

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: right;">DATE FILED July 5, 2024 9:17 AM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Appeal from the District Court for La Plata County Colorado, 6th Judicial District; Case No. 2014CV030213, Division 5 District Court Judge Suzanne F. Carlson</p>	
<p>PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS: RODDESS EKBERG, TIMOTHY EKBERG, JUSTIN FIERSTEIN, SARAH FIERSTEIN</p> <p>V.</p> <p>DEFENDANT-APPELLANT AND CROSS-APPELLEE: JEFFREY SPEICHER</p>	<p style="text-align: center;">Case No. 2023CA1535</p>
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<p>APPELLEES' REPLY BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 5,364 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellee, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Dated: July 5, 2024.

Westerfield & Martin, LLC

/s/ Zachary S. Westerfield
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ISSUES PRESENTED FOR REVIEW

The first argument advanced by Speicher is that Plaintiffs did not properly state their Issue Presented for Review. This issue is the Plaintiffs' issue, not Speicher's. Further, Speicher's attempt to re-frame the Plaintiffs' Issue reveals the extent to which he will go to elevate form over substance. As detailed below, the theft committed by Speicher was completed in April 2013. At trial, evidence was presented by the Plaintiffs of a continuing conspiracy Speicher orchestrated to conceal, retaliate against, and intimidate witnesses in this case. That conspiracy stretched **more than 10 years** past when he stole the wrongful death benefits owed to the Plaintiffs. Speicher, despite these despicable acts, seeks absolution for his decade of continued harm to the Plaintiffs by claiming that the 12 separate acts which occurred after April 2013, are either irrelevant or duplicative of acts committed a decade prior. The Defendant's position is not well taken.

STATEMENT OF THE CASE

1. Conspiracy to Commit Civil Theft.

Speicher begins his response to the Plaintiffs' Statement of the Case by making it seem implausible that he concocted a plan to steal the wrongful death benefits from the Plaintiffs within days of Rodney Ekberg passing away in a car accident. Speicher argues that for such a plan to succeed, it would have to be "premised entirely on the hope" that Jesse Bopp would not follow Colorado law, and neither would the insurance companies who paid the wrongful death benefits. *See Answer Brief at 2.* The evidence at trial overwhelmingly supported the Plaintiffs' position that this indeed was Speicher's plan. Twice now Speicher's arguments have been rejected by a jury and he has been found liable for punitive damages.

At both the April 2019 (*see*CF3952) and April 2023 trials (*see*TR4/24/2023-194:16-195:1), Speicher advanced the same argument that he does in this appeal – that he hired attorney Jesse Bopp to create Rodney's estate and that all he did was follow the advice of his attorney. The evidence at both trials convincingly established that Mr. Bopp was not hired to negotiate with any insurance company, and he was unaware that Speicher was receiving money due to Rodney's wrongful death. TR4/25/2023-149:4-152:11. The evidence at trial established that Mr. Bopp sent Speicher an email

informing him that negotiating with any insurance company and reviewing any release drafted by an insurance company related to payment by an insurance company to Rodney's estate was outside the scope of his fee agreement and that he would not undertake any such work. *Id.*; *see also* EX164-66. Mr. Bopp informed Speicher that if he wanted him to provide those legal services, he would do so if he got Speicher's authority to do that work. *Id.* Speicher never authorized Mr. Bopp to do that work, thus it was never undertaken. *Id.* The evidence made it clear that while Speicher hired Mr. Bopp to create the estate, he shielded Mr. Bopp from any settlement negotiations and handled obtaining the wrongful death benefits by himself. TR4/26/2023-69:9-70:20.

Second, by creating the estate, in which Thess was appointed the PR, Speicher created a path for the insurance companies to pay the wrongful death benefits to the PR without having to inform, discuss, or get the approval from any other heir. The evidence is clear that AmFam tried repeatedly to get the names, phone numbers and contact information of the other heirs, but Speicher, despite having this information, refused to provide it. EX54;58;60-62;79. Eventually, AmFam agreed to pay the wrongful death benefits to Thess in her capacity as PR of Rodney's estate in exchange for a release from any liability for the heirs not receiving their share of the

wrongful death benefits. EX54;58;60-62;79. Farmers did the exact same thing – it paid the wrongful death benefits to Thess in her capacity as PR of Rodney’s estate in exchange for a release from any liability for the other heirs not receiving their share of the wrongful death benefits. EX161-163.

