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| COURT OF APPEALS, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED<br>April 12, 2024 8:13 PM |
| Appeal from the District Court for La Plata County Colorado, 6th Judicial District;<br>Case No. 2014CV030213, Division 5<br>District Court Judge Suzanne F. Carlson | ▲COURT USE ONLY▲ |
| PLAINTIFFS-APPELLEES AND CROSS-APPELLANTS:<br>**RODDESS EKBERG, TIMOTHY EKBERG, JUSTIN FIERSTEIN, SARAH FIERSTEIN**<br><br>V.<br><br>DEFENDANT-APPELLANT AND CROSS-APPELLEE:<br>**JEFFREY SPEICHER** | Case No. 2023CA1535 |
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| **APPELLEES' OPENING-ANSWER BRIEF** | |

## 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 9,474 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: April 12, 2024.

Westerfield & Martin, LLC

*/s/ Zachary S. Westerfield*
Zachary S. Westerfield

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## ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that the damages awarded by the jury to the Plaintiffs on their claim against the Defendant for conspiracy were duplicative of the damages that the jury awarded the Plaintiffs on their claim for civil theft.

## STATEMENT OF THE CASE

This case relates to the wrongful death of Rodney Ekberg (hereinafter "Rodney"), who was the father of Roddess, Tim and Thess Ekberg, the grandfather of Justin and Sarah Fierstein and the father-in-law of Jeff Speicher (hereinafter "Speicher"). Rodney was killed in an automobile accident on Christmas Eve of 2012. EX173. The at-fault driver, Nancy Homler (hereinafter "Homler"), was charged with careless driving causing death and found to be 100% at fault. CF3534.

When Rodney passed away on December 24, 2012, Speicher and Thess (hereinafter collectively "the Defendants) and their children were visiting Speicher's family in Nevada. Despite learning of Rodney's death, the Defendants took time to take family pictures and to call and report the accident to their insurance company. TR4/25/2023-323:4-326:16. They did not call Roddess, who was left to find out about her father passing away from her hairdresser 11 days later. TR4/27/2023-1017:19-1018:9. The Defendants also concealed Rodney's funeral and the location of his burial (*id*. at 1018:10-

1019:10) and devised a plan to create a fake will for Rodney (*id*. at 821:6-823:1;965:2-971:22; *see also* EX89).

With the fake will, the Defendants hired Jesse Bopp (hereinafter "Bopp") to file an informal probate case in Durango. EX100-103. Thess was appointed the personal representative (hereinafter "PR") of Rodney's estate. EX138-139. Speicher, using his knowledge, experience, and training in estate planning (TR4/24/2023-208:24-209:23) exclusively negotiated with Homler's insurance, Farmers, and his own insurance, American Family (hereinafter "AmFam") to collect the full amount of wrongful death benefits which could be paid under Colorado law. *See* EX36-42;47-74. At that time, this amount was $436,070, and in fact the full amount of $436,070 was paid. CF2666-2668. Specifically, Defendants collected $100,000 in March of 2013 from Farmers (EX161-163) and $336,070 in April 2013 from AmFam (EX173-174).

Speicher was able to convince both Farmers and AmFam to pay Thess, in her capacity as the PR of Rodney's estate, the wrongful death benefits rather than the individual heirs pursuant to the wrongful death statute. EX161-163;173-174. Initially, AmFam resisted paying the PR because Speicher refused to provide them the names and contact information of the Plaintiffs/heirs. While AmFam thought this was suspicious and tried to get

this information multiple times, they eventually relented and paid the wrongful death benefits to the PR once they got a release to do so. EX54;58;60-62;79.

The Defendants also intentionally misled Bopp about the nature of their relationship with the Plaintiffs/heirs and intentionally gave Bopp the wrong contact information for Roddess and Tim to conceal Rodney's estate and Thess' appointment as PR. TR4/26/2023-525:9-526:20. Indeed, the Defendants never informed the Plaintiffs/heirs of Rodney's estate or the wrongful death benefits received.

On multiple occasions, Roddess spoke to Thess about hiring an attorney to investigate Rodney's death. TR4/27/2023-948:3-952:21. Each time Roddess was rebuked and told that it would be wrong to receive financial compensation from Rodney's death. *Id*. Despite these rebukes, the Defendants had already received $436,070 and spent it on themselves to support their lavish lifestyle (*see* TR4/25/2023-292:1-9; TR4/28/2023-1154:3-1157:14) while Roddess was homeless, (TR4/27/2023-935:6-21) and living in her car, and Tim recently had gone through foreclosure and bankruptcy. TR4/27/2023-824:9-826:1.

Roddess filed this lawsuit against Homler on December 23, 2014. CF1. Roddess later learned that Homler had settled with Thess, that an estate for

Rodney had been created, and that as PR Thess had been paid $100,000 by Farmers. CF9-11. Roddess substituted Thess for Homler as the Defendant in July 2015 so she could recover her portion of the wrongful death proceeds. CF20-25. Once Thess was sued, she hired Bopp to defend her. CF35.

Even though Speicher was not a named defendant at this time, he completely controlled the defense of this case. He instructed Bopp to obtain a quick settlement with "R"[1] so other Plaintiffs/heirs, who he referred to as "unmentionables" (TR4/25/2023-380:10-381:18), would not join the lawsuit, even though they were owed a portion of the wrongful death proceeds by statute. Speicher even told Bopp what the strategy for mediation was: "[Roddess] is entitled to NOTHING. No plan to split the baby. Period, end of story." (EX185) (emphasis in original); *see also* TR4/25/2023-438:8-22. Bopp responded that they had to keep the strategy of not mediating in good faith quiet to avert contempt of court. EX185.

It was at this time that Roddess learned that in addition to being paid by Farmers, the Defendants also received $336,070 from AmFam. After serving a subpoena on AmFam, Roddess learned that Speicher was the mastermind behind the conspiracy and theft, and he was added as a

[1] Speicher hated Roddess so much that he refused to call Roddess by her name and would only refer to her as "R" or the "evil one". TR4/25/2023-374:5375:1.

defendant to this lawsuit in February 2017. CF532-561. The Defendants went to extraordinary lengths to conceal this lawsuit from the other Plaintiffs/heirs, but eventually each became a Plaintiff in this lawsuit. The Defendants then turned to a complex strategy of retaliation and witness intimidation to convince the Plaintiffs to dismiss the lawsuit.

