897-941).

On February 8, 2022, Plaintiff moved for summary judgment as to Defendant's Counterclaim (R.4236-4257).

On March 14, 2022, Defendant served a Response opposing Plaintiff's MSJ (R.6599-6702).

In the Response, Defendant pleaded that the oral contract was capable of being performed within one year; and that Plaintiff and Defendant annually reaffirmed the agreement.

On April 19, 2022 and April 20, 2022, the trial court entered two orders, ruling that,

> "Plaintiff's Motion for Summary Judgment on Defendant, Maria Santoro's Counterclaim is GRANTED. The Court finds that Defendant, Maria Santoro's Counterclaim is barred by the Statute of Frauds. Accordingly, final summary judgment is hereby entered in favor of Plaintiff as to all counts of Defendant, Maria Santoro's Counterclaim."

Orders on Summary Judgment (R.7492-93; R.7496-97).

### A. Defendant's Testimony Created a Genuine Issue of Fact

*Pleading*. Defendant's Counterclaim pleaded the existence of an oral contract that was capable of being performed within less than a year, and the parties annually reaffirmed the agreement.

*Testimony*. Defendant was deposed on September 17, 2021 (Videotaped Deposition of Maria Santoro, hereafter as "Depo.") and testified to the terms of her compensation:

> Question:
>
> "…The ten percent that you said that were entitled to get was ten percent of what? Was it a ten percent ownership interest? Was ten percent of profit? Was it ten percent of revenue? Was it ten percent of net income?"
>
> Answer: "Net income."

Depo., p. 192, Lines 24-25; p. 193, Lines 1-4.

> Question:
>
> "[So] there was a promise made that you were going to get ten percent of net income, correct?"
>
> Answer: "Yes."

Depo., p. 193, Line 20-23.

> Question:
>
> "Let's talk about the ten precent -- that she said she promised you."

Answer: "She did."

In speaking about how the parties annually reaffirmed the contract, Defendant testified that "she promised me year after year, and that's why I stayed." Depo., p. 192, Lines 20-21.

Accordingly, the pleadings and summary judgment evidence reveal there are disputed issues of material fact and witness credibility, and the evidence is such that a reasonable jury could return a verdict in favor of Defendant on the Counterclaim.

### B. Defendant's Counterclaim Survived a Previous Challenge Under a Statute of Frauds Analysis

Prior to the summary judgment hearing, the former judge (David A. Haimes) already determined Defendant's Counterclaim was not barred by the Statute of Frauds. Further, the Agreement to pay Defendant ten percent (10%) of T4K's net income is an act that could be performed within less than a year, the reason for denying Plaintiff's prior challenge asserted in a motion to dismiss.

Since the contract was capable of being performed in less than one year, as the former judge determined, Plaintiff should not have been granted a final summary judgment. See *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008) (Only if a

contract could not possibly be performed within one year would it fall with the Statute of Frauds). See also *Browning v. Poirier*, 165 So. 3d 663, 665-66 (Fla. 2015) (It is well settled that oral contracts made unenforceable by the statute because they are not to be performed within a year include only those which cannot be performed with that period.); *Rubenstein v. Primedica Healthcare, Inc.*, 755 So. 2d 746, 748 (Fla. 4th DCA 2000) ("Only if a contract could not possibly be performed within one year would it fall within the statute."). Accordingly, the pleadings and summary judgment evidence reveal there are disputed issues of material fact and witness credibility, and the evidence is such that a reasonable jury could return a verdict in favor of Defendant on the Counterclaim.

### C. The Issue of "Witness Credibility" Was a Matter for Jury Determination, Not for Summary Judgment

The credibility of Defendant's deposition testimony is a matter that should have been put to the jury, and not something to be decided in a summary setting. Indeed, the summary judgment procedure is "not a substitute for a trial," *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264, 267 (Fla. 4th DCA 1971). Accordingly, the Counterclaim was ripe for trial, not summary disposition.

## POINT II

**WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE ADDUCED AT TRIAL ESTABLISHED APPELLANT LIABLE FOR PLAINTIFF'S CLAIMS?**

---

## INTRODUCTION

The Final Judgment is due to be vacated because the evidence adduced at trial was insufficient to establish Appellant liable for any of the claims Plaintiff sued upon. The trial court's factual findings to equate Appellant's conduct to that of liability for the claims presented by Plaintiff are not supported by competent substantial evidence.

