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IN THE DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA SIXTH DISTRICT

JOHN DANIEL SMITH

Appellant,

v.

KENNETH EDWARD KEMP, II, ELIZABETH CLARIE BENTLEY, PATRONE, KEMP, MACE & BENTLEY, P.A.,

Appellees.
_____/

CASE NO.: 6D24-3209
6D24-3444
(consolidated)

L.T..: 21-CA-2959

APPEAL FROM THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE, KENNETH E. KEMP, II, and PATRONE, KEMP, BENTLEY & MACE, P.A. (n/k/a KEMP & MACE)

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STATEMENT OF CASE AND FACTS

While Appellant has predominantly recited the facts accurately, Appellee believes that supplementation to Appellant's statement of the case and facts is necessary.

As there are two separate records, references to the standard record on appeal will be referenced as "(R. at ___)"; while references to the trial transcript record on appeal shall be referred to as "(TR. R. at ___)".

Appellant alleges that Appellee Bentley testified that she did not lose any clients as a result of Appellant's actions, however, Appellee Bentley in fact testified that she did not know how many customers she had lost as a result of Appellant's video and that said number could be zero or could be 5,000. (Tr. R. at 692:15-25).

Appellant fails to state that Appellant was found guilty of contempt of court as a result of his willful, intentional, and contumacious disregard for the discovery process and failing and refusing to provide evidence of financial worth, and as ordered to do so by the Court on the Order adopting the Report and Recommendation of Magistrate, entered on January 4, 2023. (R. at 2153). Appellant was granted an opportunity to purge his contempt within ten days of the order but failed to do so. (R. at 2153 & 2558).

Appellant misstates the jury verdict form creating the impression that the statements concern Appellant ("Mr. Smith") rather than Appellee ("Mr. Kemp"). App. Br. Pg. 30. The Verdict Form properly asks whether Appellee Kemp had proven by the greater weight of the evidence that the statements were made or published by Appellant"; "these statements were about **Mr. Kemp**"; "These statements create a false impression about **Mr. Kemp**"; "the juxtaposition of these statements has a defamatory implication about **Mr. Kemp**"' and so on.

In stating the facts about post-trial motions, Appellant leaves out his Motion for Medical Intervention for Judge Shenko dated September 10, 2023, because Appellant believed that "Judge is displaying symptoms of stroke and/or transient Ischemic Attack". (R. at 2741—2753). Further evidence of Appellant's complete disregard for decorum or respect for the legal process.

SUMMARY OF ARGUMENT

Because appellant has presented his brief as six (6) different issues, Appellees shall address each in order as presented by Appellant. That said, there are many instances where Appellant's argument raises numerous separate issues the exceed the bounds of the matters specifically raised on appeal.

As to the First Issue, Appellees first filed a Motion to amend their Complaint to add a claim for punitive damages against Appellant. The hearing was set six months after the filing of the Motion in compliance with Fla. R. Civ. P. 1.190(f). Appellees filed an Amended Motion two days before the hearing, however, this Amended Motion only include one new paragraph which provided "The proposed third Amended Complaint is attached hereto as Exhibit "'I'". That is the sole difference between the two motions. Therefore, no fundamental error occurred that resulted in a miscarriage of justice.

For the Second Issue, firstly, Appellant and his trial counsel failed to motion to vacate the Court's Order granting Appellee's leave to amend their complaint to add punitive damages, nor did they seek certiorari review of the Court's Order as required by law. Therefore, this issue has been waived by Appellant. Secondly, Appellees provided a proffer that satisfied the Lower

Tribunal in compliance with Fla. Stat. § 768.72(1) and Fla. R. Civ. P. 1.190(f) and the Appellate Courts

Appellant's Third issue fails because a District Court of Appeals "is not permitted to reweigh a trial court's finding of a sufficient evidentiary basis for punitive damages claim, and such a finding could not be disturbed, or even evaluated on certiorari review. Therefore, Appellant's appeal as to this issue must be dismissed. Appellant's argument also fails as Appellee's provided clear and convincing evidence to justify the award of punitive damages.

Appellants Fourth Issue fails because the award of punitive damages was not unconstitutionally excessive as a result of the result of Appellant's own disobedience of the Lower Tribunal's Order and subsequent sanction under the Court Order dated May 16, 2023.

Appellant's Fifth Issue fails because Appellant failed to object to the jury instructions as submitted and read to the jury. Additionally, Appellant was

Appellants Sixth issue fails because the Lower Tribunal granted Appellee's Motion for Contempt more than a month before the first day of trial. The hearing at the start of trial was mere confirmation of Appellant's failure to cure his contempt, resulting in an adverse jury instruction and

removal of Appellant's ability to argue "low net worth" for punitive damages calculations.

