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| **Colorado Court of Appeals**<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>**Appeal from:**<br>La Plata County District Court, State of Colorado<br>Honorable Suzanne F. Carlson<br>2014CV030213 | DATE FILED<br>May 31, 2024 1:40 PM |
| Plaintiffs-Appellees and Cross-Appellants:<br>RODDESS EKBERG, TIMOTHY EKBERG, JUSTIN FIERSTEIN, AND SARAH FIERSTEIN<br><br>v.<br><br>Defendant-Appellant and Cross-Appellee:<br>JEFFREY SPEICHER | |
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| **Mr. Speicher's Answer-Reply Brief** | |

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*s/ Carey Bell*
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*Attorney for Defendant-Appellant and Cross-Appellee*

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# ANSWER BRIEF

## Issue Presented

Plaintiffs (and cross-appellants) say the issue is whether the trial court erred in ruling that damages awarded "for conspiracy were duplicative of the damages . . . awarded . . . for civil theft." By framing their second claim as a claim for "conspiracy" as opposed to a "conspiracy to commit civil theft," Plaintiffs preview their argument that they are entitled to damages for a conspiracy other than the conspiracy to commit civil theft that was alleged and tried in this case. Despite Plaintiffs' arguments to the contrary, this was and is a case about an alleged conspiracy to commit civil theft. The issue is more accurately framed as "Whether the trial court erred in ruling that the damages awarded by the jury to Plaintiffs on their conspiracy to commit civil theft claim were duplicative of the damages awarded to Plaintiffs on their civil theft claim."

## Response to Plaintiffs' Statement of the Case

Plaintiffs argue that Speicher began scheming to obtain the wrongful death proceeds from the moment he learned that Rodney passed. Opening-Answer Br., pp 12-13. Although no evidence was ever presented that Speicher knew anything about wrongful death proceeds before Rodney died, Plaintiffs nonetheless insist that Speicher hatched a convoluted plan to ensure all funds paid out for Rodney's

death were paid to Thess alone. *Id.* at 12-14. If Plaintiffs are right, Speicher's plan was premised entirely on the hope that neither the attorney he hired to assist in handling Rodney's estate nor the insurance companies paying money to the estate would know or follow the law in Colorado regarding the distribution and payment of wrongful death proceeds.

Per Plaintiffs, to carry out this plan, immediately after Rodney's death, Speicher created a fake will (which, in reality, had no actual legal effect since wrongful death proceeds are disbursed per statute regardless of a will), provided the will to an attorney (who advertised himself as an experienced estate attorney but later admitted he was not even aware of the wrongful death statute in Colorado), hid the creation of the informal estate (despite providing the attorney with the last known addresses of Thess's three siblings so they could receive notice of the estate)[1], and convinced two national insurance companies that the wrongful death proceeds should be paid to Rodney's estate (on the attorney's advice) in violation of Colorado law. *Id.* at 12-14; TR 4/25/23, pp 433:9-16, 435:12-24; EX 503, p 5; TR 4/26/23, pp 469:23-24, 471:3-473:3.

[1] Roddess's notice was sent to her correct mailing address. TR 4/27/23, pp 1024:15-1025:12. It is undisputed that Paula Fierstein's address was correct and that she received the notice. *See* TR 4/25/23, p 455:4-5. The address provided for the third sibling, Tim, was unfortunately off by one digit. TR 4/26/23, pp 599:10-15, 600:6-10.

A far more likely explanation of what happened, and one that would have likely been accepted by the jurors absent the many errors in this case, was that Rodney, not Speicher, wrote the will because he had been living with Thess for the past twenty years and wanted to leave her in charge of what little he had when he passed. TR 4/26/23, pp 608:22-24, 661:18-19, 796:12-22. And that when Rodney died, Speicher had no idea what money was owed under the various insurance coverages (which only reached the high amount that they did because Speicher had been paying for multiple policies and the coverages stacked) but relied on counsel and the insurance companies for advice on how the wrongful death proceeds were to be handled. EX 9, pp 71, 66; TR 4/25/23, pp 433:9-16, 435:12-24; EX 503, p 5.

That is where the story at trial should have ended. Instead, the court took it upon itself to instruct the jury multiple times before and after trial that another jury had already found Thess liable for the exact same claims Plaintiffs were now bringing against Speicher – civil theft and conspiring with one another to commit civil theft. The court then compounded this error by admitting voluminous evidence about things that happened long after the wrongful death proceeds had been paid out and even long after the siblings (and their heirs) had learned about the payout and filed this lawsuit. These errors, both individually and collectively, substantially influenced the verdict and deprived Speicher of his right to a fair trial.

Now, as if that weren't enough, Plaintiffs are asking this Court to allow them to double dip on damages by awarding separate non-economic and punitive damages for the conspiracy to commit the theft for which they are already receiving non-economic and treble damages.

## Argument Summary

The Court of Appeals remanded this case for full retrial on two claims against Speicher: civil theft and conspiracy to commit civil theft. Plaintiffs' civil theft claim has always been based on the theory that Speicher and Thess convinced the insurance companies to pay the wrongful death proceeds to Thess and then, rather than distribute the proceeds to Thess's siblings as required by Colorado's wrongful death statute, kept the proceeds and hid this fact from the siblings (and later, their heirs). The conspiracy to commit civil theft claim has always been based on this same theory.

Plaintiffs now contend that they tried a third claim – an unpled, separate claim for conspiracy to conceal and intimidate. Even though Plaintiffs never raised this claim before this appeal, they maintain that they won this claim at trial and are entitled to additional damages as a result.

Plaintiffs did not make this argument at trial. Moreover, there is ample record support for the trial court's determination that the civil theft damages and

conspiracy to commit civil theft damages were based on the same facts. This is a determination the trial court that oversaw the trial is in the best position to make. This Court should reject Plaintiffs' efforts to sneak in a new claim that was never pled, tried, instructed on, or decided.

## Argument

### I. Plaintiffs Are Not Entitled to Double Non-Economic Damages or Punitive Damages on Top of Treble Damages

#### A. Standard of Review

Plaintiffs contend that (1) the "facts at issue here are undisputed," (2) that the "issue before the Court is . . . the proper measure of damages," and, therefore, (3) the standard of review is de novo. Opening Answer Br., p 21. Speicher disagrees on all three points.