## RULE OF LAW

Appellate review of the trial court's factual findings is whether they are supported by competent, substantial evidence. See *Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012); *Woebse v. Health,* 977 So. 2d 630, 632 (Fla. 3d DCA 2008). *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957) defined competent substantial evidence as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.*, at 916.

## DISCUSSION

As Defense Counsel, Mr. Beamer, stated in his closing,

> "Plaintiff has not and will never be able to produce any evidence of wrongdoing by Santoro or MSVP. This record's clear that she didn't solicit client number one. Her testimony has been replete and consistently replete that she has not had contact with -- they called them clients. Let's call them the patients. I think that's a better term for these kids that were treated or their families. She had no contact with them" (T.766, Lines 2-11).

When we consider every witness who testified at trial (Nole C. Pace, Eileen De Oliveira, Tammy Sue Kahler, Mary Montero, Alana Fallucca, Michael Pakter and Andrew Reisman), the collective sum of that testimony does not even come close to liability.

Nole C. Pace's testimony appears to have been offered to introduce a document he found while cleaning out the Weston office, (T.102); a "profit and loss statement and a transaction record for Connecting the Puzzle" (T.103). According to Pace, the document listed payments to Appellant for "consulting fees" (T. 105). He had no other knowledge, nor any other information to establish Appellant did anything other than her job.

Eileen De Oliveira is a witness who had a clear and obvious bias. She voiced suspicions but relied upon the documents provided by her

lawyers upon which to couch her civil claims. She also read testified to monetary amounts that revealed less damage amounts than her own damages expert calculated.

Tammy Sue Kahler, Mary Montero and Alana Fallucca –none of these purported fact witnesses were able to point to even a single act of dishonesty or disloyalty by Appellant. The fact that Appellant had left her job and moved onto other employment is not evidence of any sort of financial mismanagement or scheming.

Michael Pakter is the accounting professional that even the trial court appears to have not found credible. He relied upon documents that were created by the party seeking damages. He blindly accepted the same as credible, then built his assessment on a module of but six patients, then claimed it represented a loss pattern. Then, there is the testimony of Andrew Reisman, the digital forensic expert who admitted he could not even obtain documents from a computer. So, he instead made spreadsheets that revealed no evidence of any wrongdoing.

Here, there simply was not enough evidence to establish that Appellant committed any tort, breached any contract, or committed

any act to rise to the level of liability. It is unclear how the trial court found Appellant liable in the face of the scant evidence offered in the course of a four-day trial. Accordingly, Final Judgment is due to be vacated because the evidence adduced at trial was insufficient to establish Appellant liable for any of the claims Plaintiff sued upon.

## POINT III

**WHETHER THE TRIAL COURT'S AWARD OF $4,482,992.00 IN DAMAGES AND $350,000.00 IN PUNITIVE DAMAGES IS AGAINST THE WEIGHT OF THE EVIDENCE ADDUDICED AT TRIAL?**

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## INTRODUCTION

The Final Judgment contains the trial judge's determination of an award to Plaintiff of $4,482,992.00 in damages and $350,000.00 in punitive damages. The problem with these amounts is that they far exceed the testimony adduced at trial of $2,092,916.35. In this way, the award exceeds the testimony by more than $2,000,000.00. The damages awarded by the trial court also do not comport with a reasonable scrutiny of the evidence and appear to include damages awarded based upon speculation or guesswork rather than damages as measurable and quantifiable.

## DISCUSSION

Eileen De Oliveira testified for Plaintiff (T.173). Confronted with the evidence compiled by Plaintiff's counsel, Mrs. Oliveira testified as to the following total of ledger payments to Connecting the Puzzle, "a date of 12-30, 2019. So, that captures now all of 2018 and all of 2019 of payments that went to Maria Santoro."

Q: What's the total?

A: The total is $1,262,645.00 (T.258, Lines 3-10).

Q: If you add both the consulting and the additional fees with sub accounts to Maria Santoro? What's the total?

A: $2,092,916.35 (T.259, Lines 1-5).

Arguably, Plaintiff did provide testimony of Michael Pakter, a purported damages expert (T.628-685). The trial court appears to have rejected Mr. Pakter's conclusion of $15,000.000.00 in damages. Perhaps this is because Mr. Pakter relied upon what he referred to as his "initial view" of documents created by the very party seeking an astronomical damages determination.