ARGUMENT

I. STANDARD OF REVIEW

As a housekeeping matter, Appellees argue that many of Appellant's issues are waived or precluded from appeal such that the standard of review is shifted. Each of these procedural deficiencies will be addressed in each individual issue.

Appellant claims that the First, Second, Third, Fifth and Sixth issues "are being presented as fundamental error" because Appellant did not "raise the issues before the trial court". *See* App. Br. Pg. 35-36.

Florida Courts of Appeal have routinely held that, "in the absence of an objection below, this Court will not consider issues for the first time on appeal except in cases of fundamental error. *Millen v. Millen*, 122 So.3d 496, 498 (Fla. 3d DCA 2013). "Normally, the failure to object to error, even constitutional error, results in a waiver of appellate review." *D'Oleo-Valdez v. State*, 531 So.2d 1347, 1348 (Fla. 1988).

"'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case

or goes to the merits of the cause of action." *B.T. v. Department of Children and Families*, 300 So.3d 1273 (Fla 1st DCA 2020)(quoting *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970)).

The Florida District Court in *B.T.* held, "We are to exercise our discretion under this doctrine "very guardedly." *Id.* "[I]t 'goes to the very heart of the judicial process' and 'extinguishes a party's right to a fair trial,' such that it results in a miscarriage of justice." *Hendricks v. State*, 34 So.3d 819, 830 (Fla. 1st DCA 2010)(quoting *Martinez v. State*, 933 So.2d 1155, 1158, 1159 (Fla. 3d DCA 2006)). "The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Smith v. State*, 521 So.2d 106, 108 (Fla. 1988). "[F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981). Because this appeal arises from a civil action, the standard for fundamental error is higher than that of a criminal case in which due process and liberty interests are most prominent. *Rosier v. State*, 276 So.3d 403, 425 (Fla. 1st DCA 2019)(Makar, J., dissenting)(citing *Norman v. Gloria Farms, Inc.*, 668 So.2d 1016, 1027 n.1 (Fla. 4th DCA 1996)(Farmer, J., dissenting).

Regarding Appellant's Fourth issue, it is alleged that the issue is raised on the basis that the award of punitive damages exceeds the boundaries of due process, however, under the case cited by Appellant, the Florida Supreme Court held that, "Under Florida law, a trial court's determination of whether a damage award is excessive, requiring a remittitur or a new trial, is reviewed by an appellate court under an abuse of discretion standard. *Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1263 (Fla. 2006). If Appellant desires to avail himself of the more flexible "De Novo" standard under the *Engle* case, then Appellant must show that the award of punitive damages "exceeds the boundaries of due process as guaranteed by the Unites States Constitution Appellant". *Id*.

II. Appellee's Motion for Leave to Add Punitive Damages was Timely and Appellant was given notice such that Fla. R. Civ. P. 1.190(f) was not violated.

Appellant allegation that Appellee's filing of a Motion to Add Punitive Damages "just two days prior to hearing on same" constitutes fundamental error is completely without merit. Appellant has not accurately relayed the proper filing or timing history of the motions and an appropriate review of the docket clearly demonstrates that Appellant and his counsel were provided with almost six (6) months of notice and no fundamental error occurred.

Originally, the Motion to Amend to Add Punitive damages (the "Motion") was filed on February 28, 2022 (R. at 13). The Motion was set for hearing on August 4, 2022, (R. at 14), almost six (6) months later. There is no record evidence demonstrating that the hearing was unilaterally set as alleged by Appellant. Appellee's filed an Amended Motion to add Punitive Damages on August 2, 2022, two (2) days before the hearing (R. at 15). The Lower Tribunal entered an Order granting Appellee's Motion on August 10, 2022. (R. at 746).

Firstly, the filing of the Amended Motion does not constitute fundamental error as the Motions are identical save for the addition of the following paragraph in the Amended Motion: "The proposed third Amended Complaint is attached hereto as Exhibit "'I'". Appellant's argument that he was somehow so disadvantaged by the inclusion of this one inconsequential paragraph such that the fairness of his trial was destroyed and a miscarriage of justice occurred is completely without merit. Therefore, the Original Motion was in fact compliant with Fla. R. Civ. P. 1.190(f).

Furthermore, there is no record evidence that Appellant or his counsel moved to vacate the order or for a rehearing. It is evident that Appellant and his counsel accepted the outcome of the hearing. It is inappropriate for appellant to claim fundamental error occurred two (2) years later.