On May 9, 2018, the trial court found that the $436,070.00 paid to Thess and Rodney's estate was paid in accordance with the Wrongful Death Act and that it belongs in equal shares per capita at each generation of Rodney's heirs. CF2666-2668. In April 2019, this case proceeded to trial, where Speicher was found liable for civil theft, conspiracy, fraud, and punitive damages. Speicher appealed only two issues from the first trial in 2019CA2054. CF5436-5468. He won that appeal on the grounds that he was not allowed to present the statute of limitations as an affirmative defense. *Id.* On remand, the trial court did not limit the second trial to the issue of the statute of limitations, instead finding the scope of retrial was liability and damages. CF5336. Despite this, Speicher lost the second jury trial in April 2023.

Here, Speicher is not appealing the statute of limitations; instead, he appeals jury instructions and evidentiary rulings that go to his defenses on the merits of Plaintiffs' claims. While the Plaintiffs contend that there was

not reversible error at the second trial, Speicher's evidentiary arguments fail because they were not properly preserved. Furthermore, the jury instruction Speicher is appealing had no impact on Speicher's liability because it was not given during the first trial and Speicher was still found liable. Thus, any error was harmless.

Speicher is a thief who stole hundreds of thousands of dollars from his own family members. CF5943-5950;6034-6037. He conspired with his wife Thess to steal from Roddess, Tim, Justin and Sarah and to conceal their theft. CF5951-5958;6038-6040. When other family members learned of this theft and conspiracy, the Defendants conspired to intimidate witness/parties to this case so they would not face the consequences of their illegal actions.

In multiple instances in Speicher's Opening Brief (at 22;31;40), he argues that this was a close, hard-fought case in which Speicher presented meritorious defenses. Such claims are the pinnacle of sophistry. Speicher was found liable for civil theft, conspiracy, and punitive damages by a jury of his peers not once but twice.[2] Two separate juries found that there was proof, beyond a reasonable doubt, that Speicher's illegal actions were so outrageous and egregious that punitive damages were warranted. Speicher's arguments

[2] Speicher was also found liable for fraud at the first trial, but he did not appeal that verdict. As such, the verdict against Speicher for fraud has been a final judgment since 2019.

on appeal lack merit and there is no need for a third jury trial in this case. The time to close this matter after 11 long and painful years has arrived.

## SUMMARY OF THE ARGUMENTS

### A. Cross-Appellants Opening Brief

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

The Plaintiffs highlighted twelve facts that occurred over a ten-year period that all occurred after Speicher stole the Plaintiffs' money. Those facts related to Speicher's continued and long-term efforts to, at first, conceal his theft, and then later, to intimidate the Plaintiffs into either not joining this wrongful death lawsuit or to dismiss it.

### B. Plaintiffs-Appellees Answer Brief

1. The trial court did not err in instructing the jury that Thess had been found liable of civil theft and conspiracy at a previous trial in the same case.

The trial court did not err in instructing the jury that Thess had been found liable for civil theft and conspiracy at the first trial because the Plaintiffs were required to prove her liability as a co-conspirator in the

second trial. The probative value of Thess' liability was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial court ruled in Speicher's favor that the Plaintiffs could not inform the jury that he was found liable for fraud at the first trial, even though that was a final verdict. Thus, even if cases cited by Speicher applied to civil cases, the trial court's ruling did not run afoul of the holdings in those cases. Lastly, because the jury instruction in question was not given at the first trial, and Speicher was found liable, any impact from that instruction was harmless because there already was a trial where that instruction was not given, and Speicher was found liable anyways.

2. The trial court did not err in its admission of other acts by Speicher and Thess.

Speicher failed to preserve this argument for appeal because he failed to make timely and specific objections to this evidence at trial. Even if this argument had been properly preserved, the probative value was not substantially outweighed by the danger of unfair prejudice and the evidence conformed to the holding in *Spoto*.

3. The trial court did not err in its admission of evidence about Speicher's income and assets.

This argument was raised by Speicher before the first trial. Evidence of his income and assets was admitted at the first trial, but the ruling admitting

this evidence at the April 2019 trial was not appealed in 2019CA2054. Thus, this argument has been waived. Even if this court does not find a waiver on this basis, the argument was not properly preserved due to the lack of timely and specific objections during the second trial. Finally, even if preserved, the admission of this evidence was not in error as its probative value was not substantially outweighed by the danger of unfair prejudice.

4. The trial court did not err in its admission of summary exhibits of bank records.

The summary exhibits were admitted during the first trial, but their admission was not appealed in 2019CA2054. Thus, this argument has been waived. Even if this court does not find a waiver on this basis, it was not properly preserved due to the lack of timely and specific objections during the second trial. Even if this argument was properly preserved, the summaries, as prepared and admitted, comply with C.R.E. 1006 and the holding in *Murray*.

5. Cumulative error is inapplicable to civil cases.

Here, none of the court's rulings were erroneous, so by law there can be no cumulative error. Further, the cumulative error doctrine does not apply in civil cases, and, as a result, does not merit reversal of this case.

## 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

The issue before the Court is what is the proper measure of damages regarding the jury verdict in favor of Plaintiffs on their claims for civil theft and conspiracy. This presents a question of law subject to de novo review. *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). Because the facts at issue here are undisputed, the legal effect of those facts is a question of law. This court therefore is not bound by the trial court's conclusions of law, thus review again is de novo. *Ocmulgee Props. Inc. v. Jeffery*, 53 P.3d 665 (Colo.App.2001).

2. Where the issue was raised and ruled upon

On April 28, 2023, the jury returned a verdict for Plaintiffs on their claim for civil theft. CF5943-5950. The jury separately returned a verdict for Plaintiffs on their claim for conspiracy. CF 5951-5958. On May 12, 2023, Plaintiffs filed their Notice of Filing Proposed Findings Re: Conspiracy. CF6008-6017. 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.

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.*

The general rule is that a plaintiff may not receive a double recovery for the same wrong. *See Farmers Group, Inc. v. Williams*, 805 P.2d 419, 427 n. 6 (Colo.1991); *Rusch v. Lincoln-Devore Testing Lab., Inc.*, 698 P.2d 832, 834 (Colo.App.1984); 22 Am.Jur.2d Damages § 35 (1988). The Plaintiffs concede that in this case, the rule on double recovery prevents them from recovering economic damages on their claim for conspiracy.