First, even a quick comparison of Speicher's Statement of the Case and Plaintiffs' Statement of the Case demonstrates that the facts at issue are disputed. The allegations on which Plaintiffs now rely are based almost entirely on the disputed and self-serving trial testimony of Plaintiffs.[2]

[2] Plaintiffs rely particularly heavily on the testimony of Roddess Ekberg. Roddess, at various points in this litigation, claimed that her counsel forged her fee agreement, CF, pp 5101-5157; launched an email vendetta against her counsel and her counsel's staff that included racial slurs, harassment, and other inflammatory language, *id.*; claimed to have dropped out of school in sixth grade to support her

Second, Plaintiffs' argument is not that the trial court imposed the wrong measure of damages, but that the trial court erred in concluding that the non-economic damages for the civil theft and conspiracy to commit civil theft claims were "duplicative" and the punitive damages for those claims were "premised on the same facts." CF, pp 6039-40. The determination that Plaintiffs are appealing is not "the proper measure of damages." Rather, it is the trial court's determination that the non-economic and punitive damages awards were duplicative. *Id.*

Lastly, the question of whether the jury awarded duplicative damages based on the same factual allegations is a question of fact best determined by the trial court that oversaw the trial. Factual determinations are reviewed for clear error. *Blakeland Drive Invs., LLP IV v. Taghavi*, 2023 COA 30M, ¶ 28. As stated in the case relied on by Plaintiffs, "an appellate court affords a trial court's damages award considerable deference and will set it aside only if clearly erroneous." *Colorado Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC*, 2016 COA 64, ¶ 128. Under the clear error standard, the Court of Appeals will uphold a trial court's determination of fact unless it has "no support in the record." *Blakeland Drive*, ¶

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family when yearbook photos showed she continued her education well into high school, TR 4/27/23, 1008:18-1009:2; and claimed that a juror told her "I'm so sorry for what you have gone through," which the juror then unequivocally denied, TR 4/28/23, 1305:10-16, 1326:20-1328:2.

28. Though counsel has located no Colorado case addressing this exact question, multiple other courts have determined that a trial court's determination that damages are duplicative is a factual determination subject to clear error review. *E.g.*, *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1077 (10th Cir. 2008) ("Whether an award is duplicative is a question of fact, which we review for clear error."); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1200 n.17 (11th Cir. 2009) (same).

**B. Preservation**

Plaintiffs asked the trial court for double damages on the ground that the civil theft and conspiracy to commit civil theft claims were based on different facts. CF, pp 6010-16. On appeal, Plaintiffs have jettisoned that theory. Plaintiffs now argue that they should be awarded damages based on a "conspiracy to conceal and intimidate, which is different than conspiracy to steal." Opening-Answer Br., p 24; *see also, id.* at 24 ("the two claims are based on . . . different conspiracies"), 23-24 ("concealment and intimidation . . . differs from the conspiracy to commit civil theft"), 26 ("This course of conduct has nothing to do with theft and everything to do with concealment"), 32 ("the purpose of the [twelve "other acts"] evidence described above was specifically related to witness intimidation,

retaliation, and perjury"). Because Plaintiffs did not previously make this argument, it is not preserved.

**C. Discussion**

The claims at issue in this trial were for civil theft and conspiracy to commit civil theft. In an effort to get double damages, Plaintiffs now argue that there was a third claim – a "conspiracy to conceal and intimidate, which is different than conspiracy to steal." *Id.* There are many problems with Plaintiffs' new theory.

***1. The Only Conspiracy at Issue in this Case Is an Alleged Conspiracy to Commit the Theft of Wrongful Death Proceeds***

This case has always been about a conspiracy to commit civil theft. It was never about some additional unpled conspiracy. At the risk of belaboring the point: Plaintiffs did not plead a separate conspiracy to conceal and intimidate in their complaint. CF, pp 3012-34. In the leadup to trial, Plaintiffs continued to maintain that the case was about a conspiracy to commit theft. Plaintiffs' counsel argued, "I think we should be able to argue exactly what we believe the case is about and that that's [sic] Mr. Speicher conspired with Thess Ekberg to steal this money." TR 3/17/23, p 27:21-24. Plaintiffs submitted three separate versions of their theory of the case. CF, pp 5370-71, 5572-73, 5601-02. Each version focused on the alleged

theft and the actions to hide it from the siblings. *Id.* None of them addressed this new, separate theory. *Id.*

At trial, the jury was instructed even before jury selection that "the [2019] jury found that Thess Ekberg conspired with her husband, Defendant Speicher, *to steal the wrongful death proceeds*"; "[d]espite the verdicts against Thess Ekberg, you must evaluate Jeff Speicher's liability for . . . *conspiracy to commit theft* . . . separately"; "Plaintiffs claim Defendant Jeff Speicher *conspired with his wife* . . . *to steal the wrongful death benefits*." TR 4/24/23, pp 18:7-19.

In their opening statement, Plaintiffs' description of the conspiracy related only to actions taken to obtain the wrongful death proceeds and not tell the siblings. TR 4/24/23, 160:9-180:20. Plaintiffs asked the jury to return a verdict "for the plaintiffs on their claims for civil theft and *conspiracy to commit theft*." TR 4/24/23, 180:16-19.

Plaintiffs maintained throughout trial that their case was about a conspiracy to commit theft. At the close of evidence, the court asked plaintiffs to identify the facts underlying the conspiracy claim. TR 4/28/23, 1239:21-22. Plaintiffs' counsel described efforts to obtain the wrongful death proceeds and not tell the siblings. *Id.* at 1239:23-1249:14. Plaintiffs did not identify this alternate conspiracy claim. *Id.*

The Court then instructed the jury:

- Plaintiffs claim Defendant Jeff Speicher *conspired* with his wife . . . *to steal the wrongful death benefits*. . . . CF, p 5961.

- If you find in favor of the Plaintiffs, you must determine the total dollar amount of the Plaintiffs' damages, if any, that were caused by *conspiracy to commit civil theft* and civil theft . . . . *Id.* at 5975.

- The losses or injuries must be the direct result of the theft or *conspiracy to commit theft*. *Id.*

- With respect to Plaintiffs' claims for *conspiracy to commit theft*, if the acts alleged that constitute the underlying wrongs, namely civil theft, have not been proven, then there is no cause of action for *conspiracy to commit civil theft*. *Id.* at 5978.