Because there is essentially no difference between the Original Motion and the Amended Motion, it is disingenuous for Appellant to cry foul and allege that the date of filing the Amended motion (to include one procedural statement) extinguished Appellant's right to a fair trial, such that it resulted in a miscarriage of justice, as required by *Hendricks v. State*. Thus, Appellant was properly put on notice of the issues and elements being argued by Appellees at the hearing.

III. Appellant was required to appeal this issue under a Writ of Certiorari, Appellant has failed to provide the Court with record evidence supporting his argument, and Appellee's provided a reasonable showing to the Lower Tribunal to support a claim for punitive damages.

Appellant faces multiple procedural issues that preclude review of Appellant's Second Issue and require affirmation of the Lower Tribunal. Beyond the procedural failings, Appellees provided a significant showing of evidence, attached to their original Motion that provided a "reasonable showing" to support the Lower Tribunal's Order granting the Motion for Leave to Amend.

Firstly, Appellant and his trial counsel failed to motion to vacate the Court's Order granting Appellee's leave to amend their complaint to add punitive damages nor did they seek certiorari review of the Court's Order. Appellant cites to *Walt Disney World Co. v. Noordhoek*, in reliance on a

statement that a trial court must articulate that an identifiable factual basis exists in the record or has been proffered [. . .]". App. Br. Pg. 47. It is important to note that the *Noordhoek* case's procedural posture was that of a Writ of Certiorari. The Court in *Noordhoek*, citing the Florida Supreme Court, stated that "Preliminarily, we note that certiorari is the proper vehicle "to review whether a trial judge has conformed with the procedural requirements of section 768.72...." *Walt Disney World Co. v. Noordhoek*, 672 So.2d 98, 99 (Fla. 3d DCA 1996)(citing *Globe Newspaper Co. v. King,* 658 So.2d 518, 519 (Fla.1995)).

Therefore, Appellant has waived this argument and may not rely on fundamental error in a standard appeal. Indeed, even if Appellant's argument that the Lower Tribunal's Order is deficient in some way, this issue has been waived by Appellant.

Secondly, Florida Courts have held that "We cannot emphasize too strongly the fundamental principle of appellate review that a trial court's findings and judgment come to a reviewing court with a presumption of correctness." *Casiano v. Casiano*, 370 So.3d 991, 995 (Fla. 5th DCA 2023)(citing *Thurman v. Davis*, 321 So.3d 341, 343–44 (Fla. 1st DCA 2021)). "[t]he appellant has the burden of providing a proper record to the reviewing court, and the failure to do so is **usually fatal** to the appellant's claims." *Esaw*

v. Esaw, 965 So.2d 1261, 1264–65 (Fla. 2d DCA 2007)(emphasis added). "Where the nature of the appeal requires that the record include the testimony, where it is not available we will either dismiss the appeal or summarily affirm the order appealed from. *Beasley v. Beasley,* 463 So.2d 1248 (Fla. 5th DCA 1985).

In reviewing the evidence and proffer provided by Appellee's, this Court must review the evidence in the light most favorable to Appellees but before getting to that review, Appellant has highlighted procedural issues that his fatal to his argument. Appellant acknowledges that "it is unclear when the three-ring binder was provided to the court or counsel for appellant, but nothing suggests it was more than 20 days from the hearing". App. Br. Pg. 45. Furthermore, Appellant does not cite any transcript of the hearing on Appellee's Motion to Amend and the Record on Appeal does not contain any such transcript.

Therefore, this Court is unable to determine if the exhibits were presented in a timely or untimely manner; whether the proffer by Appellee's counsel was properly based on said documents, or if other proffer was properly presented to the Court. Given the ruling in *Esaw*, this should be construed as fatal to Appellant's claim and this issue should be summarily dismissed. Furthermore, Appellant is unable to substantiate his claim that

the Court's Order dated August 2, 2022, granting Appellee's Motion to Amend resulted in fundamental error because the record is not sufficient to support such allegations.

Thirdly, regarding the substantive argument promulgated by Appellant, Appellant argues that Appellees "failed to furnish the required evidentiary basis" to support a reasonable basis for recovery of punitive damages and that this failure was followed by the Lower Tribunal's "own failure to make any recognizable evidentiary determination." App. Br. Pg. 45. Appellant attempts to argue that there is a conflict between the jurisdictions as to the quantum of proof required to provide the Lower Tribunal with a reasonable basis to grant leave to amend the movant's complaint. This conflict has no bearing on the Lower Tribunal's consideration on the instant case as the law is presently clear as to the level of proffer Appellees were required to satisfy, that being a "reasonable showing". In fact, the standard is so low that Florida Statutes allow mere proffer to substantiate a Movant's motion.