As such, Speicher orchestrated a plan whereby he negotiated the settlement of the wrongful death claim. Then, he forced both insurance companies to pay the PR of the estate, his wife, without any notification to the other heirs. Speicher purposefully excluded his attorney, Mr. Bopp, from this process. Then, the only way for the other heirs to find out that Speicher had negotiated payment of the wrongful death benefits paid by Farmers and AmFam would if the other heirs were informed that a petition for informal probate and appointment of a PR had been filed to create Rodney’s estate.

Speicher solved that piece of the puzzle by finding a creative way to simply not inform Roddess and Tim that Rodney’s estate had been created. Speicher knew that Roddess’ home had gone into foreclosure months before Rod passed away, and that at the time of these events, she was homeless and living in her car. Instead of calling Roddess or emailing her to inform her of the estate, Speicher had Mr. Bopp send notification of the creation of the estate to her old home which was in foreclosure, and she was not living at. TR4/27/2023-935:6-21. For Tim, the Defendant provided an address to Mr.

Bopp that was missing one street number from the address on a home which had also gone into foreclosure and was included as an asset in Tim's bankruptcy. TR4/27/2023-824:9-826:1. This ensured that neither Roddiss nor Tim received any notification of the estate or the fact that Speicher negotiated the receipt of the wrongful death benefits from both Farmers and American Family.

To effectuate this plan, Speicher and Thess created a fake will for Rodney. TR4/27/2023-821:6-823:1;965:2-971:22; *see also* EX89. Speicher used his unique knowledge of estate planning to create a fake will that ensured that Thess would be appointed PR of the estate. EX210-11. This was the vehicle that allowed Speicher to steal the wrongful death benefits as the PR became responsible for paying Rodney's heirs pursuant to statute, not the insurance companies.

Speicher argues that his version of the will was not allowed to be presented because of the numerous errors made by the trial court. Speicher points to no error made by the trial court which prevented his explanation of the will. At trial, both Thess and Vinessa testified to the fact that Rodney did sign the will. *See* TR4/26/2023-608:25-612:4;794:24-801:19. Speicher's version of what happened was rejected by the jury not once, but twice. The trial court allowed Speicher to present evidence that supported the position

that Rodney signed the will in question. Thus, there was no error by the trial court in this respect. Speicher then goes on to speculate, without pointing to anything in the record, that the more likely explanation for the will was that Rodney wanted to give his daughter Thess something for having lived with her for 20-some-odd years.

This position is not supported by the record. The testimony at trial established that each of Rodney's children had an active and positive relationship with him. Roddess testified that she talked to him multiple times by phone every day (TR4/27/2023-817:22-818:6), that she sent him money whenever he needed it (*id.* at 900:20-901:8), that she paid for half of both the cars that he owned (*id.* at 901:6-23), and that she paid for car repairs when necessary (*id.* at 901:24-903:19). The continued attempts by Speicher to paint himself as a model citizen who went above and beyond to provide for Rodney in the twilight of his life are demonstrably false. Speicher was found liable for fraud after the April 2019 trial, and he never appealed that judgment. Speicher has been found liable for stealing from his own family members, for engaging in a conspiracy with Thess, and for punitive damages twice. Speicher is not the victim; he is the perpetrator of great and terrible wrongs against his own family.

Both Tim and Roddless testified that the signature on Rodney's purported will was forged. TR4/27/2023-821:6-823:1;965:12-970:4. Also, the will makes no sense. *See* EX89. It does not bequeath anything that Rodney owned, like his two vehicles or his service weapon from his tour of duty in Korea, and instead was just about "insurance". *Id.* It did not contain funeral or burial instructions. *Id.* No insurance policy that Rodney ever had could be subject to the will. Also, insurance proceeds (if any existed, which they did not) are not distributed by a decedent's will. If the insurance in question is life insurance, it is a pay on death account distributed to a named beneficiary that has been designated by the insured. Wrongful death benefits are distributed by statute, not by will. The only plausible explanation for the will was that it was forged after Rodney died to provide some type of foundation for the conspiracy to commit civil theft. The undisputed facts of this case are that all the insurance proceeds due to Rodney's wrongful death went to Speicher and Thess. The multiple jury verdicts support the Plaintiffs position that the will was forged.

