Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 **Appeal from:** La Plata County District Court, State of Colorado Honorable Suzanne F. Carlson 2014CV030213	DATE FILED February 2, 2024 3:42 PM
Plaintiff-Appellee: RODDESS EKBERG, TIMOTHY EKBERG, JUSTIN FIERSTEIN, AND SARAH FIERSTEIN v. Defendant: THESS EKBERG, v. Defendant-Appellant: JEFFREY SPEICHER	
Attorneys for Appellant Jeffrey Speicher Marci G. LaBranche, #32160 Carey Bell, #53707 Stimson LaBranche Hubbard, LLC 1652 Downing Street Denver, CO 80218 Ph: 720.689.8909 E-mail: labranche@slhlegal.com, bell@slhlegal.com	Court of Appeals Case Number: 2023CA1535
Opening Brief	

Certificate of Compliance

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Including:

Word Limits: My brief has 9,107 **words**, which is not more than the 9,500 word limit.

Included Sections: In the arguments section, before arguing **each** issue on appeal, I have the following separately titled sub-sections:

Standard of Review: I discuss which Standard of Review should be used to evaluate that issue.

Preservation: I discuss if that issue was preserved for appeal. I cite to the page in the Record on Appeal where I raised this issue before the District Court and I cite to where the District Court decided that issue.

I understand that my brief may be rejected if I fail to comply with these rules.

s/ Carey Bell
Carey Bell
Attorney for Defendant-Appellant

Table of Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

This case is about whether a person sued for conspiracy can receive a fair trial when the court tells the jury that the person's alleged coconspirator has already been found liable by another jury. Because the answer to that question is no, this Court should reverse.

ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred when it instructed the jury that a previous jury had found Speicher's wife liable for stealing the insurance proceeds and conspiring with Speicher to steal the insurance proceeds.

2. Whether the Trial Court erred when it admitted testimony about other bad acts of Speicher and his wife that occurred after the events at issue in this case.

3. Whether the Trial Court erred when it admitted testimony and evidence about Speicher's income and assets and his wife's cars and lifestyle.

4. Whether the Trial Court erred when it admitted summary exhibits prepared by one of the Plaintiffs purporting to summarize Speicher's wife's spending and identify the spending that benefited Speicher.

STATEMENT OF THE CASE

The Car Accident

Jeffrey Speicher's father-in-law, Rodney Ekberg, was killed in a car crash in late December 2012. Rodney had four children: Speicher's wife, Thess Ekberg; Roddess Ekberg; Tim Ekberg; and Paula Fierstein. Rodney was living with Thess and Speicher in Durango at the time, and the authorities notified Thess. TR 4/26/23, pp 661:9-25, 658:19-659:14.

Thess was devastated. *Id.* at 661:23-25. Rodney had moved in with Thess back in 1993 when Thess's mother died, and he had been living with her ever since. *Id.* at 608:22-24. He had helped raise Thess's children. TR 4/24/23, p 231:7-9. He had been an integral part of their family life for almost twenty years. *Id.*; TR 4/26/23, pp 608:22-24, 661:14-19, 796:12-15.

But this didn't stop the world from moving forward after Rodney's death. There were logistical items that needed to be handled: notifying Thess's siblings; the burial; the car insurance; the will; and the estate. Thess was not in an emotional place to handle many of these things by herself, so Speicher stepped up and helped. TR 4/26/23, pp 567:3-13, 577:21-25; TR 4/24/23, pp 206:22-207:3, 211:14-19.

Thess called her sister Paula to let her know what had happened. TR 4/26/23, p 664:5-14. As a result of a long and complicated family history, Thess

and Paula were estranged from their other two siblings, Roddess and Tim. *Id.* at 664:5-24, 829:13-830:1, 832:24-833:25, 835:13-21. So Thess and Paula agreed that Paula's son, Justin Fierstein, would contact them. *Id.* at 664:15-665:15.

Thess also needed to bury her father. Rodney had said that he didn't want a bunch of fuss when he died and that he didn't care where or how he was buried. *Id.* at 607:9-14, 609:8-12, 672:9-673:19, 795:18-796:15, 797:14-22. Thess was still extremely distraught and the other siblings lived far away, so Speicher handled the burial arrangements. *Id.* at 561:9-22; TR 4/27/23, pp 812:1-13, 876:3-9, 932:24-933:4; TR 4/24/23, p 211:14-19; TR 4/25/23, pp 322:23 – 323:1.

The next issue was Rodney's will. A couple years before his death, Rodney had prepared a simple will. EX 27, p 89. He had almost nothing in the way of worldly possessions, just a couple of guns and some clothes. TR 4/24/23, p 258:16-17. His will left everything to Thess, the daughter with whom he had been living and who had taken care of him for so many years. EX 27, p 89; TR 4/26/23, pp 658:19-659:14, 661:18-19. It appointed Thess executor of the estate and explicitly provided, "I give all my tangible personal property and all policies and proceeds of insurance covering such property, to my daughter, Thess Ekberg." EX 27, p 89.

The Car Insurance

Speicher owned the car that Rodney was driving and paid for the insurance with American Family. TR 4/24/23, p 205:6-206:6. A few days after the accident, Speicher spoke with American Family. EX 9, pp 70-73. He wanted to know, "how this was going to work," and if he could handle it without a lawyer. *Id.* at 70-71. An insurance representative described the claims process and told Speicher that he should also contact Farmers, the insurance company for the other driver. TR 4/24/23, p 223:21-22; EX 9, p 71. At that point, the insurance companies had not determined who was at fault, and the amount of any insurance payout was uncertain. EX 9, p 71; EX 1, p 37-40.

On January 8, 2013, American Family informed Speicher that there could be a substantial wrongful death payout under the underinsured motorist policy. EX 9, p 66. Speicher and Thess realized that handling Rodney's estate would be more complicated than parceling out some guns and clothes. TR 4/25/23, p 340:10-19. They reached out to local attorney Jesse Bopp to help them. EX 37, pp 131-132; TR 4/26/23, pp 677:3-679:11. Bopp specialized in probate and he had just been awarded the Durango Herald Reader's Choice Award for Best Lawyer. TR 4/26/23, p 471:3-22.

Bopp met with Speicher on January 17, 2013, and advised Speicher about setting up the estate and handling the insurance. EX 41, p 142. Bopp then filed the will and other paperwork to create the estate and make Thess the personal representative. *Id.*; TR 4/25/23, p 419:3-18. Bopp advised that, as personal representative, Thess had authority to negotiate with the insurance companies and handle the estate account. EX 39, p 135. Bopp provided Thess with documentation to show the insurance companies that she was the representative of the estate. *Id.*; TR 4/25/23, p 485:3-10.