"In evaluating the sufficiency of the evidence proffered in support of a punitive damages claim, the evidence is viewed in a light favorable to the moving party." *Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P.*, 16 So.3d 1006, 1009 (Fla. 1st DCA 2009). "A party wishing to pursue punitive damages must first file a motion seeking leave of court to file

an amended complaint and then make "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." *Orlando Health, Inc. v. Mohan*, 387 So.3d 477, 482 (Fla. 5th DCA 2024)(citing Fla. Stat. § 768.72(1)), Fla. Stat; *see also* Fla. R. Civ. P. 1.190(f). "In order to perform its function as a gatekeeper, the trial court must understand the specific claim proposed by the plaintiff that may justify an award of punitive damages." *Varnedore v. Copeland*, 210 So.3d 741, 745 (Fla. 5th DCA 2017).

On the contrary, the Record is replete with documents attached to Appellees' Motion and provided to Appellant and his counsel. (R. at 171—198). These documents for the Courts review included, but were not limited to, photoshopped photographs of Appellee Kemp with Appellant's Mother on a marketing flyer titled "Getting away with IRS tax evasion" (R. at 171); a DVD flyer containing Appellee Kemp and Appellee Bentley's images stating that said DVD was "inspired by the actions of these Florida attorneys" (R. at 172); An Envelope with Appellee Kemp's image and the pun "Mel Practiss" next to a "Getting Away with IRS Tax Evasion" card (R. at 173); An Envelope with Appellee Bentley's image and the name "Claire Elizabeth" (which is Appellee Bentley's middle and first name switched by Appellant) next to a "Getting Away with IRS Tax Evasion" card (R. at 176); A YouTube video on

Appellant's channel featuring photoshopped photographs of Appellee Kemp with Appellant's Mother on a marketing flyer titled "Getting away with IRS tax evasion" (R. at 181).

Further, the fact that the Lower Tribunal's granted Appellees' Motion to Amend but failed to specifically identify the rationale behind same is not fatal. In fact, oral findings made on the record can fulfill the requirement for findings of fact. See *Gidden v. State*, 613 So.2d 457, 458 (Fla. 1993). Therefore, as argued above, Appellant's failure to obtain proper record or transcript has precluded his ability to attack this issue.

IV. The Trial Court, as gatekeeper, properly managed its duties in permitting separate awards for punitive damages for Appellee, Patrone, Kemp & Bentley, P.A.

The Trial Court's gatekeeping duties were satisfied because the Lower Tribunal made a ruling on August 10, 2022, that Appellee's created a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. Had Appellant disagreed with this ruling, Appellant had the opportunity to challenge this gatekeeping function by Petitioning for Writ of Certiorari after the August 10, 2022, Order was rendered, as required by *Noordhoek*. Appellant failed to do so.

Further, a District Court of Appeals "is not permitted to reweigh a trial court's finding of a sufficient evidentiary basis for a punitive damages claim, and 'such a finding could not be disturbed, or even evaluated on certiorari review.'" *Robins v. Colombo*, 253 So.3d 94, 96 (Fla. 3d 2018)(citing *Espirito Santo Bank v. Rego*, 990 So.2d 1088, 1091 (Fla. 3d DCA 2007).

Therefore, Appellant's appeal as to this issue must be dismissed.

Should the Court decide that Appellant did not waive his right to review this issue, then Appellant's Fourth Issue still fails due to the overwhelming evidence considered by the Jury and Lower Tribunal as it relates to Appellee's employment with one another.

Regarding the standard of evidence, Appellant speaks directly about Appellee Law Firm in paragraph 122 of the Initial Brief, specifically stating that the record is "completely devoid of competent substantial evidence, much less clear and convincing evidence" to support an award of punitive damages for Appellee, Patrone, Kemp & Bentley, P.A. ("Appellee Law Firm"). App. Br. Pg. 50-51.

"[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses

must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983).

Reviewing the Record on Appeal, this Court will notice that the Lower Tribunal and the jury were able to hear testimony regarding, and review, fifteen (15) separate exhibits entered into evidence by Appellees, including watching the defamatory DVD created by Appellant. (R. at 2563—2564). What is not reflected in appellant's brief is that the Lower Tribunal and Jury were able to watch the two-hour DVD created by Defendant, in total. (R. at 115:1-186:1-11). In fact, in his closing, Appellant not only admits that he "put together the DVD, and the case" but that he was "very proud of that video" and he "could watch it ten more times.". (Tr. R. at 873:2-5).