2. Conspiracy to Conceal, Retaliate Against and Intimidate Witnesses in this Case.

The Defendant then goes on to lament how the trial court erred "by admitting voluminous evidence about things that happened long after the wrongful death proceeds had been paid out...". This claim is so absurd it is

difficult to comprehend. First, almost all the testimony and exhibits relating to the conspiracy were admitted at the first trial, and they were not appealed during the first appeal, so the Defendant has waived any argument that they were unfairly prejudicial when the exact same testimony and exhibits were admitted at the first trial. Second, all the emails and text messages which prove the conspiracy were stipulated to by Speicher prior to trial. *See* TR4/24/2023-2:8-21; TR4/25/2023-285:11-286:10; TR4/26/2023-458-14-25; TR4/27/2023-809:16-23; TR4/28/2023-1114:9-18. The alleged errors made by the trial court which Speicher argued in his Opening Brief have little to do with the conspiracy portion of this case.

Speicher then complains that the Plaintiffs are asking this Court to allow them to “double dip” on damages by finding that the facts related to the conspiracy are different from the facts related to the civil theft. Speicher’s complaints miss the mark. The only testimony that occurred at the 2023 trial that did not occur at the 2019 trial was the testimony from Roddess that on the morning of the fourth day of trial, while the parties were waiting for security to open the Courthouse, Speicher made it appear that he was drawing a gun out of his backpack and then pressed his hand together, formed a gun with them, took aim at Roddess, and then pretended to fire not one, not two, but three shots at her. TR4/27/2023-999:9-1001:10. This

incident was witnessed by Scott Landry, the attorney for Tim. An offer of proof was made about what Mr. Landry saw, and after a review of the security footage, the court allowed the testimony. TR4/27/2023-921:9-18;957:8-964:7. The truth of the matter is that Speicher wants this heinous act, which occurred during the course of the second trial, to go unpunished, It should not.

Speicher engaged in the same type of repugnant behavior during the April 2019 trial when he and Thess made a noose and made it appear that they were going to hang Roddess. TR4/27/2023-1003:5-18. Speicher wants this act to go unpunished. Speicher retaliated against his own nephew when he tried to get Justin fired from his job at Wells Fargo simply because he joined this lawsuit. TR4/27/2023-1073:22-25. That testimony, not from Roddess but from Justin, was unrebutted by Speicher. Speicher had an opportunity to explain his side of the story and he chose to say nothing. That was his choice, and he must live with it. Now, he wants that act to go unpunished.

Thess perjured herself when she filed an affidavit in February 2017 with the trial court stating that Justin had no interest in becoming involved in this lawsuit. TR4/27/2023-1104:14-1109:5. That statement was disproved by contemporaneous text messages between Justin and Thess. *Id.* The

testimony that supported that argument was from Justin, not Roddess. Speicher also retaliated against Justin by unfriending him on social media. TR4/27/2023-1102:7–1103:14; *see also* EX205, EX207 and 208. This was proved again by text messages between Justin and Speicher. Speicher told Justin in a text message: “End of the day, you're either with us or against us even if you decide to do nothing.” TR4/27/2023-1102:4-7; *see also* EX207. This is not the self-serving testimony of one of the Plaintiffs, this is a direct quote from Speicher himself.

Speicher also retaliated against Justin for joining this lawsuit by following Justin in his truck, and then rolling down his window and having his young son flip Justin off. TR4/27/2023-1099:23-1100:23. That testimony, not from Roddess but from Justin, was unrebutted by Speicher. Speicher had an opportunity to explain his side of the story and he chose to say nothing. That was his choice, and he must live with it. Speicher also retaliated against Justin for joining this lawsuit by forcing him to move offices and trying to humiliate him in front of his co-workers by playing the "goodbye" song. *Id.* at 1099:16-22. That testimony, not from Roddess but from Justin, was also unrebutted by Speicher. Speicher also retaliated against Justin for joining this lawsuit by filing a false complaint with HR

about him. *Id.* at 1092:23-1098:3. That testimony, not from Roddess but from Justin, was yet again un rebutted by Speicher.