- This [statute of limitations] defense is provided if you find . . . Defendant Speicher's involvement in the claimed theft or *conspiracy to commit theft*. *Id.* at 5986.

- Defendant Jeff Speicher claims his actions do not make him liable to the Plaintiffs on their claims for theft and *conspiracy to commit civil theft*. *Id.*

- Did the Defendant Jeffrey Speicher commit *conspiracy to commit civil theft*? *Id.* at 5991.

- Did the defendant Jeffrey Speicher's *conspiracy to commit civil theft* cause any of the damages or losses claimed by the Plaintiffs? *Id.*

Plaintiffs argued in closing that the "noneconomic damages are based solely on the theft and the *conspiracy to commit civil theft*." TR 4/28/23, p 1344:22-23.

Each conspiracy verdict form was titled, "CONSPIRACY TO COMMIT CIVIL THEFT." CF, pp 5951-57. Each form asked the jury for a verdict on "*conspiracy to commit civil theft*." *Id.*

After trial, Plaintiffs titled their motion for judgment, "Plaintiffs' Notice of Filing Proposed Finding, Order and Judgment and Request for Entry of Judgment on Jury Verdict on Plaintiffs' Claim for *Conspiracy to Commit Civil Theft*," and described the damages to which they believed they were entitled on their "*Conspiracy to Commit Civil Theft*." CF, pp 6008-16. Plaintiffs' response in support of that motion also referred only to a "*conspiracy to commit civil theft*." *Id.* at 6024-29.

This new damages theory was never pled, tried, instructed on, or decided. It was never raised before the trial court. The trial court did not err when it did not award damages on this basis.

### *2. Plaintiffs' New Claim Was Not Tried by Implied Consent*

Plaintiffs contend that this separate "conspiracy to conceal and intimidate" was tried by the express or implied consent of the parties by providing a "*see*" cite to C.R.C.P. 15(b). Opening-Answer Br., p 24 n. 4. However, Plaintiffs cite no case law and make no further argument in support of their position. Arguments not presented to or ruled on by the district court cannot be raised for the first time on appeal. *Crum v. April Corp.,* 62 P.3d 1039, 1042 (Colo. App. 2002). Here, because Plaintiffs never asked the trial court to amend the pleadings or the judgment to

reflect this new allegation, and C.R.C.P. 15(b) does not permit an appellate court to address an issue that was never raised in front of the trial court.

Moreover, an amendment to conform to the evidence is only permitted when there is "no reasonable doubt . . . that the issue raised by the amendment has been intentionally and actually tried." *Real Equity Diversification, Inc. v. Coville*, 744 P.2d 756, 759 (Colo. App. 1987). It "must appear that the parties intentionally and actually tried that issue; it is not sufficient that some evidence relative thereto has been introduced." *Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, ¶ 32. Here, Plaintiffs never raised this issue until they filed their Opening-Answer brief. Not only is there reasonable doubt that the Plaintiffs "intentionally and actually tried" this new claim, the record is clear that this new allegation was never "intentionally and actually tried." *Real Equity*, 744 P.2d at 759.

In addition, implied consent does not apply unless the evidence introduced is unrelated to the pled claims so that it provides sufficient notice of the unpled claim. *Soicher*, ¶ 33. Plaintiffs have always maintained that this "other act" evidence relates to their conspiracy to commit theft claim. *E.g.*, CF, p 5800 ("The evidence of Defendant's previous bad acts is directly relevant and probative to the case and admissible under 404(b)."). Plaintiffs never claimed otherwise until their Opening-Answer brief. Accordingly, Speicher never received notice of this new allegation.

It would be patently unfair and impermissible under C.R.C.P. 15(b) to award double damages on a claim that Speicher never learned about until the cross-appeal and never had the opportunity to defend against at trial.

Finally, the Court of Appeals remanded this case for a trial on only two claims: civil theft and conspiracy to commit civil theft. CF, p 5452. Damages based on this new, unpled theory would violate the Court of Appeals' Mandate.

### *3. The Record Supports the Trial Court's Duplicative Damages Determination for Theft and a Conspiracy to Commit that Theft*

Plaintiffs may not recover twice for one harm. *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 823-24 (Colo. 1992). Similarly, plaintiffs are not entitled to recover both treble damages and punitive damages premised on the same facts because such damages awards serve similar purposes. *Id.* at 822.

The trial court determined that the jury verdicts awarding non-economic and punitive damages to Plaintiffs on their civil theft and conspiracy to commit civil theft were premised on the same facts and duplicative. CF, pp 6039-40. This factual determination must stand unless the Court determines that it has *no support* in the record. *Blakeland*, ¶ 28; *Morrison Knudsen*, 532 F.3d at 1077 (applying this standard under similar circumstances); *St. Luke's*, 573 F.3d at 1200 n.17 (same).

The trial court's duplicative damages determination should be affirmed because it has support in the record.

For example, the evidence that Plaintiffs introduced and the testimony they elicited focused heavily on Speicher's communications with the insurance companies, his communications with his lawyer, and what he and Thess did and didn't tell the siblings. *See, e.g.*, EX 1, 9, 13, 16, 18, 20, 42-45, 54, 59, pp 36-42, 47-86, 146-56, 167-76; TR 4/24/23, pp 203:22-209:11, 221:23-251:14, 267:9-281:17; TR 4/25/23, pp 295:17-322:7, 327:3-340:19, 356:5-373:23, 384:4-388:17 (playing complete videotaped deposition of insurance representative who communicated with Speicher), 400:15-455:7; TR 4/26/23, pp 517:2-530:25, 535:4-548:14, 557:19-640:22, 719:17-751:16; TR 4/27/23, pp 812:7-821:5, 839:3-841:18, 880:15-881:9, 912:13-941:3, 946:3-953:12, 979:14-999:8, 1062:5-1064:12, 1074:22-1092:22; TR 4/28/23, pp 1131:13-1132:3, 1204:9-1205:10. Plaintiffs argued that Speicher "initiated his plan to steal the wrongful death proceeds" by calling the insurance companies. TR 4/28/23, pp 1336:22-1337:4. Plaintiffs emphasized that Speicher's calls with the insurance company were not "about just a theft, but a conspiracy to commit theft with his wife." *Id.* at 1337:5-20. They further contended that the "conspiratorial conduct" and the "plan to steal $327,000" included what Speicher did and did not tell the insurance companies. *Id.*

at 1337:21-1338:19. According to Plaintiffs, "part of the conspiracy was making sure that the [siblings] never found out about [the wrongful death proceeds]." *Id.* at 1341:11-13. They claimed that Speicher and Thess used their lawyer to help them do this. *Id.* at 1341:2-6; TR 4/24/23, pp 174:3-175:23. Plaintiffs argued that Speicher and Thess "conspired to conceal this information [about the wrongful death proceeds] and take 100 percent of the wrongful death proceeds for themselves." TR 4/24/23, pp 163:21-164:6. By Plaintiffs' own admission at trial, the evidence and testimony regarding the calls with the insurance companies, communications with Jesse Bopp, and what Speicher and Thess did and did not tell the siblings were part of both the civil theft and conspiracy to commit civil theft claims and support the trial court's duplicative damages determination.