But the jury awarded non-economic and punitive damages to the Plaintiffs on their claim for conspiracy which are separate and independent of the damages awarded for civil theft. As such, if the noneconomic and punitive damages the jury awarded to the Plaintiffs on their claim for conspiracy were not based on the same wrong, they are not duplicative of the damages for civil theft.

When determining what constitutes the same wrong, courts look at whether the claims at issue are based upon the same facts. *Refuse & Envtl. Sys., Inc. v. Industrial Servs. of America*, 932 F.2d 37, 43 (1stCir.1991). The

analysis in the *Refuse* case is critical to the holding of *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819 (Colo.1992). If the claims are not based on the same facts, Plaintiffs can recover their non-economic and punitive damages for conspiracy.

By definition, a claim for civil conspiracy is a derivative cause of action. If the acts constituting the underlying wrong do not provide the basis for an independent cause of action, there is no cause of action for the conspiracy itself. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 55, 474 P.3d 1231, 1244. To prove conspiracy, Plaintiff must prove additional facts beyond what is required to prove the underlying wrong. Put another way, simply because there was theft does not mean there was a conspiracy. It was possible for the Plaintiffs to prevail at trial on their claim for civil theft and lose their claim for conspiracy.

In this instance, Plaintiffs' have non-economic damages for conspiracy which relates to Defendants agreeing, by words or conduct, to accomplish a goal through unlawful means. CF5980. These damages are different than the damages for civil theft because concealment and intimidation, as detailed

below, are not facts needed to prove theft. This differs from the conspiracy to commit civil theft, which is based on the **other** part of Instruction 19. *Id.*[3]

b. *The Defendant stole Plaintiffs' money in March/April 2013.*

The theft at issue in this case took place in March 2013 (the theft of monies paid by Farmers) and April 2013 (the theft of the money paid by AmFam). If the underlying theft was completed by April 2013, any facts that occurred **after** April 2013 would prove that the two claims are based on different facts and thus different conspiracies. There are numerous facts that occurred **after** April 2013 which support Plaintiffs' argument that the conspiracy is based on different facts than the theft.[4]

1. September 2013 Celebration of Life for Paula Fierstein.

Paula passed away in September of 2013. The family held a celebration of life for her, and during that celebration Roddess discussed the possibility of hiring an attorney to investigate the facts and nature of Rodney's death with Thess. TR4/27/2023-950:19-952:21.

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[3] This instruction allows for conspiracy based on the unlawful goal of civil theft **or** accomplishing a goal through unlawful means.

[4] As detailed in this section, significant evidence was allowed without objection at the second trial regarding the conspiracy to conceal and intimidate, which is different than conspiracy to steal. *See* C.R.C.P. 15(b) ("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.")

During the celebration, neither Roddess, nor any other Plaintiff, was told of the following:

- Defendants had filed an informal probate case for Rodney's estate;
- Thess was appointed PR of that estate;
- Defendants hired Bopp;
- Bopp had requested Roddess and Tim's addresses;
- Defendants had intentionally provided bad address to Bopp to prevent Roddess and Tim from having notice of the probate case;
- The notices sent by Bopp to **both** Roddess and Tim were returned as undeliverable;
- Defendants expected the notices to come back as undeliverable because they intentionally provided Bopp with the wrong addresses
- Defendants had been negotiating with both Farmers and AmFam to receive wrongful death benefits;
- As PR of the estate, Thess had signed releases with both Farmers and AmFam which released all of Plaintiffs' claims against them; and

- When Roddess suggested to Thess that they hire an attorney to investigate their father's death, Thess "…blew up again on [Roddess], you know [and said], 'How dare you think of benefiting off the death of our father?'". *Id*. at 952:14-15.

2. June 17, 2016, Emails between Speicher and Bopp.

In 2016, Thess was the only Defendant and Roddess the only Plaintiff in this lawsuit. Despite that, Speicher controlled the defense of the lawsuit. Speicher told Bopp what the strategy for mediation was: "[Roddess] is entitled to NOTHING. No plan to split the baby. Period, end of story." (EX185) (emphasis in original). Bopp responded that they had keep the strategy of mediating in bad faith quiet to avert contempt of court. *Id*.

This was 3 years and 2 months after Defendants stole the Plaintiffs' money. This course of conduct has nothing to do with theft and everything to do with concealment.

3. July 28, 2016, Email from Speicher to Bopp.

On July 28, 2016, Speicher directed Bopp to obtain a quick settlement with Roddess because he did not want the news of this case to "…trickle down to other unmentionables." (EX189). By other unmentionables, Speicher was referring to other Plaintiffs. (TR4/25/2023-380:10-381:18).

4. July 2016, Justin was made aware of this lawsuit.

Justin first learned about this lawsuit during a phone call with Roddess in July 2016. (TR4/27/2023-1073:22-25). Up to that point in time, neither Defendant had told Justin about the lawsuit, even though he worked with Speicher at Wells Fargo, had seen him every day for years, and even lived with Defendants for six months. *Id.* at 1065-17:25;1068-4:10;1075-16:24.

5. Speicher retaliated against Justin by filing a complaint with Human Resources at Wells Fargo.

During their time working together, Speicher told Justin, and many of the others, how much money he made. *Id.* at 1092:23-1098:3. To intimidate Justin, and to retaliate against him for joining this lawsuit, Speicher tried to het Justin fired when he filed a complaint with HR in which he claimed that Justin had impermissibly accessed confidential information about Speicher's income and had disseminated it to other employees at Wells Fargo. *Id.*

In response, HR seized Justin's computer, had it electronically analyzed, and sat Justin down for an interrogation regarding the same. *Id.* There was no truth to Speicher's allegations as he was the one disseminating the information about his income, and no further action was taken against Justin. *Id.*

6. Speicher forced Justin to have to move offices to humiliate him in front of his co-workers.

To further intimidate and retaliate against Justin, Speicher was able to convince management at Wells Fargo that Justin had to be moved from the second floor, where all the advisors had offices, to the first floor, where no advisor had an office. *Id.* at 1098:4-1099:22. While moving, Speicher began started humming the "goodbye" song when Speicher passed Justin carrying boxes down the stairs. *Id.* at 1099:16-17. When Justin went back upstairs, Speicher had the same song playing on his phone loud enough for the entire office to hear. *Id.* at 1099:18-22.