Speicher also attempted to conceal this lawsuit from Justin. When Roddess called Justin to tell him about the lawsuit (*id.* at 1073:22-25), Speicher had his daughter, Vinessa, record the conversation and then play it off like Roddess was making stuff up because she was “crazy” when in truth, all Roddess was doing was informing Justin of his rights. *Id.* at 1177:8-1179:19. That testimony, not from Roddess but from Justin, was also un rebutted by Speicher.

Speicher also tried to conceal the lawsuit from Tim, Justin and Sarah by trying to get a quick settlement with Roddess, a settlement that would occur before the other “unmentionables” would find out about it. TR4/25/2023-380:10-381:18; *see also* EX189. This is not the self-serving testimony of one of the Plaintiffs, this is a direct quote from Speicher himself. Speicher wants that act to go unpunished.

Speicher also directed the strategy for mediation early on in this case, at a time (June 2016) when he was not even a defendant in this lawsuit yet. Speicher intended to mediate this case in bad faith and was devising a strategy to not only mediate in bad faith, but also to conceal his intent to mediate in bad faith from everyone else. EX185. This is not the self-serving

testimony of one of the Plaintiffs, this is a direct quote from Speicher himself. Speicher wants that act to go unpunished.

SUMMARY OF THE ARGUMENTS

None of the above-described acts in Section 2 of the Plaintiffs' Statement of the Case, *supra*, have anything to do with the theft of the wrongful death proceeds owed by Speicher to the Plaintiffs. They all relate to his efforts to conceal his actions and to retaliate against anyone willing to stand up to him. Speicher tries to blame his bad acts on the self-serving testimony of Roddess and then attempts to undercut her testimony in a footnote. This is a tired trope that Speicher has harped back on time and time again. And time and time again, it has failed. Twice now a jury has seen through Speicher's smoke screen and found him liable for theft, conspiracy and punitive damages.

Prior to this lawsuit being filed, Roddess tried to speak to Thess on two different occasions about jointly hiring an attorney to investigate the circumstances surrounding their father's death. Both times the response from Thess was to gaslight Roddess and make her think she was a terrible human being for obtaining financial compensation for her father's death. *See* TR4/27/2023-952:14-15. In the meantime, Speicher and Thess had themselves already financially benefited from Rodney's death, and they were

not interested in sharing, so they stole the money owed to the Plaintiffs. When Roddess filed this lawsuit, it was not against her sister Thess or her brother-in-law Speicher, it was against Nancy Homler. CF1. Roddess never could have imagined that her sister and Speicher would do this to her, but they did. And they tried to conceal it. And they retaliated against their own family members when they stood up to them. That concealment and retaliation should not go unpunished.

The trial court erred in ruling that the damages awarded to Plaintiffs for conspiracy were duplicative of their claim for civil theft. Plaintiffs have conceded that part of that ruling regarding economic damages was correct. However, the noneconomic and punitive damages for conspiracy were not duplicative because the noneconomic and punitive damages for conspiracy are separate, distinct, and rest on different facts than the claim for civil theft.

ARGUMENT

A. THE TRIAL COURT ERRED IN RULING THAT THE DAMAGES AWARDED BY THE JURY TO THE PLAINTIFFS FOR CONSPIRACY WERE DUPLICATIVE OF THE DAMAGES ON THEIR CLAIM FOR CIVIL THEFT.

1. Standard of Review

Speicher argues that he has sufficiently disputed the facts at issue, and as such, the standard of review is clear error, not de novo. As explained in Section 2 of the Statement of the Case, as well as in the Plaintiffs' Opening

Brief, these facts occurred **after** Speicher committed theft. As such, the Plaintiffs' claim for conspiracy rests upon facts which differ from their claim for theft. This is evidence of Speicher concealing the theft after it occurred, of him retaliating against anyone who tried to join the lawsuit, and of witness intimidation both before, and during trial.