Moreover, Plaintiffs completely flip on the position they took at the last trial that theft and conspiracy to commit civil theft were based on the same facts. CF, pp 4525. Plaintiffs conceded at the end of the first trial that Plaintiffs could not recover both treble damages and punitive damages on the civil theft and conspiracy

to commit civil theft claims because those claims were premised on the same facts.[3] *Id.* The trial court agreed.[4] *Id.* at 4596.

Lastly, the fact that the jury awarded – to the penny – the exact same economic, non-economic, and punitive damages on the theft and conspiracy to commit civil theft claims strongly suggests that those awards were based on the same facts. CF, pp 5943-57.

### *4. Plaintiffs' Reliance on Double Oak Is Misplaced*

According to Plaintiffs, *Double Oak Const., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 146 (Colo. App. 2003), held that "money damages could be awarded for conspiracy even though they *were not available for the underlying wrong*," and the "court could award exemplary damages solely based on the conspiracy claim, as exemplary damages *were not available for the underlying wrong*." Opening-Answer Br., p 32 (emphasis added). This case is different because noneconomic and punitive damages *were* available for the underlying wrong and they were awarded for the underlying wrong. In this case, awarding additional damages on the conspiracy claim would be duplicative.

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[3] Plaintiffs made the same concession with respect to the verdicts against Thess. CF, p 4021.

[4] Plaintiffs did not make a claim for noneconomic damages at the first trial, so that was not an issue.

To the extent *Double Oak* has any application here, its continued viability is questionable. *Double Oak's* analysis cited by Plaintiffs relies on *Dalton v. Meister*, 71 Wis. 2d 504, 239 N.W.2d 9 (1976), and *McElhanon v. Hing*, 151 Ariz. 386, 728 P.2d 256 (Ct. App. 1985). Neither of those cases hold that a plaintiff can obtain damages on a conspiracy claim that are independent of the damages available for the underlying wrong.

In all three cases – *Double Oak*, *Dalton*, and *McElhanon* – plaintiff used the conspiracy claim to extend liability for a fraudulent conveyance to defendants who helped make the fraudulent conveyance possible but were not an actual party to the conveyance. That logic is inapplicable here where Plaintiffs argued that Speicher was a direct beneficiary of the theft of the wrongful death proceeds.

### *5. The Twelve "Other Acts" Do Not Support Double Damages*

No matter how the Court views them, the twelve "other acts" listed in the Opening-Answer Brief do not support a claim for double damages. *See* Opening-Answer Br., pp 24-31. A conspiracy claim is a derivative cause of action. *Colorado Cmty. Bank v. Hoffman*, 2013 COA 146, ¶ 43. It is not actionable standing on its own. *Id.* It must be tied to an underlying wrong. *Id.* In this case, the underlying wrong is civil theft.

The twelve "other acts" that Plaintiffs claim support double damages were either taken as part of the effort to commit civil theft or they were not. If those acts were taken as part of the effort to commit civil theft, then they are part of the civil theft claim and the court cannot award double damages on the basis of those acts. On the other hand, if those acts were not taken as part of the effort to commit civil theft, then they are not relevant (as Speicher has always maintained) and cannot support an additional damages award for some separate unpled and untried claim. No matter how the Court looks at these twelve "other acts," they do not support additional damages.

**Conclusion**

For these reasons, the Court should affirm the trial court's duplicative damages determination.

## REPLY BRIEF

The trial court erred when it instructed the jury that the previous jury had found that Thess conspired with Speicher to steal the wrongful death proceeds. If Thess conspired with Speicher to steal the wrongful death proceeds, then Speicher conspired with Thess to steal the wrongful death proceeds. The court's instruction told the jury that a previous jury had considered the exact question now before them and found Speicher liable.

This was particularly damaging because it was emphasized before, during, and at the close of trial. The trial court instructed the jury about the previous verdicts multiple times before trial even started. Plaintiffs relied on the previous verdicts in opening and throughout trial. The court provided the same information about the previous verdicts multiple times in closing instructions. Plaintiffs emphasized those previous verdicts again in closing.

Plaintiffs argue that this was okay because it saved them and the court the time of proving one of the elements of their case – that Thess conspired with Speicher. Plaintiffs also defend the previous verdicts instruction on the ground that the previous verdicts had bearing on the questions before this jury. Of course they did; that is why they are so problematic. They invited the jury to defer to the decisions of the previous jury rather than decide the case on the evidence before it.

Plaintiffs contend that there was no error because the trial court provided a curative instruction, an argument that courts in this state and elsewhere have uniformly rejected. Plaintiffs further claim that the previous jury verdicts supply the law of the case – an argument that grossly misconstrues the law of the case doctrine. Lastly, Plaintiffs claim that any error was harmless because a previous jury – in a different trial with different evidence – had already found Speicher liable. Plaintiffs argue that there was nothing wrong with the jury relying on the

previous verdicts instead of the facts before them, and they now invite this Court to do the same.

Plaintiffs cite no authority for their position that a trial court can instruct a jury about a previous jury verdict that bears directly on the issues before that jury. Cases in Colorado and elsewhere uniformly reject that position.

The trial court also admitted significant amounts of "other acts" evidence that was unrelated to Plaintiffs' two claims. In their Opening Brief asking for double damages, Plaintiffs argue that this "other acts" evidence had nothing to do with their civil theft and conspiracy to commit civil theft claims. They claim this evidence was instead part of a separate, unpled conspiracy claim. This argument creates an obvious problem for Plaintiffs in their Answer, so they argue preservation and make only conclusory arguments that this "other acts" evidence was relevant to the two claims at issue.