On February 1, Bopp advised that they needed to send written notice to the other siblings about the creation of the estate. EX 39, p 135. Speicher obtained the siblings' addresses from Thess and provided them to Bopp. TR 4/24/23, p 271:5-12; Ex 40, p 140. Bopp then sent notice to Paula, Thess, and Tim. EX 42, p 146.

On February 13, Bopp informed Speicher and Thess that Paula had received the notice, but that Roddess' and Tim's notices had been returned as undeliverable. EX 46, p 157.[1] Bopp advised that there was "[n]othing more for us to do," except

[1] Roddess's notice was sent to her correct mailing address. TR 4/27/23, pp 1024:15-1025:12. It turned out that the street number for Tim's address that Thess provided was one digit off (533 as opposed to 5333). TR 4/26/23, pp 599:10-15, 600:6-10.

convey the information about the creation of the estate if they heard from Tim or Roddess. *Id.*

Ultimately, the insurance companies determined that the other driver was 100% at fault. EX 9, p 55. On February 28, Farmers told Speicher that it would settle the insurance claim for the full amount available under the policy, $100,000. EX 1, p 41. Thess accepted the offer. *Id.* at 42. Farmers mailed the check to Thess as personal representative of Rodney's estate on March 12. *Id.*

American Family initially told Speicher than any wrongful death proceeds would be paid to the estate. EX 9, p 71. American Family later told Speicher that Thess's siblings might need to be included in any settlement. EX 9, p 62. So Thess and Speicher went to Bopp. TR 4/26/23, p 678:1-7.

Bopp advised that any insurance proceeds would need to be paid into the estate and then distributed according to the will. TR 4/25/23, pp 433:9-16, 435:12-24; EX 503, p 5. Based on this information, Speicher asked American Family to pay the insurance proceeds to the estate, like Farmers had. EX 9, p 60; TR 4/24/23, p 205:16-19. Speicher further explained that the other siblings were not heirs to the estate and that Thess and Speicher had taken care of Rodney for the past twenty some odd years. EX 9, p 60. American Family consulted its legal department and issued a check for $336,070 (the maximum amount available under the wrongful

death statute) to the estate on April 4. EX 9, p 53. Neither the insurance companies nor anyone else told Speicher or Thess that the siblings were entitled to a share of the insurance recovery.

It wouldn't be discovered until years later that Bopp had gotten it wrong. Under Colorado law, the will did not control the distribution of wrongful death proceeds. Rather, Colorado law required that the insurance proceeds be distributed evenly between Rodney's heirs. But neither Thess nor Speicher nor their attorney knew that at the time. TR 4/25/23, pp 467:6-469:24.

The First Trial and Appeal

About a year later, Roddess hired a lawyer and sued the at-fault driver. CF, pp 1-3. She learned that the case had already been settled through Rodney's estate. CF 5440. She then sued Thess for a share of the wrongful death proceeds. *Id.*

Thess went back to Bopp for help. TR 4/26/23, p 705:2-12. She thought Bopp "would be the person who could clean this up the easiest" and "tell them that everything was done exactly the way it should have been done because an attorney had done it." *Id.* at 705:5-12. Bopp stood by the advice he had provided. Bopp told Thess and Speicher, "This is in my hands, so do not stress about it. I have noted that it was Jeff's insurance for which paid out / helped pay out the claim and that

Roddess was not in Rod's will. My goal is to try to get this case dismissed as soon as reasonably possible." Ex 532, p 17.

Bopp did not get the case dismissed. The other siblings joined the suit.[2] CF, p 5440. They added Speicher as a defendant and sued on multiple claims, including civil theft and conspiracy. *Id.*

The case went to trial in April of 2019. *Id.* At the end of trial, the jury appeared to reach a compromise position. The jury found Thess not liable for fraudulent transfer, but liable for breach of fiduciary duty, civil theft, deceit based on fraud, and conspiracy. CF, pp 3911, 3915, 3919, 3924, 3927, 4049. The jury awarded $326,963.50 in economic damages and $15,000 in punitive damages against Thess.[3] CF, pp 4049-4050.

The jury found Speicher not liable for conversion and fraudulent transfer, but liable for deceit based on fraud, civil theft, and conspiracy. CF, pp 3914, 3917, 3921, 3926, 3927, 5440-5441.

---

[2] Paula Fierstein had passed away by the time the lawsuit was filed; her children, Justin Fierstein and Sarah Fierstein, pursued it as her heirs. CF, p 5439-5440.
[3] The Trial Court then imposed interest and treble damages under C.R.S. § 18-4-405. CF, p 4050.

Speicher appealed; Thess did not. CF, pp 5436-5452. The Court of Appeals reversed the judgments against Speicher and remanded for a new trial on those claims.[4] *Id.*

The Second Trial

Trial on remand began in April 2023. At the beginning of trial and again at the close of evidence, the Trial Court instructed the jury that Thess had stolen the insurance proceeds and that another jury in an earlier trial had already found that Thess "conspired with her husband, Defendant Speicher, to steal the wrongful death proceeds" from the Plaintiffs. TR 4/24/23, p 18:3-12; CF, p 5961. Throughout trial, the Court admitted allegations about other bad acts of Thess and Speicher that did not occur until long after this lawsuit was filed in 2015. *E.g.*, TR 4/27/23, pp 999:9-1001:6, 1002:16-1003:18, 1092:23-100:23. Though it had nothing to do with the claims, the Court admitted testimony about how much money Speicher made and the kinds of cars he and his family drove. TR 4/26/23, pp 346:24-347:21; TR 4/27/23, p 1071:6-12. The Court even admitted summary exhibits prepared by one of the Plaintiffs purporting to analyze Thess's spending. EX 105-107, pp 214-220.

[4] The Colorado Supreme Court denied Plaintiffs' petition for certiorari.

At the end of the trial, the jury returned verdicts in favor of the Plaintiffs and awarded economic damages totaling $654,464.80, noneconomic damages totaling $600,000, and punitive damages totaling $2,288,280. CF, pp 5943-5958. The Trial Court determined that the damages awarded for conspiracy to commit civil theft were duplicative of the damages awarded for civil theft, imposed treble damages under C.R.S. § 18-4-405 in lieu of punitive damages, assessed interest, and entered a judgment against Speicher in the amount of $2,537,018.59 plus attorneys' fees and costs. CF, pp 6034-6040.