7. Speicher followed Justin and had his young son make obscene gestures at Justin.

One day, during the pendency of this lawsuit, Justin was at the Courthouse doing research. *Id.* at 1099:23-1100:3. When he left the courthouse on foot, he encountered Speicher, who was driving his truck. *Id.* at 1100:4-11. Upon seeing Justin, Speicher turned his truck around, followed Justin, rolled the passenger window of the truck down, and had his young son (Justin's cousin), who was approximately 9 years old, flip Justin off. *Id.* 1100:12-23.

8. Defendants retaliated against Justin by unfriending him on social media.

During the pendency of this lawsuit, Justin was issued an order by the trial court that gave him three options regarding his involvement: (1) Justin

could become an active plaintiff; (2) Justin could disclaim himself; or (3) Justin could take no action and become an involuntary plaintiff. *Id*. at 1084:1-23; *see also* EX209. While Justin was deciding what he was going to do, he received a text message from Speicher which read: "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. Ultimately, when Speicher could not force Justin to comply with his demands, Defendants unfriended him on social media. TR4/27/2023-1102:7–1103:14; *see also* EX205 and 208.

9. Thess perjured herself.

Thess executed an affidavit on February 24, 2017, in which she claimed in paragraph 7: "Justin…told me that he has no interest [in] pursuing any issue raised in the probate or in this litigation." EX197-198. Justin testified, unequivocally, that this was untrue. *See* TR4/27/2023-1104:14-1105:4. Justin's testimony was corroborated by contemporaneous text messages regarding the same. EX199-206.

Three days after executing the affidavit, Thess texted Justin: "I gave your number to my attorney, the judge most likely is going to request that you and Sarah say or sign something official like, that you do or you don't want to be involved." *Id.* at 199. Justin responded stating that he was

uncomfortable signing anything until he knew what was going on. *Id*. Clearly, Justin had not decided what his involvement would be at the time Thess executed her affidavit, and Thess knew that he was undecided. Thus, she lied in her affidavit.

Justin learned about Thess' perjury in April 2017. TR4/27/2023-1104:14-1105:8. Justin confronted Thess about her perjury and she retaliated by unfriending him on social media. *Id*. 1105:9-1109:5.

10. Speicher attempted to get Justin fired from Wells Fargo.

As part of Speicher's intimidation and retaliation, he attempted to get Justin fired, though his efforts failed. TR4/28/2023-1190:20-25; 1210:20-1211:1.

11. Thess engaged in witness tampering and intimidation during the April 2019 trial.

During the April 2019 trial, there was an incident when Defendants walked by Roddess and Tim and Thess 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. TR4/27/2023-1003:5-18.

12. Speicher engaged in witness tampering and intimidation at the April 2023 trial.

During the morning of the fourth day of the second jury trial, some of the attorneys and parties were waiting in front of the courthouse for the

sheriff to unlock the front door to the courthouse. While Roddess was talking to her attorney, Zach Westerfield, 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. TR4/27/2023-999:9-1001:10.

This event was witnessed by Scott Landry, Tim's attorney. Mr. Landry provided an offer of proof regarding what he witnessed. TR4/27/2023-921:9-18;957:8-964:7. The court gave Speicher the opportunity to rebut the testimony provided by Roddess and to deny that he attempted to tamper with, and intimidate, a witness/party during the course of trial. TR4/27/2023-959:25-960:10; 963:16-24. Speicher refused, and his silence was deafening.

c. *Claims for conspiracy are independent claims that can have independent damages.*

"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.*, CJI-Civ.4th 27:1, notes on use." *Double Oak v. Cornerstone Devel.*, 97 P.3d 140, 148 (Colo.App.2004). In the *Double Oak* case, the underlying wrong related to a violation of CUFTA. *Id.* Even though the only remedy under CUFTA was equitable in nature, the court ruled that the claim for conspiracy was an

independent tort, and money damages could be awarded for conspiracy even though they were not available for the underlying wrong. *Id*. at 148-49.

The court further held that the trial court could award exemplary damages solely based on the conspiracy claim, as exemplary damages were not available for the underlying wrong. *Id*. at 149. In this case, the damages awarded to the Plaintiffs on their claim for conspiracy were separately awarded from their claim for civil theft.

The record is replete with statements from Plaintiffs' counsel that the purpose of the evidence described above was specifically related to witness intimidation, retaliation, and perjury. Indeed, the phrase "intimidation" or "witness intimidation" was used more than a dozen times to describe the unlawful nature of Defendants' actions. *See* TR4/27/2023-864:16; 866:8; 866:13; 868:6-7; 1001:9; 1002:2; 1002:20; 1003:9; 1092:25; 1093:8; 1098:9; and 1099:23.

The Court has a duty to reconcile the jury's verdict based on the evidence if possible. Here, there is a factual basis to sustain the conspiracy damages that is distinct from the civil theft claim. "'The amount of damages to which a plaintiff is entitled is a matter within the sole province of the jury." *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 148 P.3d 212, 217 (Colo. App. 2006). Thus, '[w]hen possible, trial courts must give effect to

a jury's verdict.' *Id.*" *Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC*, 2020 COA 165, ¶ 56. If this court determines that the damages for conspiracy are the same as the damages for civil theft, the evidence at the second trial of the Defendants conspiracy to conceal their theft and to intimidate and tamper with witnesses will not be given any effect, and Speicher and Thess will get away all of the illegal actions described in detail above which occurred **after** the theft was completed.

Therefore, the claims for theft and conspiracy are based on different facts, and the noneconomic and punitive damages award by the jury for conspiracy are not duplicative of the damages award for theft.

## B. THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY THAT THESS EKBERG HAD BEEN FOUND LIABLE OF CIVIL THEFT AND CONSPIRACY TO COMMIT CIVIL THEFT AT A PREVIOUS TRIAL IN THE SAME CASE.

### 1. Standard of Review

The standard of review is not abuse of discretion, it is harmless error. "…[W]e apply a harmless error standard of review to a properly preserved objection to a jury instruction." *Harris Group v. Robinson*, 209 P.3d 1188, 1195 (Colo.App.2009).

### 2. Where the issue was raised and ruled upon

The Plaintiffs/heirs agree with Speicher about where the issue was raised and ruled upon. *See* Opening Brief at 12-13.