## Argument

### I. The Jury Instructions About the Previous Jury Verdict Require Reversal

#### A. Standard of Review

Plaintiffs claim that the "standard of review is not abuse of discretion, it is harmless error." Opening-Answer Br., p 33. Harmless error is not a standard of review; it is a standard for reversibility. As explained in the case cited by Plaintiffs,

the Court of Appeals will overturn a jury instruction if there is an "abuse of discretion." *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1195 (Colo. App. 2009). If there is an error, the court then applies harmless error to determine whether the error requires reversal. *Id.*

Plaintiffs' Opening-Answer Brief raises the question of whether the jury instruction is more properly subject to de novo review. Plaintiffs argue that the instruction was proper because it represents the "law of the case." The Court of Appeals "review[s] de novo . . . whether a district court properly applied the law of the case." *Cummings v. Arapahoe Cnty. Sheriff's Off.*, 2021 COA 122, ¶ 18; *see also Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) ("rulings involving [interpretation of prior appellate rulings under] the law of the case doctrine should be reviewed de novo"). The Court of Appeals "review[s] de novo whether a given jury instruction correctly states the law." *Id.* Based on Plaintiffs' arguments, de novo review is at least partly appropriate.

Under either standard, the jury instruction was error requiring reversal.

**B. Yes, Plaintiffs Had to Prove Thess Was a Co-Conspirator**

Plaintiffs argue that the jury instruction was correct because, without it, Plaintiffs would have had to prove at the second trial that Thess agreed with Speicher to steal the insurance proceeds. Opening-Answer Br., p 34. As Plaintiffs

explain, the "essence of a civil conspiracy is that **two or more people** agreed." *Id.* (emphasis in original). Plaintiffs' position has always been that "Speicher's co-co-conspirator was Thess." *Id.* So Plaintiffs bore the burden of proving that Speicher agreed, with Thess, to steal the insurance proceeds. CF, p 5980.

This means, and the parties agree, that Plaintiffs had to prove that Thess agreed with Speicher to steal the insurance proceeds. Opening-Answer Br., p 34. The jury instruction that Thess had been found liable for agreeing with Speicher to steal the proceeds lifted this burden. It removed a basic element that Plaintiffs had the burden to prove at this trial.

Plaintiffs claim that this was okay because it shortened the retrial. *Id.* Plaintiffs do not cite, and counsel is unaware of, any case that has ever held that a party does not need to meet its burden of proof because doing so would take more time.

Moreover, Plaintiffs made this same argument in their petition for rehearing to the Court of Appeals following the 2019 trial, and the Court rejected it. Petition for Rehearing, July 29, 2021.[5] Plaintiffs asked the Court of Appeals to reconsider its opinion and issue a limited remand for a trial on when the statute of limitations

[5] The Court may "take judicial notice of the contents of this court's file in the prior appeal." *Harriman v. Cabela's Inc.*, 2016 COA 43, ¶ 64.

began to run on Roddess's claims. *Id.* Plaintiffs argued that "[j]udicial resources should not be spent unnecessarily on issues that already have been tried for nearly two weeks and determined by a jury." *Id.* The Court rejected this request and remanded for retrial on the civil theft and conspiracy to commit civil theft claims.[6] The trial court's instruction lifting Plaintiffs' burden of proof as to one of the elements of their claims runs directly counter to the Court of Appeals' Mandate that directed a retrial – not a partial retrial – on the conspiracy to commit civil theft claim.

Lastly, Plaintiffs' argument concedes that Plaintiffs had to prove at this trial that Thess committed conspiracy to commit theft in order to prove that Speicher committed conspiracy to commit theft. In doing so, they concede that the inverse is true. To prove that Thess committed conspiracy to commit theft at the previous trial, Plaintiffs had to prove that Speicher committed conspiracy to commit theft. So, by Plaintiffs' own admission, the conspiracy verdict against Thess in Trial One told the jury in Trial Two that the previous jury had found that Speicher committed

[6] Despite the Court of Appeals' clear rejection of Plaintiffs' request, Plaintiffs then made the same request to the trial court. CF, p 5323 ("the narrow issue regarding the statute of limitations against Roddess Ekberg is the only issue that needs to be or can be properly retried"); CF, pp 5326-35 (same). The trial court declined Plaintiffs' invitation to ignore the Court of Appeals' Mandate. CF, p 5336 ("The order is clear . . . the scope of retrial will be . . . civil theft and conspiracy to commit civil theft.").

conspiracy to commit civil theft. Thus, the trial court instructed the jury that another jury had considered the exact issue before it and concluded that Speicher was liable. This was "patent error." *People v. Medina*, 185 Colo. 101, 109, 521 P.2d 1257, 1261 (1974).

### C. No Instruction Could Fix This Error

The court's instruction to consider Speicher's liability separately could not fix this error. First, as explained above, the question of Thess's conspiracy liability and the question of Speicher's conspiracy liability are inextricably intertwined. Second, the prejudice of introducing a previous jury's verdict that bears on an issue before the current jury is so great that no instruction can fix it. *Salas v. People*, 177 Colo. 264, 266, 493 P.2d 1356, 1357 (1972). In *Salas*, the jury learned about the previous jury's verdict, and the trial court instructed the jury to disregard the previous verdict. *Id.* at 265-66. The Colorado Supreme Court held that the impermissible inference from previous jury's verdict "could not be cured or eradicated by an instruction, but was compounded by it." *Id.* at 266. The trial court's "curative" instruction actually made the problem worse. *Id.* Third, the instruction was even more damaging than if this information had been admitted through testimony because it bore the imprimatur of the court and was presented to

the jury *before* trial, affecting how the jury saw all the evidence introduced after it. *See* Opening Br., pp 23-25.

### D. *Salas and Medina* Control the Analysis

Plaintiffs argue that *Salas* and *Medina* are distinguishable because they reference prior convictions of the same defendant in a subsequent trial. Plaintiffs miss the mark here for two reasons.

First, *Medina* did not involve a previous conviction, so its holding cannot be cabined to cases involving previous criminal convictions. *Medina*, 185 Colo. at 109, 521 P.2d at 1261.

Second, both *Salas* and *Medina* stand for a much broader principle that is applicable here: a jury cannot be told about a previous jury's verdict that touches on the issues before it because there is a serious risk that the jury will defer to the previous jury's findings rather than deciding the case on the evidence before it.