ARGUMENT SUMMARY

The Trial Court erred when it instructed the jury that there was a previous trial and that the previous jury found that Thess had stolen the insurance proceeds and conspired with Speicher to steal those proceeds. As a matter of common sense and hornbook law, a conspiracy requires the participation of two people: if Thess conspired with Speicher, Speicher conspired with Thess. This instruction went to the core question to be decided by the jury and answered it for them.

It is well-recognized that neither witnesses nor the court can reference previous jury verdicts. It invites the jury to abdicate its role as factfinder and defer to the previous jury. It is not only highly prejudicial; it is so prejudicial it cannot be cured by an instruction. Despite this, the Trial Court gave the instruction about the

prior verdict right at the start of trial and repeated it multiple times after the close of evidence. Plaintiffs relied on this previous verdict throughout trial and argued it in opening and closing. This error tainted the entire proceeding and denied Speicher his right to a fair trial.

The Trial Court compounded this error by admitting a long list of other testimony and evidence that was irrelevant and served only to smear Speicher and prejudice the jury against him. The Trial Court permitted allegations of other bad acts by Speicher and Thess that didn't occur until long after this lawsuit was filed. Plaintiffs were permitted to testify about how much money Speicher made and the cars that he and his wife drove. One Plaintiff was even permitted to introduce purported summary exhibits that were nothing more than his own conclusions regarding Thess's spending.

In this case, the evidence showed that Speicher hired a reputable lawyer and that lawyer told him that the insurance proceeds belonged to Thess through the operation of Rodney's will. Despite this, the jury returned verdicts in favor of Plaintiffs and awarded exorbitant damages. We can say with fair assurance that each of the Trial Court's errors described below substantially influenced the outcome of this case and impaired the basic fairness of trial.

ARGUMENT

I. The Trial Court Erred 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

A. Standard of Review

An appellate court reviews a trial court's decision to give a particular jury instruction for abuse of discretion. *People In Int. of M.H-K.*, 2018 COA 178, ¶ 17. A trial court abuses its discretion when it instructs a jury in a way that is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues the law. *Id.*

B. Preservation on Appeal

Speicher filed a brief asking the Trial Court to keep the 2019 jury verdicts against Thess out of the upcoming trial. CF, pp 5431-5434. Speicher's counsel reiterated this point at hearing. TR 3/17/23, pp 27-42. Counsel argued, "I just want to make really clear that it is our position none of the verdicts should come in, that the jury next month should be making determinations on the facts presented in this case, not on what the jury did back in 2019." *Id.* at 27:15-20. Later in the same hearing, counsel explained, "we are very strenuously arguing that the verdicts, the factual findings that the prior jury returned does not give them [Plaintiffs] a shortcut in this case. We are not saying that they can't present all the evidence that they want to to establish their case, they just don't get to piggyback on the factual

determinations of another jury." *Id.* at 30:10-16. Speicher then submitted supplemental authority in support of his position. CF, pp 5539-5543. Speicher objected again in a brief in support of his proposed jury instructions and at the jury instruction conference. CF, pp 5825; TR 4/21/23, pp 7-8. The Trial Court denied Speicher's request in a written order and repeatedly instructed the jury about the previous verdict. CF, pp 5571, 5961, 5970, 5988; TR 4/24/23, pp 17:24-18:12.

C. Argument

By giving these instructions, the Trial Court abused its discretion and deprived Speicher of his right to a fair trial.

i. Controlling Law

A previous jury verdict related to a fact at issue in the current case is one of the single most prejudicial things that can come in during a trial. *See Salas v. People*, 177 Colo. 264, 493 P.2d 1356 (1972). It creates the kind of prejudice that cannot be cured by an instruction. *Id.* at 266, 1357. It is so prejudicial that in many instances the mere mention of the prior verdict will require a mistrial. *Id.* It deprives the defendant of his right to a fair trial and results in a denial of justice. *Id.*

The Colorado Supreme Court has held that the introduction of previous jury verdicts is "patent error." *People v. Medina*, 185 Colo. 101, 109, 521 P.2d 1257, 1261 (1974). It runs the risk of confusing the jury, the jury substituting the

previous jury's judgment for its own, and the jury indirectly relying on evidence and testimony presented to the previous jury as opposed to the evidence before it. *Id.*; *Salas*, 177 Colo. at 266, 493 P.2d at 1357; *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975). "[A]ny information as to prior verdicts has the inevitable tendency of causing the jury in the present case to defer to decisions made in a previous one and thus to delegate the uniquely non-delegable duty of reaching its own independent conclusions." *Secada v. Weinstein*, 563 So. 2d 172, 173 (Fla. Dist. Ct. App. 1990).

The Colorado Supreme Court has considered the admissibility of prior verdicts on two occasions and concluded in both instances that the prior verdicts were inadmissible and their introduction required reversal. *Medina*, 185 Colo. 101; *Salas*, 177 Colo. 264. In *Medina*, there were three trials: Trial No. 1 on whether defendant was sane at the time of the offense, Trial No. 2 on whether defendant was sane at the time of trial, and Trial No. 3 on the merits. 185 Colo. at 103-104, 521 P.2d at 1258-59. Separate juries found the defendant sane at the time of the offense, sane at the time of trial, and guilty of the offense. *Id.*

At Trial No. 2, the "trial court not only permitted the prosecution to elicit the fact that the jury in Trial No. 1 returned a verdict of sane but also gave an instruction to the jury as to that fact." *Id.* at 109, 1261. On appeal, the Colorado

Supreme Court agreed with the defendant that that "the previous verdict of sanity was irrelevant and immaterial to the question of the defendant's present sanity." *Id.* The court held that permitting the result of the previous sanity trial to be made known to the jury in Trial No. 2 "was *patent error* and requires reversal of the judgment in Trial No. 2." *Id.* (emphasis added).