Appellant's DVD video specifically tied his defamatory allegations about Appellee in his capacity as an attorney. This is especially evident with Appellants allegations against Appellee Bentley, again, all actions Appellant describes centers around Appellee Law Firm. Appellant understands that Appellee Law Firm is a small firm in Fort Myers, Florida (R. at 126) and therefore, would know that attacking Appellee Kemp and Bentley in their capacities as attorneys (and owners) of Appellee Law Firm, that Appellee'

Law Firm's reputation would be harmed. Appellee Bentley and Kemp, both as owners of Appellee Law Firm, testified that they were concerned this DVD harmed the reputation of the firm. (Tr. R. at 197:6-10). In fact, Appellant even mailed the DVD with a picture of Appellee Kemp's face on the outside of the envelope to appellee Law Firm where all of Appellees' staff were able to view the material. (R. at 217:14-24). Appellee stated in the various materials that his mother and sisters, "participated in a conspiracy with dishonest Fort Myers attorney Kenneth Kemp to steal Mr. Smith's $24 million dollar estate and underreport its value to the IRS as $8,033,511." (Tr. R. at 249:24-250:5). Every statement about Appellee Kemp concerns his employment as an attorney and named Shareholder of Appellee Law Firm. Finally, Appellant failed to properly object to the admission of Appellee's exhibits. Therefore, the Lower Tribunal and jury were able to consider said exhibits.

The witnesses who testified included Appellee Kemp who occupies a respected seat within the Florida Bar Association, as part of the Grievance Committee (Tr. R. at 49:7-17); Chair of the Lee County Bar Association for Wills, Trust and Estates section, member of the Southwest Florida guardianship Association and a member of the Estate Planning Council of Southwest Florida (Tr. R. at 49:18-25).

Another witness, Peggy Glatz, testified that she had worked for the Central Intelligence Agency for twenty-four years. (Tr. R. at 244:23-25). Mrs. Glatz further testified that she received the letter from the fictious entity created by Appellant, the Center for Tax Fraud Reporting, containing numerous defamatory documents, including a document alleging "attorney Kenneth Kemp" conspired to commit tax fraud and theft with Appellant's mother. (Tr. R. at 249:24-250:5).

The Lower Tribunal and jury were presented with credible evidence from credible witnesses, including documents Appellant admitted were created by him; and the facts to which the witnesses testified were distinctly remembered; and the testimony was precise and explicit and the witnesses were clear as to the embarrassment they all felt as a result of the actions of Appellant.

V. The award of punitive damages was not unconstitutionally excessive and was the result of Appellant's own disobedience of the Lower Tribunal's Order.

The award of punitive damages to Appellees was not unconstitutionally excessive and was a direct result of Appellant's bad acts, disobedience of the Lower Tribunal's Orders and procedural due process and notions of fairness amongst the parties. Therefore, Appellant is precluded from complaining of purported injury that he himself caused.

Firstly, on this issue of waiver, Appellees Kemp and PKB concede that the *pro se* Appellant filed a Motion for New Trial and Remittitur on July 6, 2023. (R. at 2602—2618). However, Appellant's Motion predominantly attacked the lower tribunal for alleged biases against Appellant and continued to push the very narrative that resulted in the instant defamation action. (R. at 2613-2614). The only time Appellant raised the issue of the amount of punitive damages was on paragraph 65 and 66 of the Motion wherein Appellant attempted to recite legal authority, and alleged that the award was excessive in consideration of his personal finances. (R. at 2615).

Appellant's reference of his personal finances shines a light on the exact issue that defeats Appellant's argument. The defense of unconstitutionally excessive punitive damages in light of Appellant's finances is not available to Appellant due to his own actions. "A defendant against whom punitive damages are sought, however, must present evidence as to his or her net worth at trial to preclude a jury from assessing an unduly harsh penalty, as well as to preserve his or her right to argue the excessiveness of the punitive award on appeal. *Brooks v. Rios*, 707 So.2d 374, 376 (Fla. 3d DCA 1998).