3. Argument

a. *To prove conspiracy, the Plaintiffs were required to prove Speicher conspired with another person.*

The essence of a civil conspiracy is that **two or more people** agreed, by words or conduct, to accomplish an unlawful goal or accomplish a goal through unlawful means. *See* CJI 27:1. This is the same instruction that was given to the jury in this case. CF5980. Plaintiffs' position is that Speicher's co-conspirator was Thess. If the jury did not know that Thess was found liable for civil theft and conspiracy at the first trial, the Plaintiffs would have to prove, for a second time, Thess' liability even though the judgment against her was never appealed and is final. TR3/17/2023-16:3-17:21; *see also* CF5420-5425; 5511-5521.

This would be fundamentally unfair to Plaintiffs, would extend the trial, and would allow Speicher to argue that he was not liable for conspiracy because there was no evidence of his co-conspirator's liability.

b. *The trial court did not err by instructing the jury about Thess's liability for civil theft and conspiracy.*

The trial court evaluated this matter by engaging in C.R.E. 401 and 403 analyses. CF5570-5571. The trial court ruled that the jury should **not** be informed that Speicher was found liable for civil theft, conspiracy, and fraud in the first trial, as the prejudicial effect and probable confusion would be

high and would substantially outweigh the probative value. *Id*. Speicher made no mention of this ruling in his Opening Brief.

The trial court further ruled that "…**because conspiracy requires a co-conspirator**, the jury verdicts for theft and conspiracy are highly relevant to the claims to be tried. The verdicts are also prejudicial to Speicher. However, the prejudicial effect **does not** outweigh the probative value of the theft and conspiracy liability findings against Defendant [Thess] Ekberg." *Id*. at 5571 (emphasis added). The trial court did not err. It recognized that if the jury was not instructed about the prior verdicts against Thess for civil theft and conspiracy, the Plaintiffs would have to unfairly prove her liability a second time.

The trial court also took two additional steps to reduce the prejudicial effect the ruling might have on Speicher. First, the trial court ruled that the jury would be informed of the verdicts against Thess through an instruction, rather than letting Plaintiffs' counsel elicit this information during their examination of Thess. Second, the trial court gave an additional jury instruction "…stating that Speicher's liability is to be considered separately from Thess' liability…" *Id*. Two specific instructions **were** given to the jury which made it abundantly clear that Speicher's liability was to be determined separately from Thess'. *See* CF5961; *see also* CF5988.

c. *The case law cited by Speicher on this matter is not binding and can easily be distinguished from the facts of this case.*

Speicher cites two cases from Colorado to support his argument that what the trial court did was so prejudicial that a mistrial is required: *Salas v. People*, 177 Colo. 264, 493 P.2d 1356 (1972) and *People v. Medina*, 185 Colo. 101, 109, 521 P.2d 1257, 1261 (1974). These cases do not support Speicher's argument.

1. Both *Salas* and *Medina* involve the admissibility of prior verdicts of the same defendant, not a co-defendant or co-conspirator.

In the *Salas* case, "Defendant Salas was convicted and sentenced in a previous trial for the crimes of assault to rob and assault. This sentence was vacated, and a new trial granted.... The defendant was subsequently convicted in a second trial and now brings error as to that trial." 177 Colo. at 265. During the second trial, a witness testified that he had read a newspaper clipping that Salas had been previously convicted. *Id.* at 265-66.

In *Medina*, there were three different trials. 521 P.2d at 1258-59. The portion of *Medina* that Speicher cites relates to the prosecutions reference during Trial No. 2 to the sanity result of Trial No. 1. *Id.* Again, the issue in *Medina* is the same as in *Salas*: reference to prior convictions of the same criminal defendant in a subsequent trial.

*Salas* and *Medina* can be distinguished from the instant case because the issue before this court is not about the jury's findings against Speicher at the first trial in the second trial because, as noted above, the trial court ruled in Speicher's favor on this matter. CF5571.

2. Both Salas and Medina are criminal, not civil cases.

*Salas* and *Medina* are both criminal, not civil, cases. Speicher tries to pre-empt this, but his argument is unpersuasive. Opening Brief at 19-20. The reason that courts are more concerned about the prejudicial effect outweighing the probative value of evidence in a criminal case is because the criminally accused have constitutionally afforded due process rights that simply do not exist in a civil case. *See Griffin v. California*, 380 U.S. 609 (1965); *see also Miranda v. Arizona*, 384 U.S. 436 (1966).

In a civil case the plaintiff has the right to call the defendant in their case-in-chief, while in a criminal case the accused cannot be compelled to testify. Here, the Plaintiffs called Speicher as their first witness. *See* TR4/24/2023. While Speicher would have the right to plead the fifth, the jury would be instructed that it could infer that the answer would have been unfavorable to him. *See* CJI 3:5A; *see also*, *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 141 & n.5 (Colo.2004).

3. Speicher admits that there is no binding case law in Colorado supporting his argument.

The Defendant admits that "…counsel is unaware of any Colorado court that has addressed this exact question…". Opening Brief at 20. The Defendant then cites several nonbinding cases from outside Colorado to support his argument. The Defendant's reliance on these out-of-jurisdiction cases is misplaced. Those cases (1) only apply to cases in which the jury has been instructed about a prior verdict against the same Defendant in a subsequent trial, which is not the issue before this court, and (2) that cases outside the jurisdiction take a variety of approaches to handling this matter, which demonstrates a range of possible outcomes the trial court can choose, thus supporting the Plaintiffs' position that the trial court did not err.

d. *This Court can affirm the judgment of the trial court on alternate grounds.*

Thess was found liable for civil theft and conspiracy after the first trial and neither she, nor Speicher, appealed those verdicts. Thus, the law of the case is that Thess was Speicher's co-conspirator, and she was liable for both conspiracy and civil theft. As such, it was not error to instruct the jury about Thess' liability because those findings are the law of the case. "…[T]he first issue involves the law of the case doctrine. This doctrine contains two branches, analyzed differently, depending on whether the prior 'law' of the case involved a court's own rulings or the rulings of a higher court. This

appeal involves the latter: the so-called 'mandate rule.' The mandate rule has been described as the 'more powerful version,' or 'the purest form.'" *Hardesty v. Pino*, 222 P.3d 336, 339 (Colo.App.2009) (internal citations omitted). "Trial courts have no discretion to disregard binding appellate rulings: '[t]he law of the case as established by an appellate court must be followed in subsequent proceedings before the trial court.'" *Id.* at 340 (internal citations omitted). As such, it was not error for the trial court to instruct the jury about the verdicts against Thess because they are the law of the case. *U.S. v. Webb*, 98 F.3d 585, 589 (10thCir.1996) (noting that because an issue was not appealed the district court's ruling became final and court did not err in declining to address it on remand); *see also Doe v. Chao*, 511 F.3d 461, 465 (4thCir.2007) (stating that "any issue that could have been but was not raised on appeal is waived and thus not remanded"); *U.S. v. Lee*, 358 F.3d 315, 324 (5thCir.2004) ("All other issues not arising out of [the appellate] court's ruling and not raised in the appeals court, *which could have been brought in the original appeal*, are not proper for reconsideration by the district court below."); *S. Atl. Ltd. P'ship of Tenn, LP v. Riese*, 356 F.3d 576, 584 (4thCir.2004) (stating that "the mandate rule forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived") (quotation marks and citation omitted); *U.S. v. Husband*, 312 F.3d