Lastly, Plaintiffs also appear to argue that *Salas* and *Medina* don't apply in the civil context because civil defendants, unlike criminal defendants, do not have a Fifth Amendment right to remain silent. Opening-Answer Br., p 37. Undersigned counsel does not understand this argument. The Fifth Amendment has no bearing on *Salas's* and *Medina's* basic principle that juries should be basing their decisions on the evidence before them rather than the decisions of previous juries. It also has

no bearing on a defendant's fundamental rights to a fair trial, an impartial jury, and to hold plaintiffs to their burden of proving each and every element of their claims – all of which were impaired by the court's instruction in this case.

### E. Cases Outside This Jurisdiction Universally Support Speicher's Position

Plaintiffs cite no authority from courts inside or outside Colorado to support their position that the trial court did not err when it instructed the jury about the previous jury's verdicts on issues that bore directly on Speicher's liability.

Plaintiffs' efforts to avoid the well-reasoned guidance from other courts are unsuccessful.

#### *1. Appellate Courts Outside Colorado Take a Uniform Approach to this Issue*

Plaintiffs argue that the cases from other jurisdictions cited in the Opening Brief "take a variety of approaches to handling this matter, which demonstrates a range of possible outcomes the trial court can choose, thus supporting Plaintiffs' position that the trial court did not err." Opening-Answer Br., p 38. Plaintiffs are wrong. While perhaps the trial courts took a variety of approaches to handling these issues, the appellate courts' responses were uniform and consistent. When the trial court admitted evidence about the prior verdict or instructed on the prior verdict, the appellate court reversed. *Secada v. Weinstein*, 563 So. 2d 172, 173-74 (Fla. Dist. Ct. App. 1990); *Guarnier v. Am. Dredging Co.*, 145 A.D.2d 341, 342,

535 N.Y.S.2d 705 (1988); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *McKibben v. Philadelphia & R. Ry. Co.*, 251 F. 577 (3d Cir. 1918). When the trial court excluded evidence on the prior verdict or declined to instruct on the prior verdict, the appellate court affirmed. *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985 (9th Cir. 2007); *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342 (Fed. Cir. 1998); *Garris v. McClain*, 399 Pa. 261, 160 A.2d 398, 400 (1960). It is the analysis in published appellate court opinions – rather than the (often reversed) rulings of the trial courts – that guides the decision here.

### *2. Plaintiffs' Efforts to Distinguish This Authority Fail*

Plaintiffs argue that the cases from other jurisdictions cited in the Opening Brief are distinguishable because they "only apply to cases in which the jury has been instructed about a prior verdict against the same defendant in a subsequent trial." Opening-Answer Brief, p 38. This is incorrect for several reasons.

First, this argument ignores the fact that a prior verdict against a co-conspirator for conspiring with the defendant has the same prejudicial effect as a prior verdict against the defendant. Both tell the jury that a previous jury found the defendant liable for conspiracy.

Second, these cases are not limited to prior verdicts against the same defendant. In *Johns Hopkins*, 152 F.3d at 1362-64, the trial court excluded a

previous verdict in *favor* of the defendant, and the appellate court affirmed because the previous verdict "had significant potential to confuse the jury."

In *Secada*, 563 So.2d at 173-74, the sole question at trial was whether the plaintiff had suffered a permanent injury. The trial court admitted evidence that, in other cases involving other parties, juries had reached verdicts rejecting the defense expert's testimony that there was no permanent injury. *Id.* at 172-173. The appellate court reversed. *Id.* at 173. The court held that "any 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." *Id.* The court supported its conclusion by reviewing a number of cases from other jurisdictions addressing similar facts and reaching the identical conclusion, including the *Medina* case from Colorado. *Id.* at 173-174.

Third, these cases are not limited to prior verdicts against the same defendant *in a subsequent trial*. Many of the cases involve prior verdicts against the same defendant in a separate proceeding. In *Engquist*, 478 F.3d at 1010, the appellate court affirmed the exclusion of a previous verdict against the defendant in a separate case because if the other verdict came in, "there was a substantial risk that the jury would import the whole verdict of liability from the prior proceeding."

Similarly in *Coleman Motor*, 525 F.2d at 1351, the Third Circuit held that reference to a previous antitrust verdict in a separate case required reversal. The court reasoned: "A jury is likely to give a prior verdict against the same defendant more weight than it warrants. The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it." *Id.* at 1351.

Finally, these cases all highlight the same basic principle that is apparent from *Salas* and *Medina*: a verdict from Trial One that touched on one of the issues before the jury in Trial Two is inadmissible because it creates the impermissible risk that the jury will decide the matter before it based not on the evidence in Trial Two but instead on the previous jury's verdict in Trial One. These cases unanimously reject the admissibility of the prior verdict.

### F. A Previous Jury Verdict Against a Co-Defendant Cannot Supply the "Law of the Case"

Plaintiffs argue that the verdicts against Thess are the "law of the case," so the trial court was required to instruct the jury that Thess had been found liable under the "mandate rule." Opening-Answer Br., pp 38-40. There are a host of problems with this argument.

First, Plaintiffs argue that the verdicts against Thess are binding against Speicher because Speicher didn't appeal them. Plaintiffs' argument requires us to

state the obvious: Speicher and Thess are not the same person. Speicher had no standing to appeal the verdicts against Thess, he could not have appealed the verdicts against Thess, and he cannot be faulted for not doing so.

Second, Plaintiffs cite *no authority* for the proposition that the previous jury verdict against another party can supply the law of the case on remand. The sole Colorado authority cited by Plaintiffs – *Hardesty v. Pino*, 222 P.3d 336 (Colo. App. 2009) – does not say that.[7] Nor do any of the non-binding authorities included in Plaintiffs' lengthy string cite on pages 39-40 of the Opening-Answer Brief.[8]

Unlike the authorities cited by Plaintiffs, the Tenth Circuit's opinion in *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1286 (10th Cir. 2005), is

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[7] Plaintiffs decline to address the facts of *Hardesty*. There, the Court of Appeals reversed a jury verdict and held that there was insufficient evidence to support a finding that there was malpractice during a surgery. *Id.* at 340. On remand, the Court of Appeals' explicit holding supplied the law of the case and precluded the plaintiff from arguing that there was malpractice during the surgery. *Id.* at 340-41. *Hardesty* was a straightforward application of the law of the case doctrine involving an explicit appellate court directive; there is no such directive in this case.