Here, the damages awarded by the trial court do not comport with a reasonable scrutiny of the evidence. It appears that some of

the damages awarded by the trial court are far lost profits. However, at trial, Plaintiff presented minimal evidence of any lost profits, and introduced speculative and self-created documents to present a theory of lost income or gross receipts. Turning to *E.T. Legg & Assocs. v. Shamrock Auto*, 386 So. 2d 1273 (Fla. 3d DCA 1980), the panel held that "[a]s to the damages, the only evidence presented pertained to income or gross receipts, not profits, and testimony concerning expenses did not establish specific dollar amounts. The evidence was therefore inadequate to prove lost profits." In construing revenues, the panel in *Bass Venture Corp. v. Devom, LLC*, 342 So. 3d 821 (Fla. 2d DCA 2022), explained that "the trial evidence was insufficient as a matter of law to support the award of lost profits because it addressed only revenues from the relevant time period, not expenses –or, consequently, profits."

The damages award is $2,000,000.00 or more than testified to by Eileen De Oliveira. The general rule is that damages cannot be based upon speculation or guesswork but must have a reasonable basis in fact. *Smith v. Austin Dev. Co.*, 538 So. 2d 128 (Fla. 2d DCA 1989). Damages for breach of contract claims are economic damages.

This means the damages must be measurable and quantifiable. In Florida, "a party claiming economic losses must produce evidence justifying a definite amount." *Alvarez v. All Star Boxing, Inc.*, 258 So. 3d 508, 512 (Fla. 3d DCA 2018) (citing *United Auto Ins. Co. v. Colon*, 990 So. 2d 1246, 1248 (Fla. 4th DCA 2008). See also *Merle Wood & Assoc., Inc. v. Frazer*, 307 So. 3d 773, 776 (Fla. 4th DCA 2020).

"Economic damages may not be founded on jury speculation or guesswork and must rest on some reasonable factual basis." *Alvarez*, 258 So. 3d at 512 (internal citations omitted). There must be some standard or "yardstick" by which the amount of damages may be adequately determined. *Montage Group v. Athle-Tech Computer*, 889 So. 2d 180, 195 (Fla. 2d DCA 2004) (holding court erred by failing to order appropriate remittitur for unjust enrichment award).

Where there is insufficient evidence to justify any amount on a claim for economic damages, the defendant is entitled to judgment on the claim. *Smith v. Austin Dev. Co.*, 538 So. 2d 128, 129 (Fla. 2d DCA 1989) ("[I]t is incumbent upon the party seeking damages to present evidence to justify an award of damages in a definite amount."); *Berwick v. Kleinginna Investment*, 143 So. 2d 684, 689

(Fla. 3d DCA 1962) ("It is well established that before damages may be awarded, there must be evidence authorizing or justifying the award of a definite amount."). See also *Taylor v. Lee*, 884 So. 2d 222, 224 (Fla. 2d DCA 2004) ("There must be some reasonable basis in the evidence to support the amount awarded.").

It was Plaintiff's burden to present evidence justifying a specific and definite amount of economic damages, which Plaintiff failed to do. That failure yielded a grossly inconsistent damages award.

## POINT IV

## WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR REHEARING?

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## INTRODUCTION

The trial court reversibly erred in denying Appellant's Motion for Rehearing, as a rehearing should have been permitted, and vacatur of the order granting summary judgment.

## RULE OF LAW

The decision to grant rehearing rests in the sound discretion of the trial court. *Allard v. Al-Nayem, International, Inc.*, 59 So. 3d 198 (Fla. 2d DCA 2011). The standard of review of an order denying a

motion for rehearing or reconsideration is abuse of discretion. *Gibson Trust, Inc. v. Office of the Atty. Gen.*, 883 So. 2d 379 (Fla. 4th DCA 2004); *Florida Power & Light Co. v. Hayes*, 122 So. 3d 408 (Fla. 4th DCA 2013).

Under Fla .R. Civ. P. 1.530(b), a party may move for rehearing of final orders in order to give the trial court an opportunity to consider matters which it overlooked or failed to consider. *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) (quoting *Carollo v. Carollo*, 920 So. 2d 16, 19 (Fla. 3d DCA 2004)). Judicial error rather than simple mistake, must be presented by motion to rehear under Rule 1.530. *Schrank v. State Farm Mut. Auto. Ins. Co.*, 438 So. 2d 410, 412 (Fla. 4th DCA 1983).