In *Salas*, the mere mention of a previous verdict was enough to require a mistrial. 177 Colo. at 266, 493 P.2d at 1357. In that case, the defendant was convicted of robbery and assault, and those convictions were reversed. *Id.* at 265, 1357. During retrial, a government witness testified that he had seen in the paper that the defendant had previously been convicted of the same offenses at trial. *Id.* at 265-266, 1357. The defendant moved for a mistrial. *Id.* at 266, 1357. The trial court denied the motion and instructed the jury that there had been a previous trial but that the jury was not to be concerned with the result of the previous trial or the reason for the new trial. *Id.*

The Colorado Supreme Court held that the "testimony of Glandon that a newspaper clipping had stated that Salas had been convicted and Glandon's reference to a previous trial was most prejudicial to the defendant." *Id.* The court reasoned that "[i]t is possible that the jury's knowledge that another group of citizens in the same community had agreed that Salas was guilty of the same crime

could have affected their decision." *Id.* This kind of prejudice was not cured by the trial court's instruction. *Id.* Rather, the trial court's instruction compounded the error. *Id.* The court held that the reference to the previous trial and verdicts denied the defendant a right to a fair trial and that a "proper exercise of the trial court's discretion would have required him to grant the motion for mistrial in order to prevent a denial of justice." *Id.*

ii. The Prior Verdicts Should Have Never Been Mentioned

In this case, the prior verdicts permeated every stage of the proceedings. Before opening statements, the Trial Court instructed the jury that,

> The Court has ruled that Thess Ekberg converted the wrongful death benefits for her own personal use by failing the pay the wrongful death funds in proportionate shares as ruled by the Court.
>
> Further, you are instructed that the plaintiffs sued Thess Ekberg and there was a jury trial against her in April of 2019. At that jury trial, the jury found in favor of plaintiffs and against Thess Ekberg.
>
> *Specifically, the jury found that Thess Ekberg conspired with her husband, Defendant Speicher, to steal the wrongful death proceeds from the death of Rodney Ekberg* which were owed to the plaintiffs, and thus was found liable for entering into a civil conspiracy to deprive the heirs of the wrongful death funds at the conclusion of April 2019 trial.

TR 4/24/23, pp 17:24-18:12 (emphasis added). Plaintiffs took full advantage of the Trial Court's error and repeatedly emphasized the prior verdicts in opening, throughout trial, and in closing. *E.g.*, TR 4/24/23, pp 176:22-177:6; TR 4/26/23, pp 645:9-11, 649:14-650:20; TR 4/28/23, p 1349:19-20.

At the close of evidence, the Trial Court repeatedly instructed the jury about the prior verdict. First, the Trial Court repeated the same instruction from the beginning of trial quoted above. CF, p 5961. Then, the Trial Court instructed the jury that, "If you find in favor of the Plaintiffs, you must return an award which fully compensates them for all their injuries without regard to the fact . . . that Thess Ekberg was found liable for conspiracy and civil theft by a jury at the conclusion of the trial in April 2019." CF, p 5970. Later in the closing instructions, the Trial Court instructed the jury, *again*, that "Plaintiffs previously sued Thess Ekberg for their portion of the insurance funds related to Rodney Ekberg's death. Thess Ekberg was found liable for civil theft, and conspiracy to commit civil theft." CF, p 5988.

If passing reference to a previous trial verdict requires a mistrial, then the repeated instructions from the Trial Court and repeated argument from Plaintiffs' counsel about the previous verdicts in this case require reversal. *See Salas*, 177 Colo. at 266, 493 P.2d at 1357. In *Salas*, reference to the previous verdict told the

jury that a previous jury had considered the same question now before them and found the defendant guilty. *Id.* In this case, the instruction that Thess had been found liable for conspiring with Speicher to steal the insurance proceeds had the exact same effect. It is a basic legal principle, and everyone knows as a matter of common sense, that a conspiracy requires the participation of two or more people. *Rosenblum v. Budd*, 2023 COA 72, ⁋⁋ 51-52. The jury was instructed that conspiracy requires agreement with another person. CF, p 5980. Accordingly, a finding that Party A conspired with Party B necessarily means that Party B conspired with Party A. Thus, when the Trial Court told the jury that a previous jury had found that Thess had conspired with Speicher to steal the insurance proceeds, it was telling the jury that a previous jury had found that Speicher conspired with Thess to steal the insurance proceeds.[5]

For the same reasons, the Trial Court's instruction that Thess had conspired with Speicher to steal the insurance proceeds goes directly to one of the elements that Plaintiffs were required to prove in this case. To establish conspiracy, Plaintiffs were required to prove that "Defendant agreed, with another person, by words or

[5] Plaintiffs' counsel made this exact point in opening: "conspiracy . . . involves two people acting to achieve an unlawful goal, and the two people that the plaintiffs allege were in the conspiracy is Thess Ekberg and her husband, Jeffrey Speicher." TR 4/24/23, p 163:21-25.

conduct, to accomplish an unlawful goal, the theft of insurance proceeds." CF, p 5980. The Trial Court's instruction that Thess conspired with Speicher to steal the insurance proceeds satisfied that element for the Plaintiffs. If Thess agreed with Speicher, Speicher necessarily agreed with Thess. This instruction impermissibly lifted Plaintiffs' burden to establish their case at *this* trial and requires reversal on that basis alone.

iii. Medina and Salas Were Criminal Cases, But Their Holdings Control Here

Plaintiffs may argue that *Medina* and *Salinas* are different because they are both criminal cases. But if anything, the prejudice of introducing prior verdicts in the civil context is even greater because the plaintiff's burden of proof in civil cases is so much lower. If reference to a prior trial or verdict impermissibly tips the scales in a criminal case where the government's burden is to prove their case beyond a reasonable doubt – arguably making it less likely the jury would rely on another jury's opinion – then it certainly does in a civil case where plaintiffs need only prove their claims are more likely true than not.

Furthermore, *Medina* may have been a criminal case, but its holding applies with even greater force in this civil case. In *Medina*, the sanity verdict in Trial No. 1 related to a different time period than the sanity verdict in Trial No. 2. The issues before the jury in the two trials were not the same, but the Colorado Supreme

Court held that the introduction of the prior verdict so tainted the proceedings that it was patent error requiring reversal. *Id.* at 109, 1261. Here, the two verdicts involved the same people, in the same alleged conspiracy, during the exact same time period.

Lastly, though counsel is unaware of any Colorado court that has addressed this exact question, courts in other jurisdictions have repeatedly found that the principle articulated in *Medina* and *Salas* applies in the civil context. "Most courts hold, or recognize, that it is improper for counsel in civil cases to call to the attention of the jury the results of a former trial of the same case, or the amount of verdict therein." D.C. Barrett, *Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein*, 15 A.L.R.3d 1101. "Commentators agree that most courts forbid the mention of verdicts or damage amounts obtained in former or related cases." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1009 (9th Cir. 2007). These other courts have condemned the introduction of prior verdicts in the strongest terms:

- "[I]dentifying the defendant as the 'losing party' at the first trial, was of course harmfully prejudicial and . . . introduced into the case extraneous matter implying defendant's responsibility for the plaintiff's injury – the very issue which it was for the jury to determine from the evidence." *Garris v. McClain*, 399 Pa. 261, 264, 160 A.2d 398, 400 (1960).