On January 27, 2023, Appellees' filed a Motion for Contempt against Appellant. (R. at. 1381—1433). The Motion for Contempt pertained to

Appellant actions wherein Appellant "willfully, intentionally, and contumacious disregarded the discovery process by failing and refusing to provide evidence of financial worth as set for in the Motion, and so ordered to do so by this Court pursuant to its Order Adopting the Report and Recommendation of Magistrate, entered on January 4, 2023." (R. at 2153). On March 16, 2023, Appellee's filed a supplement to their Motion for Contempt against Appellant. (R. at 1952—2049). On May 10, 2023, a hearing on the Motion for Contempt was held by the Trial Court. (R. at 2146). On May 16, 2023, the Court entered an Order Granting Appellees' Motion for Contempt and Sanctions. (R. at 2153—2156). The Order required Appellant to abide by the discovery process within ten (10) days of the Court's Order. (R. at. 2155). Failure to comply with the Order would result in Appellees being entitled to a jury instruction advising the jury that the Appellant has affirmatively concealed his net worth and that Appellant would be prohibited from producing evidence at trial and/or arguing "low net worth" defense to a claim for punitive damages. (R. at 2155). Appellant failed to cure his contempt as ordered by the Lower Tribunal's Order. As a result, Appellees' were entitled to jury instructions adverse to Appellant which was granted on June 20, 2023. (R. at 2155).

Appellant was precluded from providing information as to his personal wealth as a result of his disobedience of the Lower Tribunal. Regardless, Appellant failed to provide any documentation substantiating any argument that the punitive damages award vastly exceeded his ability to pay.

Secondly, in the event this Court does not find that Appellant is precluded from using the "low net worth" defense, to address Appellant's statements that concerning compensatory damages, "[b]ecause a finding of entitlement to punitive damages is not dependent on a finding that a plaintiff suffered a specific injury, an award of compensatory damages need not precede a determination of entitlement to punitive damages. *Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1262 (Fla. 2006).

Thirdly, even if Appellant was not precluded from the defense of "low net worth, the award of punitive damages was not unconstitutionally excessive.

Under the *Engle* case cited by Appellant as a basis for his appeal on this issue, the Florida Supreme Court held that, "Florida law requires that an appellate court review a punitive damages award to make certain that the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage,

or wantonness of the tortious conduct. *Id*. at 1263(*See* also *Arab Termite & Pest Control of Fla., Inc. v. Jenkins,* 409 So.2d 1039, 1043 (Fla.1982).

In the instant issue of the denial of Appellant's Motion for New Trial and Remittitur (R. at 2619), the Supreme Court stated that "Under Florida law, a trial court's determination of whether a damage award is excessive, requiring a remittitur or a new trial, is reviewed by an appellate court under an abuse of discretion standard. *Id*. at 1263 (See also *St. John v. Coisman,* 799 So.2d 1110, 1114 (Fla. 5th DCA 2001)). Fla. Stat. § 768.73(1) provides that an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled there thereto, or $500,000.00. Fla. Stat. § 768.73(1)(c) provides that, "Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages."

Despite not having evidence of Appellant's financial net worth, Appellees requested, and the Lower Tribunal/jury awarded, punitive damages to Appellee Kemp and within the statute cap set by Fla. Stat. § 768.73(1). (R. at. 2568; 2570; 2573; 2577). Despite sticking to the limits, said limits may have been ignored by the Jury due to Appellants specific intent to harm Appellee Kemp.

No fundamental error occurred creating unfairness to Appellant, just the ramifications of his own actions and inactions during the trial process.

VI. Appellant failed to timely object to the jury instructions resulting in waiver of his objection and the record supports a finding of defamation by implication such that the statements said about one Appellee effected all Appellees.

a. Appellant failed to timely object to the Jurys instructions at Trial resulting in waiver.

As with all of Appellant's stated issues (other than his Fourth Issue), he relies upon fundamental error that goes to the foundation of the case and resulted in a miscarriage of justice. In doing so, Appellant is attempting to cover his failings as a pro se litigant as fundamental error to garner a more favorable result for his failure to choose legal counsel and represent himself.

Florida courts have consistently held that pro se litigants should be treated no differently or more leniently than litigants represented by counsel. See *Millen v. Millen*, 122 So.3d 496, 497 (Fla. 3d DCA 2013)("We first note, '[i]t is a mistake to hold a pro se litigant to a lesser standard than a reasonably competent attorney.'" (quoting *Kohn v. City of Miami Beach*, 611 So.2d 538, 539 (Fla. 3d DCA 1992))); *Anderson v. Sch. Bd. of Seminole Cnty.*, 830 So.2d 952, 953 (Fla. 5th DCA 2002)("Pro se litigants, however, should not be treated differently from litigants in similar situations who are represented by

counsel and are charged with knowledge of those rights." (citing *Kohn*)); *Stueber v. Gallagher*, 812 So.2d 454, 457 (Fla. 5th DCA 2002)("In Florida, pro se litigants are bound by the same rules that apply to counsel." (citing Kohn)); *Gladstone*, 729 So.2d at 1004 ("A pro se litigant should not be held to a lesser standard than a reasonably competent attorney because applying a lesser standard would only encourage continued frivolous litigation." (citing *Kohn*)).