**DISCUSSION**

On May 4, 2022, Appellant moved the trial court for rehearing of the orders entered April 19, 2022 and April 20, 2022, as to the grant of summary judgment to Plaintiff (R.7504-7519).

Defendant's motion pointed to three concrete reasons why the trial court should have granted rehearing and subsequently vacated the two orders granting Plaintiff summary judgment.

Within less than five days, the trial court had decided to deny the rehearing motion, arguably without even a hearing on any of the merits offered.

On May 9, 2022, the trial court denied rehearing (R.7522).

Here, the trial court committed legal error by failing to exercise reasonable discretion to act, *i.e.*, to even hear the rehearing motion. Where the issue on appeal is legal error (such as the scope of the trial court's authority), or where the trial court declines or fails to exercise its discretion under a misapprehension of the scope of its authority, review is de novo. *J.A. v. Housel*, 271 So. 3d 54 (Fla. 3d DCA 2019). Under these circumstances, the trial court's failure to exercise its discretion constitutes reversible error. *Glosson v. Solomon*, 490 So. 2d 94, 95 (Fla. 3d DCA 1986) ("Where a court is given discretion to act on a matter, refusal to exercise such discretion is error") (citing *Fazio v. Russell Bldg. Movers, Inc.*, 469 So. 2d 844 (Fla. 3d DCA 1985)).

As it stands, in declining to grant rehearing, the trial court abused its discretion. Additionally, the argument contained in Point I of this appellate brief further demonstrates the prejudice flowing

from the trial court's decision to decline to grant any rehearing on the decision granting Plaintiff a summary judgment.

## POINT V

**WHETHER THE FINAL JUDGMENT AND TRIAL COURT'S AWARD OF $4,482,992.00 IN DAMAGES AND $350,000.00 IN PUNITIVE DAMAGES TO PLAINTIFF SHOULD BE VACATED DUE TO THE CUMULATIVE EFFECT OF MULTIPLE TRIAL RELATED ERRORS?**

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## INTRODUCTION

The trial was riddled with a litany of errors, which when viewed cumulatively are not in the aggregate harmless, and which reveal the prejudice to the defense. There was insufficient evidence to establish liability, yet the testimony over a four-day period that essentially offered opinion and suspicion was elevated to fact; damage amounts after a finding of liability flowed from speculation and damages were awarded for losses neither proven nor quantified. The assessment of punitive damages when the collective testimony failed to reasonably establish any wrongdoing –less any intent to financially harm—this state of affairs yielded a grossly excessive damages award and the same should be vacated with a remand for new trial.

## DISCUSSION

"A cumulative error claim asks an appellate court to evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial." *Harrison v. Gregory*, 221 So. 3d 1273 (Fla. 5th DCA 2017). The law recognizes that the cumulative effect of two or more individually harmless errors has the potential to prejudice a party to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility. See *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988).

A cumulative-error analysis evaluates only the effect of matters determined to be error, not the cumulative effect of non-errors. See *United States v. Smith*, 776 F.2d 892, 899 (10th Cir. 1985); see also *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985). The doctrine was rooted in *Gordon v. United States*, 344 U.S. 414 (1953).

The errors raised in Points I and II when viewed cumulatively, are sufficient to warrant vacatur of the excessive Final Judgment and award of $4,482,992.00 in damages and $350,000.00 in punitive damages, with remand for a new trial.

## CONCLUSION

**WHEREFORE,** Appellant respectfully prays that this Honorable Court vacate and reverse the Final Judgment and remand to the trial court with instructions to vacate the orders granting Plaintiff summary judgment; grant Defendant a new trial, or grant any other relief, if any there be at law, as is deemed just and proper, less Appellant suffer irreparable financial harm.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 29th day of November, 2023, a true copy of the foregoing has been furnished pursuant to Fla. R. Gen. Prac. & Jud. Adm. 2.516, via the Florida e-Portal Filing System to all parties and Counsel of Record on the attached Service List.

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## CERTIFICATE OF COMPLIANCE

**I CERTIFY** that the lettering in this brief (Bookman Old Style 14-point Font) complies with the font requirements of Fla. R. App. P. 9.045(b). This brief contains 7,809 words and complies with the word limitations set forth in Fla. R. App. P. 9.210(a)(2)(B).

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