[8] Closer review of the string cite Plaintiffs copied verbatim from a footnote in a non-published Utah case shows that none of those cases involve the issue presented here, whether a previous jury verdict against another party can supply the law of the case on remand. *Compare* pages 39-40 of the Opening-Answer Brief *and SCO Group, Inc. v. Novell, Inc.*, No. 2:04-CV-139 TS, 2010 WL 413836, at *1, n. 7 (D. Utah Jan. 28, 2010).

on point and instructive. There, a group of 36 homeowners sued Goodyear alleging that home heating pipes made by Goodyear were defective and had damaged their houses. The trial court dismissed the claims of one homeowner, Glas. The claims of the other homeowners proceeded to trial. At trial, the jury found that the pipes were defective and awarded damages. Glas then appealed the dismissal of her claims.

The Tenth Circuit reversed the dismissal because the trial court had held Glas's claims to an incorrect standard. Glas then argued that the jury's liability verdict as to the other 35 homeowners supplied the law of the case (i.e., Goodyear was liable) and that remand should be limited to a trial on damages. The Tenth Circuit rejected Glas's argument:

> While her argument is imaginative, the doctrine of law of the case does not apply here. '[T]he law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' Ms. Glas provides no authority for the proposition that once the district court enters judgment on a verdict, it somehow becomes a conclusion of law and thus is appropriate for application within the law of the case context. We decline Ms. Glas's invitation to create such authority. We therefore remand Ms. Glas's claims for a new trial.

*Id.* at 1286 (internal citations omitted). There, like here, a jury's liability determinations as to one party cannot supply the law of the case as to another party on remand. A full retrial is required.

Third, Plaintiffs are attempting to weaponize the portions of the previous judgment that they like and jettison the portions that they don't. By Plaintiffs' logic, the previous jury's damages award of $0 in noneconomic damages and $15,000 in punitive damages was also the law of the case. CF 4048-50.

Lastly, the Court of Appeals' Mandate was for a "new trial" on the civil theft and conspiracy to commit civil theft claims against Speicher. CF, p 5452. The Court of Appeals remanded this case, over Plaintiffs' objection, for a full retrial on liability. For the reasons described above, there cannot be a full retrial if the jury is instructed that the previous jury found Speicher conspired with Thess to steal the insurance proceeds.

**G. This Was Not a Harmless Error**

Lastly, Plaintiffs argue that any error in instructing the jury about the previous verdicts was harmless "because when the first trial occurred, this instruction was not given, and Speicher was found liable," so "it is indisputable that this instruction had no bearing on Speicher's liability." Opening-Answer Br., p 41. This argument fails.

First and foremost, Plaintiffs are asking this Court to hang its harmless error analysis on verdicts at a *different trial* with *different evidence* that were later *reversed*.

Second, by Plaintiffs' reasoning, virtually any error in a second trial that found Speicher liable would be harmless. Plaintiffs' contention renders the prior reversals of the theft and conspiracy to commit theft verdicts a nullity: the mandate would be useless if the prior verdicts so controlled the retrial.

Third, aside from the conclusory assertion that the evidence against Speicher was "overwhelming," Plaintiffs make no argument that the error was harmless based on what actually happened at the second trial.

Fourth, this kind of evidence has the "inevitable tendency" of causing the jury to abdicate its factfinding duty and defer to the previous jury. *Secada*, 563 So.2d at 173. This effect is so pernicious that at least one federal circuit court has declined even to "speculate about the role the [previous] verdict played in this jury's deliberations," and reversed. *Coleman*, 525 F.3d at 1350-5. It is why "a whole series of cases has found reversible error in the admission of evidence that a previous 'fact finder' . . . reached a conclusion on an issue in the present trial." *Secada*, 563 So.2d at 173-74 (collecting cases).

Finally, the court's instructional error, which began at the start of trial in opening instructions, was relied on by Plaintiffs throughout trial, and was reiterated multiple times in the closing instructions, permeated the entire proceeding and both substantially influenced the verdict and denied Speicher a fair trial.

## II. "Other Acts" Evidence

### A. Preservation

Plaintiffs do not dispute that Speicher preserved his objections to testimony that Speicher's son flipped Justin off or that Speicher had Justin moved to another floor at Wells Fargo. CF, pp 5651-55; *see also Bernache v. Brown*, 2020 COA 106, ¶ 9 (ruling on motion in limine preserves the issue for appeal).

As to Plaintiffs' other preservation arguments, to preserve an issue an objection must present "the sum and substance of the argument" to the court. *Gebert v. Sears, Roebuck & Co.*, 2023 COA 107, ¶ 25 (quoting *Madalena v. Zurich Am. Ins. Co.*, 2023 COA 32, ¶ 50). In other words, "all that is necessary is that the issue be brought to the attention of the trial court and that the court be given an opportunity to rule on it." *Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶ 24 (internal quotation and citation omitted). The Colorado courts have said again and again that they do not require "talismanic language" to preserve an argument, just that the trial court be presented with an adequate opportunity to make findings

of fact and conclusions of law on an issue. *E.g.*, *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

On testimony about the investigation of Justin, Speicher's counsel made a timely objection and began explaining why, but he did not get to finish because he was cut off by Plaintiffs' counsel. TR 4/27/23, pp 1093:15-1094:8. The court ruled before Speicher's counsel could get another word in. *Id.* at 1094:9-10. Plaintiffs cannot claim that Speicher failed to adequately preserve the issue when Speicher raised an objection, Plaintiffs denied him the opportunity to explain the basis for the objection, and the court determined that it had heard sufficient argument and issued a ruling.

On the allegation that Thess made a choking motion with her hands during the previous trial, Speicher's counsel timely objected and argued that the proposed testimony was not about Speicher. *Id.* at 1001:7-25. In a case where Speicher was the only defendant, an objection that the proposed testimony was not about Speicher is sufficient to make the Court aware that the proposed testimony is not relevant.[9]

[9] Speicher's counsel later remarked that Plaintiffs' counsel should have asked Thess about the incident, but immediately clarified that the proposed testimony, "has nothing to do with Mr. Speicher." *Id.* at 1002:3-5.