- "[S]tatement . . . as to what had been done by other juries in former trials of this case [is] deemed so improper as to warrant opposing counsel to

request, and courts of their own motion to direct, the withdrawal of a juror and the continuance of a cause." *McKibben v. Philadelphia & R. Ry. Co.*, 251 F. 577, 578–79 (3rd Cir. 1918).

- The previous liability verdict was properly excluded from later trial on willfulness and damages because, among other things, it "had significant potential to confuse the jury." *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1362–63 (Fed. Cir. 1998).

- "[D]isclosure by the court of the prior verdict . . . improperly prejudiced defendant at this second trial." *Guarnier v. Am. Dredging Co.*, 145 A.D.2d 341, 342, 535 N.Y.S.2d 705, 706 (1988).

iv. This Error Cannot Be Cured by Instruction

The Trial Court's instruction that "[d]espite the verdicts against Thess Ekberg, you must evaluate Jeff Speicher's liability for theft and conspiracy to commit theft during this trial separately from that of Thess Ekberg" did not cure the error. CF, p 5961. As the Colorado Supreme Court in *Salas* recognized, the error is one that an instruction cannot fix. 177 Colo. at 266, 493 P.2d at 1357.

v. This Was Not a Harmless Error

In a civil case, a properly preserved objection to an instruction is subject to review for harmless error. *M.H-K.*, ¶ 21. This standard requires reversal if the error prejudiced a party's substantial rights. *Id.* An error prejudiced a substantial right "if it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." *Id.*

This was a close case. The will said the insurance proceeds went to Thess. A well-regarded attorney said the insurance proceeds went to Thess. Thess and Speicher then did what that attorney told them to do. Neither insurance company nor anyone else told them differently.

Plaintiffs argued that Thess and Speicher conspired to steal the insurance proceeds from the minute they learned about Rodney's death by not telling the siblings that Rodney died, by not telling them about his burial, by hiring a subpar lawyer, by not giving the siblings' names to the insurance companies, and by not notifying the siblings about the creation of the estate. But the evidence at trial showed that (1) Thess called her sister Paula right away to tell her about their father's passing; (2) Thess made a plan with Paula to notify Tim and Roddess; (3) Tim was told a day or two after Rodney's death, TR 4/27/23, p 818:7-14; (4) Roddess knew by the 29th, EX 175, p 408; (5) at the time of the burial the insurance companies had yet to determine liability and no one knew what the insurance payout, if any, would look like; (6) Bopp was a well-regarded lawyer experienced in probate; (7); both insurance companies paid the estate even though Speicher told them that Rodney had other children, EX 1, p 38, EX 9, p 66; and (8) notice of the estate was sent to the correct addresses for Paula and Roddess.

At the very beginning of the trial, the Trial Court instructed the jury that another jury had already found Speicher liable. This error shaped the course of the entire trial. It is often said that the majority of jurors make up their minds during opening statements. Donald E. Vinson, *How to Persuade Jurors*, 71 A.B.A. J. 72, 72 (Oct. 1985) ("80 to 90 percent of all jurors come to a decision during or immediately after opening statements"); John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 Am. J. Crim. L. 139, 157-58 (2000) ("Widely quoted is the statistic that 80% of jurors make up their minds on civil liability after opening statement."). This Court and numerous scientists and academics have recognized that "principles of primacy may cause statements and arguments made early in a trial to have a *disproportionately influential weight*." *People v. Robinson*, 2017 COA 128M, ¶ 36 (emphasis added) rev'd on other grounds 2019 CO 102; L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 Emory L.J. 107, 124 (1999)) (hereinafter Perrin).

Once a juror makes up their mind, they view all evidence and argument that comes after it through the lens of the decision that they have already made. *See* Perrin, at 124-125. They credit evidence and arguments that support their decision; they discount evidence and arguments that cut against that decision. *Id.* So the Trial Court's instruction at the very beginning of this case was especially

damaging because it shaped how the jury viewed all the evidence and argument that came after it.

Plaintiffs' counsel took the Trial Court's license to rely on the previous verdict and ran with it. In opening statement, Plaintiffs' counsel argued that a previous jury had already found Speicher liable for conspiracy: "Thess Ekberg was found liable for civil theft and conspiracy to commit civil theft at that trial. Her coconspirator? Her husband, Defendant Jeff Speicher." TR 4/24/23, pp 176:22-177:6.

During trial, Plaintiffs' counsel repeatedly elicited testimony about the prior trial and verdict. For example, Plaintiffs' counsel repeatedly asked Thess about the judgment against her and whether she had paid it. TR 4/26/23, pp 645:9-11, 649:14-650:20. Plaintiffs' counsel argued that Thess had maneuvered financially to limit her ability to pay the judgment. *Id.* at 644:25- 650:6, 651:14-652:1; TR 4/28/23, pp 1338:20-1339:1. Roddess testified at length about the course of the lawsuit, evidence Plaintiffs obtained through discovery and subpoenas, and conclusions that she drew from that evidence. TR 4/27/23, pp 988:7-997:16. Justin's testimony focused almost entirely on events that occurred after the lawsuit was filed. *Id.* at 1073:22-1110:18; TR 4/28/23, pp 1132:4-1142:23. The Trial Court's closing instructions told the jury three separate times that Thess had

already been found liable for conspiring with Speicher. In closing, Plaintiffs again emphasized the previous jury verdicts, arguing that "we already know that his co-conspirator was found to be liable." TR 4/28/23, pp 1349:19-20.

In this way, the repeated instructions from the Trial Court and repeated argument from Plaintiffs about the prior verdicts tainted every stage of the trial. While we expect that jurors will follow instructions, we cannot expect them to learn that another jury already found Thess liable for conspiring with Speicher and then make an independent judgment about whether Speicher conspired with Thess.

Telling the jury that a previous jury found Thess conspired with Speicher practically eliminated the need for a trial. The instruction covered the exact issue the jury in this case was supposed to determine independently from the evidence and created the overwhelming risk that the jurors deferred to the previous jury's findings and made their decision, not based on the facts before them but on the facts presented to the previous jury. As numerous courts have recognized, this is the kind of prejudice that cannot be cured and is so prejudicial it renders a trial fundamentally unfair.