In *Kohn*, the court held that "it is a mistake to hold a pro se litigant to a lesser standard than a reasonably competent attorney" and that "a party's self-representation does not relieve the party of the obligation to comply with any appropriate rules of civil procedure." 611 So.2d at 539–40. The court in Kohn further noted, citing numerous cases from other jurisdictions, that "[c]ourts around the country have likewise recognized that once a party chooses to represent himself he cannot expect favored treatment from the court." 611 So.2d at 540 n. 1.

Fla. R. Civ. P. 1.470(b) provides that "No party may assign as error the giving of any instruction unless that party objects thereto at such time [. . .]". Appellant failed to timely object and is therefore barred from seeking review of said instructions.

b. Appellant's statements and the charges of Defamation by Implication relate to all Appellees by virtue of occupations as attorneys within the same law firm, therefore, the jury instruction was not confusing

Appellant's argument alleges that jury instructions that are suggestive of an answer render final judgement built thereon subject to fatal collapse." App. Br. Pg. 57. Appellant also appears to argue that the accusations of and statements of conduct against Appellee Kemp could not be inferred about Appellee Bently and Appellee Law Firm.

"Defamation by implication arises, not from what is stated, but from what is implied when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, such that he may be held responsible for the defamatory implication." *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008). "A classic example of defamation by implication was before the Second District in *Heekin v. CBS Broad., Inc.*, 789 So.2d 355, 358 (Fla. 2d DCA 2001). In *Heekin*, the plaintiff alleged that a broadcast falsely portrayed him as a spouse abuser by juxtaposing an interview with his former spouse along with stories and pictures of women who had been abused and killed by their partners. 789 So.2d at 357. Even though the reporting did not literally claim that the plaintiff was a spouse abuser; by overplaying his former wife's

story with stories of spouse abuse, the reporting created the defamatory implication that the plaintiff had abused his spouse." *Readon v. WPLG, LLC*, 317 So.3d 1229, 1237 (Fla. 3d DCA 2021).

It is reasonable that Appellant's allegations that attorneys of a small law firm who have high net worth clients and assist them in carrying out tax fraud or theft would be imputed on the law firm said individuals are employed by/own. Regardless of whether or not the jury instructions were redrafted, the record evidence supports the jury's finding that Appellant defamed all Appellee's by his grossly negligent mailing of slightly altered material alleging that Appellees were actively involved in tax crimes. Appellant's two-hour DVD, the cover associated, and the envelopes containing photos of Appellee Kemp and Bentley, sent to third party individuals, such as Peggy Glatz, clearly are meant create an inference that, Appellees and their law firms, engage in illegal and unethical practice of law. This inference is not a logical leap of such distance that the jury was misled.

Therefore, Appellant's claim fails because he, by his own actions, provided the basis for the jury instructions and said instructions were not suggestive.

VII. Appellant was held in contempt of court and sanctioned more than a month before trial, only Appellant's failure to cure the contempt was considered on the first day of trial.

The Motion for Contempt was not heard on the first day of trial and Appellant was given notice that the hearing would take place months later. Therefore, the Trial Court did not violate Appellant's due process rights such that his unpreserved error amounts to fundamental error and, therefore, a miscarriage of justice founded in the heart of the instant matter.

On January 27, 2023, Appellees' filed a Motion for Contempt against Appellant. (R. at. 1381—1433). The Motion for Contempt pertained to Appellant actions wherein Appellant "willfully, intentionally, and contumacious disregarded the discovery process by failing and refusing to provide evidence of financial worth as set for in the Motion, and so ordered to do so by this Court pursuant to its Order Adopting the Report and Recommendation of Magistrate, entered on January 4, 2023." (R. at 2153). On March 16, 2023, Appellee's filed a supplement to their Motion for Contempt against Appellant. (R. at 1952—2049). On May 10, 2023, three and a half months after the Motion for Contempt was filed, and almost two (2) months after the supplement was filed, there was a hearing on the Motion for Contempt held by the Trial Court. (R. at 2146). On May 16, 2023, the

Court entered an Order Granting Appellees' Motion for Contempt and Sanctions. (R. at 2153—2156). The Trial in the Lower Tribunal did not take place until June 20, 2023, well over a month after the hearing on the Motion for Contempt. Appellee's filed the transcript of the proceeding on the Motion on June 7, 2023 (R. at 2244) which further evinces that the hearing took place on May 10, 2023, not the day of trial, as Appellant alleges.