Lastly, on the allegation that Speicher made a finger gun outside the court, the record is convoluted because the court understandably wanted the opportunity to view video of the incident and at the same time keep trial moving. However, Plaintiffs' counsel again deprived Speicher's counsel of the opportunity to make the "specific" record Plaintiffs now claim was required by cutting off and talking over Speicher's counsel and even the court. *Id* at 868:3-25. The court indicated it was going to let the testimony in. *Id.* at 865:12-13, 868:15-16. Speicher's counsel then took another tack and urged that the testimony could not come in unless the court also admitted the video of the incident to rebut the way Roddess described it. *Id.* at 963:8-22.

**B. The "Other Acts" Evidence Never Should Have Been Admitted**

Plaintiffs list many of these same "other acts" in their argument for double damages. Opening-Answer Br., pp 27-31. In support of that argument, Plaintiffs claim that these acts were in fact unrelated to the civil theft or conspiracy to commit civil theft claims but were instead part of a separate, unpled conspiracy to conceal or intimidate. *Id.* at 23-24, 26, 32. By Plaintiffs' own admission these other acts are irrelevant. Given this lack of relevance, they are unfairly prejudicial and inadmissible under C.R.E. 404(b).

## III. Evidence About Speicher's Income and Assets

### A. Preservation

Before the first trial, the court held that evidence of Speicher's income, assets, and net worth and Thess's lifestyle and car were admissible to explain the money flow between the two and rebut any contention that Thess didn't have any money to pay damages. CF, p 3905. That logic no longer applied in a new trial in which Thess was not a defendant. Further, Speicher filed a motion in limine, the court ruled on it, and the issue was preserved.[10] CF, pp 5676-5677, 5927. The court's instruction that it "may" entertain further objections at trial does not change this. CF, p 5927.

### B. This Was Reversible Error

Plaintiffs claim, without any supporting argument, that this evidence was relevant, its prejudicial effect did not outweigh its probative value, and that it was not misleading. Plaintiffs make no attempt to counter the arguments raised in Defendant's Opening Brief. They make no claim that this error was harmless. Thus, Plaintiffs have conceded there was error and that it substantially influenced the outcome of the trial. *See People v. Bondsteel*, 2015 COA 165, ¶ 61, n. 1

[10] *Bernache*, ¶ 9 (ruling on motion in limine preserves the issue for appeal).

("failure to respond in the reply brief to an argument made in the answer brief may be taken as a concession") (*rev'd on other grounds in Garcia v. People*, 2022 CO 6).

## IV. Plaintiffs' Summary Exhibit of Bank Records

### A. Preservation

Plaintiffs concede that Speicher raised this issue, and the court ruled on it in a pretrial motion in limine. Opening-Answer Br., p 50. Plaintiffs cite no Colorado authority for the proposition that, after a successful appeal, a party cannot move to exclude evidence on retrial that was improperly admitted in the first trial but was not a part of the successful appeal. Plaintiffs' position appears to be that even when a party has a winning appellate issue, it must plead and argue every potential evidentiary issue to preserve those issues for trial on remand. Not only would this impose a substantial burden on appellants (and the appeals court that would have to address these additional arguments when there already is a separate reason for reversal), it also makes little sense as a practical matter. Evidence that was relevant in the first trial may become irrelevant or inadmissible in a retrial based on the claims and the context in which the evidence is presented, or vice versa. This position runs counter to the judicial efficiency arguments implicit in the waiver rule. Plaintiffs' position also appears to run counter to the more limited scope of

the law of the case doctrine that has been articulated in Colorado: "[C]onclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case," but nothing more. *Hardesty*, 222 P.3d at 340 (quoting *Super Valu Stores, Inc. v. Dist. Ct.*, 906 P.2d 72, 78–79 (Colo. 1995)).

Moreover, Plaintiffs had the opportunity to make this waiver argument in response to Speicher's motion in limine and declined to do so. CF, pp 5794-5800. The Court of Appeals has held that it will not consider the type of waiver argument now raised by Plaintiffs when it was not first raised in the district court. *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22, ¶¶ 20-24 ("Core-Mark argues that the district court erred in allowing Sonitrol to contest the foreseeability of the fire because . . . Sonitrol failed to appeal that issue in *Sonitrol II* . . . . [But] Core-Mark never argued in the district court that Sonitrol's failure to appeal this specific foreseeability question waived the issue. . . . We do not consider 'arguments never presented to, considered or rule upon by' the district court.") (citation omitted). Plaintiffs, like Core-Mark, waived their waiver argument.

**B. The Bank "Summaries" Are Inadmissible Under C.R.E. 1006**

Plaintiffs make no attempt to contest Speicher's claims that Exhibits 105-107 are inaccurate. Opening-Answer Br., pp 51-52. Instead, citing a case from

outside this jurisdiction, Plaintiffs maintain that the inaccuracies in those exhibits go to the exhibits' weight, rather than their admissibility.

This argument runs directly counter to the Colorado Supreme Court's holding in *Murray v. Just In Case Bus. Lighthouse, LLC*, 2016 CO 47M. In *Murray,* the court held that summaries admitted under C.R.E. 1006 must meet certain conditions: "[S]ummaries under Rule 1006 *must* 'summarize the information in the underlying documents *accurately*, *correctly*, and in a nonmisleading manner.'" *Id.* at ¶ 50 (emphasis added). By Plaintiffs' own admission, Exhibits 105-107 fail to meet this standard.

In addition, these exhibits are misleading and they are not summaries. They purport to be summaries of checking accounts but they do not actually summarize voluminous information. Instead they are simply a list of transactions cherry-picked by one of the Plaintiffs. Their content represents the conclusions of one of the Plaintiffs as to what was a Speicher household expenditure and what was not. That is not a summary; that is argument.

**V. Cumulative Error**

The errors in this case began with the pretrial instructions, continued throughout the evidence, and were emphasized again in the closing instructions. Their cumulative effect was to deny Speicher of his right to a fair trial. The

cumulative error doctrine should be extended in this case to the extent necessary to support reversal.

## VI. Attorneys' Fees

Plaintiffs' request for appellate attorneys' fees should be denied because the judgment in this case should be reversed.

## Conclusion

This Court should grant the relief requested in Speicher's Opening Brief and reverse the civil theft and conspiracy to commit civil theft verdicts and remand for a new trial.

Dated: May 31, 2024.

Respectfully submitted,

*s/ Carey Bell*

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 31, 2024, a true and correct copy of the foregoing **Mr. Speicher's Answer-Reply Brief** was filed through Colorado Courts E-Filing system on the person(s) named below:

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