247, 250 (7thCir.2002) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded."); *U.S. v. Stanley*, 54 F.3d 103, 107 (2dCir.1995) (holding that mandate rule prevents district court from revisiting issue not raised in initial appeal); *U.S. v. Bell*, 988 F.2d 247, 250 (1stCir.1993) ("The black letter rule governing this point is that a legal decision made at one stage of a civil...case, unchallenged in a subsequent appeal despite the existence of ample opportunity to do so, becomes the law of the case for future stages of the same litigation, and the aggrieved party is deemed to have forfeited any right to challenge that particular decision at a subsequent date."); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250, 258 U.S. App. D.C. 124 (D.C.Cir.1987) ("Under law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity to do existed, become the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.").

e. *Even if the trial court erred, such error was harmless.*

Finally, if this court believes there is evidence supporting Speicher's argument, any such error is harmless. Pursuant to C.A.R. 35(c), "[t]he

appellate court may disregard any error or defect not affecting the substantial rights of the parties." *See also Harris Group*, 209 P.3d at 1195.

We do not need to speculate, guess, or theorize about what would have happened if this instruction were not given because when the first trial occurred, this instruction was not given, and Speicher was found liable. As such, it is indisputable that this instruction had no bearing on Speicher's liability. As noted above, the evidence of Speicher's liability was overwhelming. *See* Statement of the Case, *supra*, at 11-13.

## C. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED EVIDENCE OF OTHER ACTS BY SPEICHER AND THESS.

1. Standard of Review

Plaintiffs dispute that the standard of review is abuse of discretion because the issue has been waived.

2. Where the issue was raised and ruled upon

Speicher failed to preserve this issue for appeal by failing to make **timely and specific objections** to the admission of evidence of "Other Acts" of Speicher and Thess. *Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 325 (Colo. 2009) (emphasis added); *see also Richison v. Ernest Grp.*, 634 F.3d 1123, 1127 (10thCir.2011); *see also Banning v. Prester*, 317 P.3d 1284, 1290 (Colo.App.2012). For example, an objection on relevance grounds (C.R.E. 401) itself does not preserve an objection due to unfair prejudice, etc.

(C.R.E. 403). *DeWitt*, 218 P.3d at 325. An objection must be specific because it must be "…sufficient to direct the trial court's attention to the argument…" and "afford[] the judge an opportunity to focus on the issue and … avoid the error." *Id.* (internal citations omitted).

In the Opening Brief, Defendant states: "Speicher's counsel objected to Justin testifying about being investigated at work for disclosing Speicher's income." Opening Brief at 26. Nowhere in the cited section did Defense counsel make a timely and specific objection to that evidence. Justin's counsel asked him to "…explain to me what experiences you've had with Mr. Speicher's actions of intimidation". TR4/27/2023-1093:7-8. After Justin began to answer the question, Defendant's counsel stated: "Your Honor, I'm going to object. If we can approach." *Id.* at 1093:15-16. The trial court conducted a sidebar during which Defense counsel failed to state any objections to the proffered testimony. *Id.* at 1093:18-1094:11. Plaintiff's counsel then questioned Justin about this topic without objection (other than for leading). *Id.* at 1094:12-1098:8.

The Opening Brief states that the admission of this testimony was a violation of C.R.E. 401, 402, 403 and 404(b). At trial, Defense counsel did object on those grounds or mention any prejudicial effect that admission of

the evidence might have. Defense counsel never used the words "relevance" or "prejudice".

In the Opening Brief, Defendant states: "Speicher's counsel objected to Roddess testifying that Speicher had pantomimed shooting a gun at her. *Id.* at 864-870, 920-21, 963:8-22." Nowhere in the cited section did Defense counsel make a timely and specific objection to that evidence. In fact, the trial court asked Defense counsel if he was objecting, and he did not. *Id.* at 868:3-20. Again, Defense counsel did not object to this evidence pursuant to C.R.E. 401, 402, 403 or 404(b) and never used the words "relevance" or "prejudice".

In the Opening Brief, Defendant states: "Speicher's counsel objected to Roddess testifying that Thess had pantomimed choking towards her during the previous trial. *Id.* at 1001-1002." Nowhere in the cited section did Defense counsel make a timely and specific objection to that evidence.

Roddess testified, without objection, about Speicher's "pantomimed shooting" of her. Counsel asked if that was the first time during the litigation that Defendants had tried to intimidate her. *Id.* at 999:9-1001:12. Defense counsel stated: "Objection. May we approach, Your Honor?" *Id.* at 1001:13-14. During the sidebar Defense counsel objected to evidence of the "pantomimed choking" incident because it did not involve Defendant

Speicher and the questions should have been posed to Thess. Defense counsel did not raise C.R.E. 401, 402, 403 and 404(b) or even mention any prejudicial effect that admission of this evidence might have. Defense counsel did not use the words "relevance" or "prejudice" regarding this testimony. Because Defense counsel failed to make a timely or specific objection to the foregoing evidence, this argument has been waived.

3. Argument

a. *The Other Acts of Defendant Speicher and Thess were Relevant, Not Unfairly Prejudicial and were Properly Admitted.*

Trial courts have substantial discretion to decide whether to admit evidence of prior bad acts. *See People v. Snyder*, 874 P.2d 1076, 1080 (Colo.1994). Further, the court may allow this evidence when used for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* The Colorado Supreme Court has articulated a four-part test to determine the admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b). *People v. Spoto*, 795 P.2d 1314, 1318 (Colo.1990).

To be admissible under *Spoto*, the 404(b) evidence must:

(1) relate to a material fact;
(2) be logically relevant;
(3) have a logical relevance that "is independent of the intermediate inference, prohibited by CRE 404(b), that the

> defendant has a bad character" and committed the crime charged because he acted in conformity with that bad character; and
> (4) have a probative value that is not substantially outweighed by the danger of unfair prejudice.