II. The Trial Court Erred When It Admitted Evidence of Other Acts by Speicher and Thess

A. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Town of Silverthorne v. Lutz*, 2016 COA 17, ¶ 16. The trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it erroneously applies the law. *Id.*

B. Preservation on Appeal

Speicher filed a motion in limine to exclude certain interactions between him and Justin. CF, pp 5651-5655. Speicher's counsel objected to Justin testifying about being investigated at work for disclosing Speicher's income. TR 4/27/23, p 1093:15-24. 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. Speicher's counsel objected to Roddess testifying that Thess had pantomimed choking towards her during the previous trial. *Id.* at 1001-1002. The Trial Court denied the motion and admitted the testimony. CF, p 5906; TR 4/27/23, pp 868:15-16, 1002:6-8, 1094:9-10.

C. Background

In the years before Rodney's death, Thess and Speicher took their nephew Justin Fierstein into their home in Durango. TR 4/27/23, p 1172:16-25. Speicher was working at Wells Fargo, and he helped Justin get a job there. *Id.* at 1067:6-1068:25, 1171:20-1172:6. Justin continued to live with Thess and Speicher while he got on his feet in Durango. *Id.* at 1172:16-25, 1174:20-23.

At trial, the Court admitted evidence that after Justin joined the lawsuit against Thess and Speicher in 2017, (1) Speicher had Justin moved to another floor at their Wells Fargo office and then taunted Justin about it, (2) Speicher had Justin investigated at work for improperly disclosing his income, and (3) Speicher followed Justin in his car and had Speicher's son flip Justin off. TR 4/27/23, pp 1092:23-100:23. The Trial Court also admitted testimony from Roddess that Speicher pantomimed shooting a gun at her in front of the courthouse during this trial in 2023[6] and that Thess pantomimed a choking motion at Roddess during the previous trial in 2019. TR 4/27/23, pp 999:9-1001:6, 1002:16-1003:18.

[6] The Trial Court obtained video footage from the front of the courthouse that day. After watching the footage, the Trial Court stated, "I'm not sure the video shows that," and that it was "unclear as to what was happening there." TR 4/27/23, pp 921:19-20, 922:2-5.

D. The Alleged Other Acts Were Irrelevant, Unfairly Prejudicial, and Never Should Have Been Admitted

This "other acts" evidence was inadmissible under C.R.E. 401 and 402, 403, and 404(b).

i. The "Other Acts" Evidence Is Inadmissible Because It Is Not Relevant

These incidents are inadmissible because they do not make any fact of consequence more or less likely. C.R.E. 401, 402. This is particularly true because they occurred long after the alleged theft and long after the alleged conspiracy to cover up the theft had been discovered.

Thess obtained and spent the insurance proceeds in 2013 and 2014. TR 4/26/23, p 642:9-19. Roddess sued Thess for stealing the insurance proceeds in early 2015. CF, pp 20-25. Tim joined the suit in early 2017. CF, pp 481-82. They added Speicher as a defendant just a couple weeks later. CF, pp 536-572. In April 2018, the Trial Court issued an order aligning Justin and Sarah Fierstein as Plaintiffs. CF, p 2034.

Once the Plaintiffs learned that the insurance proceeds had been distributed to Thess, any conspiracy to hide the distribution of the insurance proceeds was necessarily over. The alleged "other acts" all happened *after* Plaintiffs had learned about the alleged conspiracy. The incidents between Justin and Speicher at work

didn't happen until after Justin "injected" himself into the lawsuit. TR 4/27/23, pp 1092-1093. The flip-off and choking pantomime incidents didn't happen until around the time of the first trial in 2019. And the gun pantomime incident didn't happen until the second trial in 2023. Because all these other acts occurred after the events forming the basis for Plaintiffs' claims, they cannot make any elements of those claims more likely.

ii. The Other Acts Are Inadmissible Under Rule 403

For the reasons stated above, these incidents have little, if any, probative value, but they are highly prejudicial. Their only purpose is to make Speicher and Thess look like bad people who are more likely to have conspired together to steal the insurance proceeds. Providing the jury with this evidence created the risk that the jury would decide against Speicher out of personal animus, rather than on the facts presented. *See Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002) ("Unfairly prejudicial evidence has an undue tendency to suggest a decision on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror."). For these reasons, this evidence's probative value, if any, was substantially outweighed by the danger of unfair prejudice. C.R.E. 403.

iii. The "Other Acts" Evidence Is Inadmissible Under Rule 404(b)

The Trial Court erred when it concluded that the "other acts" evidence, at least as it related to Justin, was intrinsic evidence under *Rojas v. People*, 2022 CO 8, and therefore not subject to Rule 404(b). CF, p 5906. The threshold consideration under Rule 404(b) is whether the other acts evidence is intrinsic or extrinsic to plaintiff's claims, as Rule 404(b) only applies to extrinsic acts. *Rojas*, ¶ 52. Intrinsic acts are those (1) that directly prove the charged offense or claim or (2) that occurred contemporaneously with the charged offense or claim and facilitated the commission of it. *Id.*

The "other acts" evidence is extrinsic to the civil theft and conspiracy claims because, as explained above, all of it occurred long after the alleged theft was completed and long after the facts that the Plaintiffs allege constitute the conspiracy to hide the theft had been uncovered. The alleged other acts did not occur contemporaneously with the alleged theft and conspiracy to cover it up, and they cannot possibly "directly prove" these allegations. *Id.*

Rule 404(b) prohibits introduction of evidence to prove that a person acted in conformity with a character trait. C.R.E. 404(b). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* In order for evidence

to be admitted under C.R.E. 404(b), it must pass a four-part test: (1) the proffered evidence relates to a material fact; (2) the evidence is logically relevant; (3) the logical relevance must be independent of the prohibited inference; and (4) the probative value of the evidence is not substantially outweighed by unfair prejudice. *People v. Spoto*, 795 P.2d 1314 (Colo.1990).

These incidents do not relate to a material fact and are not logically relevant for the reasons stated above. Moreover, these incidents are not part of a common plan or scheme. By the time of the incidents with Justin, the lawsuit had already been filed and Justin had already decided to participate. These incidents were not part of a scheme to keep the money. Similarly, by the time of the pantomiming incidents, trial was already underway. These allegedly intimidating actions may have been unsavory but they were not going to stop the lawsuit from going forward and cannot be considered part of a scheme to keep the proceeds. Lastly, for the reasons stated above, any probative value of these incidents was substantially outweighed by the danger of unfair prejudice.

iv. The Admission of the Other Acts Evidence Was Not Harmless

This was a close case that hinged on whether the jury believed Speicher's account that he relied on his father-in-law's will and a well-regarded lawyer or Plaintiffs' account that Speicher was scheming to wrongfully keep the insurance

proceeds from the beginning. Plaintiffs emphasized the other acts evidence throughout trial and at closing. *E.g.*, TR 4/28/23, pp 1341:11-1432:11. In a case where so much turned on Speicher and Thess's credibility, the admission of this highly prejudicial and inadmissible bad character evidence tipped the scales in Plaintiffs' favor.