That said, Appellees filed a second Motion for Contempt and Sanctions on June 7, 2023 (R. at 2238) because Appellant had failed to cure his contempt as ordered by the Lower Tribunal on May 16, 2023.

Appellant's argument, on its face, fails because the initial contempt and sanction was filed, heard and order months before trial. Indeed, Appellant has failed to cite specific parts of the record where this purported due process violation occurred. A review of the Trial Transcript refutes Appellant's argument, as the trial transcript makes no reference to a hearing taking place at the start of the trial. In fact, the trial that took place on June 20, 2024, started immediately with opening statements.by the Parties (Tr. R. at 6).

On the contrary, it is clear from the record that Appellant was given notice of the Motion for Contempt months in advance of the hearing, and had

an opportunity to be heard, with counsel, a month before trial. Appellant's brief fails to cite to the record evincing where Appellees' Motion for Contempt was heard, without notice, on the first day of trial.

Ultimately, Appellant was given ten (10) days to cure his default and did not. As a result, Appellees' were entitled to jury instructions adverse to Appellant. (R. at 2238—2243). Appellant was already held in contempt and was sanctioned, therefore, his failure to cure or purge the contempt resulted in this Second Motion for Contempt to confirm Appellees' entitlement to jury instruction removing Appellant's ability to claim "low net-worth" as a defense. (Tr. R. at 238:8-25). This was not a new Motion for Contempt or new allegations. The Lower Tribunal did grant the Second Motion at trial (R. at 2558), but again, this was merely a procedural confirmation that Appellant did not abide by the Court's Order dated May 16, 2023, and Appellees were entitled to a jury instruction against Appellant.

In fact, when questioned by the Trial Court about the negative jury instructions regarding Appellant's financial worth, counsel for Appellees correctly instructed the Court that the purpose of punitive damage "is not to financially destroy the party to which they are being assigned" and "there are considerations that the jury is to take into account when making a determination about whether a damage award would financially destroy a

Defendant". (Tr. R. at 235—236). Appellee's Counsel informed the Court that those punitive damage "considerations are predicated on the parties being on equal footing about how much the Defendant is worth". (Tr. R. at 236).

As a result, there can be no finding of fundamental error as Appellant was given due notice of the hearing on the Motion for Contempt and said hearing did not take place on the first day of trial without notice as alleged by Appellant. Plaintiff was given notice in the Court's Order that he should provide Appellees his financial information. He failed to do so.

Appellant's "Sixth Issue" argument also intertwines an attack on the jury instructions alleging that an alternative jury instruction would have provided adequate instruction without "stating that Appellant wrongfully concealed information". App. Br. Pg. 60. Firstly, Appellant's argument fails as this is a separate argument with no bearing on whether or not a hearing on Appellees' Motion for Contempt was heard without notice in violation of Appellant's due process rights.

Secondly, this jury instruction was a direct result of Appellant's contempt of Court, sanction, and failure to cure said contempt. To the extent that this Court considers Appellant's arguments under this Sixth Issue, the

Trial Court specifically allowed Appellant an opportunity to cure the contempt by complying with the Court's order. (R. at 2155). Appellant was adequately warned that failing to abide by the Court's Order dated May 16, 2023, would result in Appellees being "entitled to a jury instruction advising the jury that the Defendants have affirmatively concealed their net worth, and the Defendants shall be prohibited from producing evidence at trial and/or arguing 'low net worth' defense to a claim for punitive damages." (R. at 2155).

Appellant may not now complain of his self-imposed injury caused by his own malfeasance and disregard for the judicial process, especially when Appellant was given a chance to cure the contempt before the jury instruction entitlement was granted.

CONCLUSION

Appellant's failures to properly preserve his objections and to timely appeal issues from the Lower Tribunal have resulted in waivers and preclusions of the arguments he has presented. Beyond the procedural issues facing Appellant, the record evidence does not support a finding of fundamental error resulting in unfairness at trial nor a miscarriage of justice.

For the foregoing reasons and arguments, the Lower Tribunal's Final Judgement should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 1, 2024, the Appellee's Answer Brief was electronically transmitted to the Clerk of Court via the Florida eDCA Portal for filing and has been served to the following parties or their attorneys via the manner specified:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellee's Answer Brief was submitted in Arial 14-point font in compliance with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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