*Id.*

Here, Plaintiffs introduced evidence related to Speicher's actions, including following and taunting Plaintiffs, and taking measures against a subordinate, Justin, at their place of employment. This evidence was directly relevant and probative, as it tended to prove Defendants plan to conspire to intimidate the Plaintiffs from joining this lawsuit, from continued pursuit of this lawsuit, and from seeking recovery of their stolen property. Thus, this evidence is admissible under *Spoto, supra.*

b. *The evidence of Speicher's other acts was directly related to the conspiracy to conceal the theft of the Wrongful Death proceeds and to intimidate the Plaintiffs from pursuing this case.*

The testimony at issue related to a material fact in the case *i.e.*, Speicher's plan to conceal his fraudulent scheme and intimidate the Plaintiffs to obtain dismissal of the case. It proves Speicher's attitude was to demean the Plaintiffs. The fact that Speicher followed, intimidated, and taunted a witness/party in this case is logically relevant, as it tends to demonstrate Speicher's willingness to prevent Justin's testimony or otherwise cause him to give up his rights to the wrongful death funds.

The logical relevance is "independent of the intermediate inference" that Speicher has bad character. The Plaintiffs did not introduce evidence of the other acts of Speicher to demonstrate that he has bad character, but rather to show his intent, attitude, and plan to conceal his theft and intimidate Justin. It also refutes any claim Speicher had that he was acting on the advice of counsel or pursuant to the testamentary wishes of Rodney.

Finally, the probative value of the testimony far outweighed any prejudicial effect, as it showed the lengths Speicher went to avoid paying his current judgment for fraud and his intent to steal. To relieve any prejudicial effect, Speicher was given the opportunity to rebut this evidence. Speicher **chose** to not testify in rebuttal. Now, Speicher must live with the consequences of his actions. The fact that some of the intimidation against Roddess happened **at the courthouse** the day that Roddess was set to, and did, testify should not be lost on this Court.

## D. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED EVIDENCE ABOUT SPEICHER'S INCOME AND ASSETS.

1. Standard of Review

Abuse of discretion is not the correct standard of review because of waiver. *See* C(1), *supra*, above.

2. Where the issue was raised and ruled upon

Speicher waived his right to appeal whether the trial court erred when it admitted evidence about Speicher's income and assets because this issue was fully briefed and ruled on prior to the April 2019 trial, significant evidence about Speicher's income and assets came into evidence at the first trial, and Speicher failed to appeal the admission of that evidence in 2019CA2054. *See Webb*, 98 F.3d at 589; *see also Chao*, 511 F.3d at 465; *Lee*, 358 F.3d at 324; *Riese*, 356 F.3d at 584; *Husband*, 312 F.3d at 250; *Stanley*, 54 F.3d at 107; *Bell*, 988 F.2d at 250; *Williamsburg Wax Museum, Inc.*, 810 F.2d at 250.

3. Argument

a. *Speicher waived this argument.*

This issue was raised **prior to the first trial** in April 2019 and significant evidence was presented at that trial regarding Speicher's income and assets. *See* MILs dated 5/2/2018 (CF2398-2403) and 3/18/2019. (CF3663-3667) and order dated 4/12/2019 (CF3905-3908); Significant testimony regarding Speicher's income, lifestyle, assets, and cars was offered during the first trial through Dale Willbanks (TR4/17/2019-418:2-425:17) and Justin (TR4/24/2019-1697:7-1739:10). Speicher did not appeal the admission of his income and assets after the first trial in 2019CA2054, thus

he has waived his ability to object to the admission of evidence of his income and assets during the second trial in this appeal.

Any argument that Speicher may make that he changed the nature of his arguments from trial one to trial two are unavailing. The basis for the ruling that the evidence was admissible at the first trial is the same as the second trial. *Compare* CF3905 and CF5927. The trial court explained why the evidence was probative that this evidence was probative and because the basis of the ruling is identical in the 2019 and 2023 order, the way Speicher may have slightly altered his argument prior to the second trial is a distinction without difference.

In the 2023 Order, the trial court ordered that Speicher make appropriate objections to specific evidence at trial. CF5927. The objections that Speicher contends were made at trial were on the basis of relevance (what cars were owned and when they were purchased). Once the timeframe issue was resolved, the trial court allowed that testimony with no further objection from Speicher. TR4/25/2023at346:8-347:9. The trial court agreed with Speicher that evidence about vehicles owned at any time since 2013 was not relevant, but evidence of vehicles owned in 2019 was relevant to the intent to permanently deprive the Plaintiffs of their rightful share of the

subject funds and Speicher's ability to pay the same because that is when Speicher transferred the money and those titles. *Id*. at 346:12-20.

Thus, even if Speicher had not waived his ability to object to this evidence because he failed to appeal its admission in 2019CA2054, Speicher failed to properly object to the admission of this evidence at the second trial, thus providing a second, independent basis for waiver. *See DeWitt*, 218 P.3d at 325.

b. *Even if Speicher did not waive this argument, the trial court did not err by admitting this evidence.*

The trial court correctly ruled that this evidence was admissible. First, the evidence is relevant. Second, while this evidence may be prejudicial, the probative value was not substantially outweighed by any prejudice, confusion, nor does it mislead the jury. *See Murray v. Just in Case Business Lighthouse* 374 P.3d 443, 451 (2016); *see also* CF5927; TR4/25/2023 - 346:12-20. To further alleviate any potential for prejudicial effect on Speicher, the trial court asked that (1) contemporaneous objections to specific evidence of income and assets be made at trial, and (2) that if such objections were made, the trial court would consider a limiting instruction. Speicher made no such contemporaneous objections, and he made no request for a limiting instruction.

## E. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED A SUMMARY EXHIBIT OF THESS'S BANK RECORDS PREPARED BY JUSTIN FIERSTEIN.

1. Standard of Review

Abuse of discretion is not the correct standard of review because of waiver. *See* D(1), *supra*, above.

2. Where the issue was raised and ruled upon

Because Exhibit 105-107 were admitted at the first trial and not appealed in 2019CA2054, this argument was not properly preserved. *See* D(2), *supra*, above. Plaintiffs/heirs do admit that prior to the second trial Speicher did file a MIL on this issue. *See* Opening Brief at 36.