The vast majority of these 12 independent facts are based on either emails or text messages sent by Speicher, and thus they cannot be disputed. The remaining facts are based on the sworn testimony of Justin and Roddess. The last fact is further supported by the offer of proof made by attorney Scott Landry in his capacity as an officer of the court. Speicher had an opportunity at trial to dispute these facts, and he did not. Speicher does not point to anywhere in the record where he disputed these 12 facts.

When facts are undisputed, the only issue before this court is whether the trial court properly applied the law regarding what constitutes duplicative damages. As such, the standard of review is in fact de novo, not clear error. *See Colo. Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC*, 2016 COA 64, ¶ 128, 405 P.3d 320; *see Ferrellgas, Inc. v. Yeiser*, 247 P.3d 1022, 1026-27 (Colo.2011) (considering the propriety of a setoff under de novo standard of review); *see also Ocmulgee Props. Inc. v. Jeffery*, 53 P.3d 665, 667

(Colo.App.2001) (“Here, because the controlling facts are stipulated and therefore undisputed, the legal effect of those facts is a question of law.”).

While Plaintiffs will concede that the 12 facts at issue were not stipulated to, they were not disputed at trial. Even if this Court were to agree with Speicher that some of the facts were disputed, and this Court were to apply a clear error standard of review, this Court should reverse the trial court's order holding that the damages for conspiracy are duplicative of the damages for theft as there is “no support in the record” for the trial court’s ruling. *Blakeland Drive Invs., LLP IV v. Taghavi*, 2023 COA 30M, ¶ 28.

2. Where the issue was raised and ruled upon

Speicher conceded that on April 28, 2023, the jury returned a verdict for Plaintiffs on their claim for civil theft. CF5943-5950. Speicher also conceded that the jury separately returned a verdict for Plaintiffs on their claim for conspiracy. CF 5951-5958. Speicher further conceded that on May 12, 2023, Plaintiffs filed their Notice of Filing Proposed Findings Re: Conspiracy. CF6008-6017. Lastly, Speicher has conceded that on May 19, 2023, Speicher filed his Objection (CF6018-6023) and Plaintiffs filed their Response on May 26, 2023 (CF6024-6029). The Court order is July 17, 2023. CF6038-6040.

What Speicher argues is that Plaintiffs did not preserve their argument. Speicher's argument is without merit. In the Plaintiffs' Notice of Filing Proposed Findings Re: Conspiracy which was filed on May 12, 2023, Plaintiffs wrote: "This position is further supported by the plethora of evidence **since** the Plaintiffs' money was stolen in March/April of 2013 that **related to the conspiracy, not the theft.**" CF6013 (emphasis added). Plaintiffs then went on to detail each argument that they believe supports their claim for conspiracy which is not based on the theft of the money owed to the Plaintiffs. The Plaintiffs clearly argued that these facts, which occurred after the theft occurred in March/April 2013, are separate and distinct from the facts related to Speicher stealing from the Plaintiffs, which occurred from December 2012 – April 2013.

Alternatively, Plaintiffs have argued that these 12 additional facts which were presented at trial created a separate claim for conspiracy. An amendment to the pleadings can occur even after the trial court has entered judgment. *See* C.R.C.P. 15(b). Thus, this Court has the power to amend the Plaintiffs' pleadings to conform to the evidence at trial even after the trial court's order entering judgment which occurred on July 17, 2023. *See* CF6038-40. As such, this argument has been properly preserved.

3. Argument

- a. *The Plaintiffs can recover on both their claim for civil theft and conspiracy if the two causes of action are based on different facts.*
 - i. Speicher Fails to Address Plaintiffs' First Argument that the Facts which Support the Claim for Conspiracy are Different from the Facts which Support the Claim for Theft.

The Plaintiffs have detailed 12 independent facts which support their argument that their claim for conspiracy is based upon different facts than their claim for theft. None of these facts are at all related to the theft because the theft was completed by April 2013.