III. The Trial Court Erred When It Admitted Evidence About Speicher's Income and Assets

A. Standard of Review

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Town of Silverthorne*, ¶ 16.

B. Preservation

Speicher filed a motion in limine to exclude testimony about Speicher's income, assets, and net worth, and Thess's lifestyle and car. CF, pp 5676-5677. The Trial Court denied the motion. CF, p 5927. Speicher's counsel also objected at trial to testimony about the family's cars. TR 4/25/23, pp 344:1-3, 345:9.

C. Argument

Testimony about how much money Speicher made and the kinds of cars that he and his family drove was irrelevant, unfairly prejudicial, and undermined the fairness of the trial.

Evidence of a party's financial status is irrelevant. "It has long been established as a principle of tort law that in suits involving the assessment of compensatory damages, evidence of a defendant's financial status is inadmissible." *Leidholt v. District Court*, 619 P.2d 768, 770 (Colo. 1980). That principle holds true even if the Plaintiffs are permitted to seek punitive damages. C.R.S. § 13-21-102(6).

Despite this well settled law, the Trial Court held that "[e]vidence of Speicher's income or assets, insofar as it tends to show that he had the ability to repay the wrongful death proceeds but did not do so may be relevant to the intent to permanently deprive, and whether or not his conduct was willful and wanton." CF, p 5927. This reasoning falls short for several reasons.

First, Speicher was under no obligation to repay the wrongful death proceeds owed by Thess based on the judgment against her. Speicher's ability to repay the wrongful death proceeds owed by Thess had nothing to do with whether he had the relevant culpable mental states.

Second, Speicher's assets and income did not make any material fact more or less likely. C.R.E. 401. It was therefore inadmissible under C.R.E. 402.

Third, this evidence was inadmissible under C.R.S. § 13-21-102(6). Section 13-21-102(6) provides that, "In any civil action in which exemplary damages may

be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages."

Lastly, the danger of unfair prejudice substantially outweighed any probative value. This highly prejudicial information made the jury more likely to dislike Speicher for having too much money and award higher damages because they felt he could afford it.

As to Thess's cars and lifestyle, the Trial Court held that "[e]vidence of Thess Ekberg's lifestyle and car may be relevant to conduct showing agreement and acts to accomplish the unlawful goal of permanently retaining the wrongful death proceeds." CF, p 5927. This argument misses the mark. First, it is unclear how evidence of Thess's spending could make it more likely that Speicher stole the insurance proceeds or conspired with her to do so. Second, this evidence was similarly unfairly prejudicial. It created the risk that the jury sided with the Plaintiffs simply out of animus against a family where Thess drove a Maserati (and previously drove a Lexus); Speicher drove a Ford Raptor and a Harley; and their daughter drove a Mini-Cooper. TR 4/25/23, pp 346-347; TR 4/28/23, 1155:9-1157:1. Lastly, since Plaintiffs argued that Thess had maneuvered to limit her ability to pay the judgment against her, it invited the jury to find against Speicher merely because he had the ability to pay when his wife could not.

The Trial Court appeared to conclude that all this information about income, assets, and lifestyle was relevant to whether Speicher intended to permanently deprive the Plaintiffs of the insurance proceeds. *E.g.*, TR 4/25/23, pp 345: 15-17, 346:16-20; CF, p 5927. But it was undisputed the wrongful death proceeds were spent within a matter of months back in 2013 and early 2014. TR 4/26/23, p 642:9-19. Speicher and his family's income and spending in the years after they had already spent the insurance proceeds have no bearing on whether Speicher intended to permanently deprive the Plaintiffs of the insurance proceeds back in 2013.

Admission of this evidence was not harmless. Plaintiffs' counsel repeatedly argued in closing, "we're talking about a man that's making a million dollars a year, and he puts together a plan to steal $327,000," "he's still making a million dollars a year," and "the ink on the check wasn't even dry and he's building his big toy shed, a 1,200 square foot garage so he can park all his toys in it . . . ." TR 4/28/23, pp 1339:3-4, 1345:6-7, 1374:2-4. Along with the other inadmissible and highly prejudicial evidence discussed above, this evidence fueled juror animus against Speicher. It made the jury more likely to award a more significant damages amount because they didn't like Speicher and thought he could afford it. In fact, the jury ultimately awarded more than $2.7 million to Plaintiffs in noneconomic

and punitive damages, an amount that dwarfs their $327,000 share of the insurance proceeds (even with interest). CF, pp 5943-5958, 5960.

IV. The Trial Court Erred When It Admitted a Summary Exhibit of Thess's Bank Records Prepared by One of the Plaintiffs

A. Standard of Review

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Town of Silverthorne*, ¶ 16.

B. Preservation

Speicher filed a motion in limine to preclude Plaintiffs from introducing purported summaries of Thess's banking and credit card records that one of the Plaintiffs, Justin Fierstein, prepared. CF, pp 5651-5655.[7] Speicher argued that the exhibits were inaccurate, incomplete, misleading, and inadmissible under C.R.E. 1006. *Id.* The Trial Court denied the motion. CF, p 5904.

C. Argument

i. Background

The Trial Court admitted exhibits prepared by Plaintiff Justin Fierstein that purported to summarize activity from Thess's checking account and two credit

[7] Plaintiffs may argue that this argument was waived because Exhibits 105-107 were marked as stipulated exhibits during trial. TR 4/28/23, pp 1143-1147. But they were only stipulated to *after* the Trial Court denied the motion in limine and ruled that they could come in. CF, p 5904; TR 4/27/23, pp 1144:24-1147:12.

cards. EX 105-107, pp 214-220. In Exhibit 105, Justin listed Thess's expenditures from her checking account that he believed were funded by the insurance proceeds and related to the Speicher household (as opposed to Thess alone) and therefore benefited Speicher in some way. EX 105, pp 214-216; TR 4/27/23, pp 1148:5-1160:16. To support his conclusion that the payments made from Thess's checking account to her credit card company were related to the Speicher household, Justin listed Thess's credit card expenses that he believed related to the Speicher household in Exhibits 106 and 107. Ex 106-107, pp 217-220; TR 4/27/23, pp 1149:18-1160:16.

ii. Controlling Law

Rule 1006 governs documentary summaries in the form of charts or outlines. C.R.E. 1006. The purpose of summary exhibits is to allow the jury to digest vast amounts of information in a more accessible form. One of the prerequisites to admissibility is the exhibit must summarize the information "accurately, correctly, and in a nonmisleading manner." *Murray v. Just in Case Business Lighthouse, LLC*, 374 P.3d 443, 457 (Colo. 2016). "When a summary is admitted in lieu of the underlying documents, the summary must not be "embellished by or annotated with the conclusions of or inferences drawn by the proponent." *Id.*

iii. The Summary Exhibits Should Have Been Excluded

The three exhibits prepared by Justin fail to meet the requirements for summary exhibits under Rule 1006 by a wide margin.