3. Argument

a. *Speicher Waived this argument.*

All three summary exhibits were admitted at the first trial, and their admission was not appealed in 2019CA2054. *See* D(2), *supra*, above. Speicher concedes this in his motion in limine when he wrote that Justin testified about Exhibits 105-107 at the first trial, and that those same exhibits were admitted in first trial. CF5652-5654. Because Speicher did not appeal the admission of those exhibits in 2019CA2054, he has waived his right to appeal their admission in this case. *See* D(2), *supra*, above.

b. *The financial records at issue were voluminous and were available to both parties.*

"The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." C.R.E. 1006. Here, the bank and credit card records were voluminous and are the exact type of documents that C.R.E. 1006 contemplated when allowing for such records to be summarized. The records were available to both parties, and as such, these are the exact types of voluminous writings that can be presented in the form of a chart or summary. The Court did not abuse its discretion in admitting them.

c. *The summaries are not argumentative.*

The Defendant cites *Murray* to support his argument on appeal. Here, the summaries were not argumentative in title or form, tracked the movement of monies between accounts and summarized those amounts. This does not run afoul of the holding in *Murray*. Exhibits 105-107 were sufficiently accurate, nonprejudicial and helpful to the jury. They were based on Justin's review and summary of the accounts and his experience having lived in the Defendant's household. The objections listed at trial by the Defendant go to the weight and not the admissibility of the exhibits. *See U.S. v. Robinson*, 439 F.3d 777, 781 (8th Cir 2006) (Where the court gave

defendant the opportunity to cross examine the witness to demonstrate inaccuracy, the trial court did not err in admitting the summary chart.).

None of the exhibits are highlighted, but rather each transaction is color coded to delineate the type of transactions that occurred, with a total listed for each category at the bottom of the summary. No conclusions are drawn in the summaries about what the numbers mean or prove, assign any weight to any part of the summary, go to the ultimate question in the case. They simply track how the funds over which Speicher and Thess took possession of.

Speicher was able to cross-examine Justin about the summaries and the inconsistencies or inaccuracies he found. When providing a summary, Plaintiffs were "…not required to incorporate Speicher's version of the facts…" into their summaries. *Murray*, 374 P.3d at 459. Here, there is no error which can be adjudged from the admission of the summaries and to the extent that the court might perceive any error, such error was harmless.

## F. CUMULATIVE ERROR IS NOT A REMEDY AVAILABLE IN AN APPEAL OF A CIVIL JUDGMENT, AND EVEN IF IT WERE, IT WOULD NOT APPLY IN THIS CASE.

### 1. Standard of Review

When reviewing for cumulative error, we ask whether "numerous formal irregularities, each of which in itself might be deemed harmless, may

in the aggregate show the absence of a fair trial." *Howard-Walker v. People*, 443 P.3d 1007, 1011, 2019 CO 69 at ¶ 24 (alteration omitted) (*quoting Oaks v. People*, 150 Colo. 64, 371 P.2d 443, 446 (Colo. 1962)). Furthermore, "...the question is not whether the errors were 'brief' or 'fleeting' but whether, viewed in the aggregate, the errors deprived the defendant of a fair trial." *Howard-Walker*, 443 P.3d at 1014, ¶ 40.

2. Where the issue was raised and ruled upon

Speicher made no argument in the trial court regarding cumulative error and the trial court never ruled on this issue.

3. Argument

Defendant argues that the trial court made various errors throughout the trial that, when aggregated, amounted to cumulative error. Defendant acknowledges that Colorado courts have not applied the doctrine of cumulative error in civil appeals but argues that it should be applied in this case.

First, as described above, there was no error in this case. In fact, three of the arguments that Speicher argues were decided in error were not properly preserved for appeal. If there is no error, it is axiomatic that there cannot be cumulative error. Second, the Colorado Court of Appeals has repeatedly refused to apply the doctrine of cumulative error in civil appeals

and the Colorado Supreme Court declined every opportunity to consider the issue. *See Neher v. Neher*, 402 P.3d 1030, 1040 (Colo.App.2015); *Acierno v. Garyfallos*, 409 P.3d 464, 474 (Colo.App. 2016); *see also Acierno v. Garyfallos*, 2017 Colo. LEXIS 3*, 2017 WL 74801 (Colo.2017). Third, Speicher received a fair trial. The fact that he lost does not make it unfair given the overwhelming weight of the evidence against him. Upon remand, the trial court allowed Speicher to argue liability and damages and did not limit him to a new trial on the issue of statute of limitations and Speicher **still lost**.

## REQUEST FOR APPELLATE ATTORNEY FEES

Plaintiffs are entitled to their appellate attorney fees under C.R.S. § 18-4-405, which provides that in an action for civil theft, the property owner "may . . . recover costs of the action and reasonable attorney fees." The award of attorney fees to a prevailing party under C.R.S. § 18-4-405 is mandatory. *Stewart Software Co., LLC v. Kopcho*, 275 P.3d 702, 712 (Colo. App. 2010). It applies to both fees incurred at the trial level and before the court of appeals. *Id.* ("Accordingly, should [plaintiff] prevail on its civil theft claim on remand, it would be entitled to recover its reasonable fees, including fees incurred in this appeal...."); *Bermel v. BlueRadios, Inc.*, 2017 COA 20, ¶ 40,

("We agree that [plaintiff] is entitled to its appellate attorney fees under the civil theft statute.") *cert granted on other grounds*.

Pursuant to C.A.R. 39.1, Plaintiffs request that this Court remand this matter to the trial court to determine the amount of attorney fees to which Plaintiffs are entitled, and to enter judgment accordingly.

## CONCLUSION

### A. THE PLAINTIFFS' OPENING BRIEF.

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.

### B. THE PLAINTIFFS' ANSWER BRIEF

For the foregoing reasons, this Court should **AFFIRM** the judgment of the district court in instructing the jury that Thess Ekberg had been found liable for civil theft and conspiracy to commit civil theft at a previous trial in the same case, in its admission of other acts by Speicher and Thess, in its admission of evidence about Speicher's income and assets, its admission of

summary exhibits of bank records, and hold that cumulative error is inapplicable to civil cases.

Dated April 12, 2024

Respectfully submitted by:

WESTERFIELD & MARTIN, LLC

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**CERTIFICATE OF SERVICE**

I certify I filed and served the foregoing **APPELLEES' OPENING-ANSWER BRIEF** via CCE on April 12, 2024, to the following:

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