- a. During the September 2013 Celebration of Life for Paula Fierstein, Thess lied to Roddess when she concealed that she and Speicher had received the wrongful death benefits after Rodney died. Thess further attempted to conceal her and Speicher's theft by making Roddess feel that she would be a terrible person should she want to financially benefit from the death of their father.
- b. June 17, 2016, Emails between Speicher and Bopp details Speicher's plan to attend mediation in this case in bad faith.
- c. July 28, 2016, Email from Speicher to Bopp in which Speicher says he wants to obtain a quick settlement with Roddess to prevent the other heirs, whom he calls "unmentionables" from finding out that he and Thess had stolen the wrongful death benefits owed to them.
- d. July 2016, Justin was made aware of this lawsuit by Roddess during a phone call. Until that time, Speicher and Thess had concealed this lawsuit from Justin. To further conceal the lawsuit from Justin, Speicher ordered that this phone call be recorded by his daughter, Vinessa, which it was. At the conclusion of the phone call, Speicher told Justin that there was no merit to the information that Roddess provided him about the lawsuit and not to trust Roddess because she was "crazy."

- e. After Justin joined the lawsuit, Speicher retaliated against him by filing a meritless complaint with Human Resources at Wells Fargo that Justin had disclosed Speicher's income to other employees, and that he must have surreptitiously obtained that information by unlawfully accessing that information from electronic files securely stored employment files. After investigation, it was proven that Justin did not unlawfully access Speicher's employment files, but rather Speicher continuously bragged to all the employees at Wells Fargo about how much money he made.
- f. Speicher further retaliated against Justin in their workplace by forcing Justin to have to move offices to humiliate him in front of his co-workers.
- g. Speicher further retaliated against Justin when he followed Justin in his truck and had his young son make obscene gestures at Justin.
- h. Both Speicher and Thess retaliated against Justin by unfriending him on social media. It is undisputed that Speicher attempted to convince Justin not to join this lawsuit because he sent him a text message which read: "End of the day, you're either with us or against us even if you decide to do nothing." It was after Speicher and Thess determined that Justin was "not with him" that they unfriended him on social media.
- i. Thess perjured herself when she filed an affidavit with the trial court stating that Justin told her he did not want to join this lawsuit as a Plaintiff when that was not true.
- j. Speicher further retaliated against Justin when he attempted to get Justin fired from his job at Wells Fargo.
- k. Thess engaged in witness tampering and intimidation during the April 2019 trial when she placed her hands around her throat, as if to make a noose, and looked at Roddess and Tim and made a threatening "I'm going to hang you" gesture.
- l. Speicher engaged in witness tampering and intimidation at the April 2023 trial when on the morning of the fourth day of trial, while the parties were waiting for security to open the courthouse, Speicher put his hands together, put them behind his head, made it appear that he was drawing a gun, put his hands and fingers together, pointed them at Roddess, then made a gesture as if he was shooting her.

The Plaintiffs' argument is simple and straightforward. Each of these 12 independent acts provides a significant set of facts which distinguish the Plaintiffs' claim for conspiracy from their claim for theft. None of these facts provide the basis for the Plaintiffs' claim for civil theft because each one of these facts occurred after Speicher committed theft. Colorado law is clear that if one cause of action is based upon facts that are separate and distinct from another cause of action, Plaintiffs can recover on both causes of action because the damages are not duplicative. *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819 (Colo.1992). Speicher completely fails to address this fundamental argument advanced by the Plaintiffs.

The Plaintiffs further supported their argument that to prove a conspiracy existed, they would have to prove additional facts which are not required to prove theft. The example provided by the Plaintiffs is conclusive on this issue: in this case, the jury could have decided that Speicher stole money from the Plaintiffs, but that there was no evidence that he conspired with Thess to do so. Additional facts, beyond the theft, were needed to prove the conspiracy. Thus, the two claims can differ factually.

The problem with Speicher's legal reasoning is that it would lead to a situation in which a claim for conspiracy is **always** duplicative of the underlying wrongdoing. Because a claim for conspiracy is a derivative cause

of action that requires an underlying, independent legal wrong, (*see Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 55, 474 P.3d 1231, 1244) there would be no reason for any Plaintiff to plead a claim for conspiracy and the cause of action for conspiracy would be rendered completely superfluous.