First, the exhibits are not accurate or correct. *Murray*, 374 P.3d at 457. Justin admitted this at the 2019 trial and again at the 2023 trial. CF, p 5653; TR 4/28/23, p 1157:5-14. Justin admitted that the exhibits mistakenly included personal items that were not attributable to the Speicher household. TR 4/28/23, p 1159:1-20. He also admitted that the exhibits misstated the amount that he believed were related to the Speicher household by $88,000 to $138,000. *Id.* at 1157:5-18; CF, p 5653.

Second, the exhibits are misleading. *Murray*, 374 P.3d at 457. Exhibit 105 purports to be a summary of Thess's checking account. EX 105. Justin described it at trial as a summary of Thess's checking account. TR 4/28/23, p 1148:6-7. But it is actually just the select debits and credits that Justin cherry picked from the actual bank statements. TR 4/28/23, 1197:3-25. The purported summary is not a summary at all. The same thing is true of Exhibits 106 and 107. *Id.* at 1149:24-25 – 1150:1-9, 1151:12-17.

In addition, Justin claims in Exhibit 105 that all the credit card payments made from the checking account were for the Speicher household. Exhibits 106 and 107 purport to support that conclusion by providing summaries of the credit

card spending. However, the credit card summaries are not even from the same time period. *Compare* EX 105 *and* EX 106, 107. In Exhibit 105, Justin claims that credit card payments in March 2014, April 2014, May 2014, and July 2014 all related to the Speicher household, but the credit card summaries in Exhibit 106 and 107 do not include any entries after November 2013.

Third, the exhibits are not summaries. They are advocacy pieces prepared by a party plaintiff. *Murray*, 374 P.3d at 457. They go far beyond the type of document summary contemplated by Rule 1006 by including Justin's personal conclusions about what purchases constitute Speicher household items.

Justin was not there when these purchases were made. He doesn't know what was purchased, who it was for, or where it went. He took his best guess based on the name of the retailer or service provider and nothing more. He wasn't a disinterested third party but a plaintiff with a direct financial interest in the outcome. Each conclusion about what constituted household spending is an impermissible "inference[] drawn by the proponent." *Murray*, 374 P.3d at 457. For these reasons, Exhibits 105-107 should never have been admitted.

This was not a harmless error. These "summary" exhibits concluded that Speicher supposedly benefited to the tune of $338,000 from the insurance

proceeds.[8] In a close case, with a strong defense, where the jury awarded an exorbitant amount of damages, these kinds of errors matter.

V. Cumulative Error

The Court of Appeals regularly applies the doctrine of cumulative error in criminal appeals. *See Neher v. Neher*, 2015 COA 103, ¶ 66 (declining to extend cumulative error to a civil appeal). This case illustrates why that doctrine should be extended to civil appeals.

In a case in which Speicher was on trial for stealing insurance proceeds and conspiring with his wife Thess to steal insurance proceeds, the Trial Court began trial by telling the jury that another jury had already determined that Thess stole the insurance proceeds and conspired with Speicher to do it. The Trial Court and Plaintiffs' counsel reiterated this point again and again throughout trial. Plaintiffs even alleged that Thess and Speicher were engaged in an ongoing scheme to shield Thess from the previous verdict. The Trial Court permitted Plaintiffs to accuse Speicher and Thess of a laundry list of bad acts that didn't happen – if they happened at all – until long after the insurance proceeds were supposedly stolen and spent and even after the alleged conspiracy was uncovered. Plaintiffs were

[8] Justin admitted that this number in Exhibit 105 was wrong, and that – based on his categorization of the expenses - $200,000 or $250,000 was more accurate. TR 4/28/23, p 1157:5-18.

permitted to further vilify Speicher and Thess by testifying freely about how much money Speicher made, the cars they drove, and the lifestyle they lived. One Plaintiff was even permitted to submit exhibits with his personal opinions of their spending. At the end of trial, the jury awarded noneconomic and punitive damages equal to more than *eight times* the Plaintiffs' share of the insurance proceeds (and that's before attorneys' fees and costs). While each of the errors below merits reversal, their cumulative effect undoubtedly affected the outcome of the case, depriving Speicher of a fair trial.

CONCLUSION

For these reasons, this Court should reverse the civil theft and conspiracy to commit civil theft verdicts and remand for a new trial.

Dated: February 2, 2023.

Respectfully submitted,

s/ Carey Bell
Marci G. LaBranche, #32160
Carey Bell, #53707
Stimson LaBranche Hubbard, LLC
1652 Downing Street
Denver, CO 80218
Ph: 720.689.8909
E-mail: labranche@slhlegal.com,
bell@slhlegal.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2024, a true and correct copy of the foregoing **Opening Brief** was filed through Colorado Courts E-Filing system on the person(s) named below:

Bradley P. Pollock, #9139
Bell & Pollock, P.C.
7555 E. Hampden Ave., Suite 200
Denver, CO 80231
Phone: (303) 795-5900
E-mail: bradpollock@bellpollock.com
Attorney for Justin and Sarah Fierstein

Scott P. Landry, #21934
Landry Law, P.C.
9896 Rosemont Avenue, Suite 104
Lone Tree, CO 80124
Phone: (720) 583-2143
E-mail: slandry@landrylawpc.com
Attorney for Timothy Ekberg

Zachary S. Westerfield, #38690
Westerfield & Martin, LLC
600 17th St. Suite 2800, South Tower
Denver, CO 80202
Phone: (303) 748-3444
E-mail: zach@westerfieldlaw.com
Attorney for Roddess Ekberg

The undersigned hereby further certifies that on February 2, 2024, a true and correct copy of the foregoing Opening Brief was served by mail addressed to the following:

Thess Ekberg
222 Basin Creek Circle
Durango, CO 81303

s/ Nancy Hickam
Nancy Hickam, Paralegal