Additional Colorado law supports the Plaintiffs argument. First, “Civil conspiracy is an ‘independent tort,’ and ‘[a] claim for damages arising from a civil conspiracy may be pled as a separate claim.’ *See, e.g., CJICiv.4th 27:1*, notes on use.” *Double Oak v. Cornerstone Devel.*, 97 P.3d 140, 148 (Colo.App.2004). Speicher attempts to distinguish the holding in *Double Oak* by arguing that because non-economic and punitive damages were available on the Plaintiffs’ claim for theft that the holding is inapplicable. Speicher’s argument is not well taken. *Double Oak* stands for the proposition that the entire point of a claim for conspiracy is that it is an independent claim that is different from the underlying claim.

As such, damages can be awarded separately on a claim for conspiracy if they differ from the damages in the underlying claim. Here, the claims are in fact different because they rest on different facts, thus Plaintiffs should be allowed to recover on both their claim for theft and conspiracy. Again, if Speicher’s argument is taken to its logical end point, any time that money

damages are available in the underlying wrong, those damages would be duplicative of the claim for conspiracy. The result would be that a claim for conspiracy would be completely meaningless.

The second argument which further supports the Plaintiffs' position is that the amount of damages to award in a jury trial is within the sole province of the jury. *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 148 P.3d 212, 217 (Colo. App. 2006). Thus, whenever it is possible, the trial court must do everything it can to give effect to the jury's verdict. *Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 2020 COA 165, ¶ 56. In this case, the trial court's rationale supporting its ruling is a single sentence: "Plaintiffs have not sufficiently explained how the damages for the claims are separate." CF6039. Here, the damages are different because (1) the damages for conspiracy were separately awarded to the Plaintiffs by the jury independent of their claim for theft, (2) the facts which support the Plaintiffs' claim for conspiracy are different than the facts which support the claim for theft, and (3) the Plaintiffs did not recover punitive damages on their claim for civil theft. As such, the trial court committed reversible error in ruling that the jury's award of non-economic and punitive damages on the Plaintiffs' claim for conspiracy was duplicative to the jury's award of damages on their claim for theft.

- ii. If the Plaintiffs' First Argument is Rejected, their Alternative Argument is that Pursuant to C.R.C.P. 15(b), the Plaintiffs' Complaint can be Amended to Conform to the Pleadings, even after Judgment has been Entered.

In the alternative, Plaintiffs argue that C.R.C.P. 15(b) states: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Because Speicher did not object to the 12 independent facts at issue, he provided his consent and this Court must conform the evidence at trial with the pleadings, and the Plaintiffs' argument **shall** be treated as if it was raised in the pleadings. C.R.C.P. 15(b) further states: "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, **even after judgment; but failure so to amend does not affect the result of the trial of these issues.**" (emphasis added). *See also Cox v. Bertsch*, 730 P.2d 889, 892 (Colo. App. 1986).

Speicher argues that since this argument was not raised with the trial court, that this argument has been waived. This is incorrect. As noted above, the failure of the Plaintiffs to file a motion for the trial court to amend the pleadings to conform to the evidence does not affect the result of the trial of that issue. Also, the Plaintiffs argued that the way the evidence came in during the course of the trial, the jury instruction for conspiracy should

include conspiracy based on the unlawful goal of civil theft **or** accomplishing a goal through unlawful means. *See* CF5980.

REQUEST FOR APPELLATE ATTORNEY FEES

Speicher does not dispute that award of attorney fees to a prevailing party under C.R.S. § 18-4-405 is mandatory at both the trial and appellate levels. Thus, if Speicher's appeal is denied and the judgment for civil theft is upheld, Plaintiffs are entitled to their reasonable attorney fees related to this appeal.

CONCLUSION

For the foregoing reasons, this Court should **REVERSE** the judgment of the district court that the noneconomic and punitive damages awarded on the Plaintiffs' claim for conspiracy is duplicative of the noneconomic and treble damages on the Plaintiffs' claim for civil theft and **REMAND** the case **WITH INSTRUCTIONS** that the district court is to enter an order awarding the Plaintiffs the noneconomic and punitive damages for conspiracy.

Dated July 5, 2024

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify I filed and served the foregoing **APPELLEES' REPLY BRIEF** via CCE on July 5, 2024, to the following:

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