Case No. 74275

In the Supreme Court of Nevada

GEORGE STUART YOUNT, individually and in his capacity as owner of GEORGE YOUNT IRA,

Appellant,

vs.

CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC; POWELL, COLEMAN AND ARNOLD, LLP; DAVID MARRINER; and MARRINER REAL ESTATE, LLC,

Respondents.

APPEAL

from the Second Judicial District Court, Washoe County
The Honorable N. PATRICK FLANAGAN,
The Honorable JEROME POLAHA, and
The Honorable EGAN WALKER, District Judges
District Court Case No. CV16-00767

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Stuart Yount is an individual.

2. Richard Campbell of Kaempfer Crowell and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and Adrienne Brantley-Lomeli of Lewis Roca Rothgerber Christie LLP represent Yount in the district court and in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 21st day of February, 2019.

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By: */s/ Daniel F. Polsenberg*

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JURISDICTION

Plaintiff George Stuart Yount appeals from an order dismissing his claims and awarding damages to defendants William Criswell, Robert Radovan, and David Marriner. Yount timely appealed. (10 App. 2302; *see also* Order on Appellate Jurisdiction, dated Aug. 24, 2018, Doc. No. 18-33097.)

ROUTING STATEMENT

The Supreme Court should retain this appeal to address the district court's responsibility to correct its own mistakes when it recognizes them rather than leaving an admittedly erroneous decision for correction in the appellate courts. The underlying error in this case—an award of damages to defendants who had no counterclaim—is obvious and unlikely to recur. This case illustrates a troubling tendency, however, for a successor judge to whom a case is reassigned to leave the predecessor's decisions intact, even when the successor recognizes them to be wrong. Although this issue has been touched on in *Insurance Co. of the West v. Gibson Tile Co.*, 122 Nev. 455, 134 P.3d 698 (2006), the recurring problem warrants Supreme Court review. NRAP 17(a)(12).

This case is also a contract case where plaintiff sued for return of

$1 million and the court awarded defendants $4.5 million. This is far in excess of the $75,000 amount under NRAP 17(b)(6) presumed to be a case for the court of appeals.

This case also involves a number of procedural issues never resolved by this Court. Although appellant believes defendants' procedural arguments are meritless, they are an issue of first impression.

ISSUES PRESENTED

1. What is the district court's responsibility to correct its own mistakes, through a successor judge, rather than requiring an appeal?

2. May a district court award damages to a defendant solely on the basis of an affirmative defense when the defendant did not plead any counterclaims and did not try any counterclaims by consent?

3. Can a party claim intentional interference with contractual relations without an existing contract (or even the prospect of a contractual relationship) and without any affirmative act of interference?

4. May a district court award damages for intentional interference with contractual relations without evidence of the anticipated profits from the contract?

5. Are the voting rights of a member of an LLC *per se* insub-

stantial, such that an investor, whose membership interest in the LLC is converted to strip those voting rights, has no remedy in tort or contract?

STATEMENT OF THE CASE

This is an appeal from a judgment after bench trial, the Honorable N. Patrick Flanagan, Jerome Polaha, and Egan Walker, District Judges of the Second Judicial District Court, Washoe County, presiding.

Plaintiff George Stuart Yount paid $1 million for a membership interest in the historic Cal Neva Lodge to finance its renovation. He received neither the paid-for interest nor a refund, though.

When Yount sued, defendants argued that unclean hands barred the claim but did not plead any counterclaims. At trial, defendants confirmed that they asserted no counterclaim. The district court nonetheless dismissed Yount's claims and *sua sponte* awarded $4.5 million as "damages" to Criswell, Radovan, and Marriner on the affirmative defense of unclean hands.

STATEMENT OF FACTS

A. The Project to Renovate the Cal Neva Lodge

Criswell and Radovan Solicit Investors

In 2013 developers William Criswell and Robert Radovan bought the historic Cal Neva Lodge with the intent of renovating and then managing it upon its reopening. (5 App. 1161:13–15; 6 App. 1339:11–24; 6 App. 1345:10–24.) They formed three entities: Cal Neva Lodge, LLC as the entity owning the resort; Criswell Radovan LLC as the development company; and CR Cal Neva, LLC ("CR") as the management company. (6 App. 1336:1–8, 1338:6–8; 10 App. 2435, Section 8.1.)

Cal Neva Lodge, LLC issued a private placement memorandum soliciting $20 million in equity investment: each investment would give an investor a "Founder's Share" stake in the Cal Neva Lodge. (6 App. 1336:10–24; 6 App. 1348:13–16; 10 App. 2426–27, Section 4.3; 5 App. 1169:12–20.)

By February 2014 nearly all of the Founder's Shares had been sold. (5 App. 1162:19–23, 1163:1–4.) To help find the remaining founding membership investors, Criswell and Radovan hired David Marriner. (5 App. 1162:19–23, 1163:1–4.)

Criswell and Radovan Mismanaged the Project from Inception

Although Criswell and Radovan held themselves out as experienced developers, Yount discovered that the pair mismanaged the project from the beginning. (8 App. 1851:1–15; 7 App. 1752.) Criswell Radovan had to loan the project over $900,000 to keep it afloat. (7 App. 1769:23–24, 5 App. 1737–9, 1744:4–11.) The project also faced over $9 million of change orders. (5 App. 1706:3–14.) Eventually, Criswell and Radovan concluded that the project needed a total refinance. (5 App. 1720:1–24.)

Criswell and Radovan concealed their mismanagement by not communicating with investors and inadequately reporting on the status of the project. (5 App. 1738:18–24, 1739:1–6.) Criswell, Radovan, and Marriner inaccurately claimed that the project was fully funded and provided rosy projections and an opening date of December 12, 2015. (5 App. 1736:9–24; 1737:1–10, 1738:9–24; 5 App. 1185:16–19.)

Facing a Budget Shortfall, Marriner Solicits Yount

Facing substantial budget overruns, Cal Neva desperately needed money. (7 App. 1722:12–13; 11 App. 2677.) Criswell and Radovan

asked Marriner to sell the last remaining Founder's Share. (5 App. 1162:19–23, 1163:1–4); 5 App. 1132:24–28.)

Marriner had initially contacted Yount about investing in the Cal Neva in February of 2014. (5 App. 1182:22–24, 1183:1.) Yount was not interested then but kept in sporadic contact with Marriner. (*Id.*) When Yount asked about the project in 2015, Marriner jumped at the opportunity to sell the last Founder's Share and offered to give Yount a tour. (5 App. 1183:22–24, 1184:1–2.)

During the tour, Marriner told Yount that the project was on track to open on December 12, 2015 and also offered Yount the last remaining Founder's Share. (5 App. 1186:18–24; 5 App. 1186:12–15.) Afterwards, Marriner emailed Yount the confidential offering memorandum. (5 App. 1188:5–11; 20 App. 4879.)

Unbeknownst to Yount, at the same time Marriner was also soliciting another investor, Les Busick, to purchase that same share. (7 App. 1729:1–12.)

B. Defendants Convert Yount's Investment *Yount and another Investor Buy the Same Share*

Criswell, Radovan, and Marriner quickly realized that both Yount

and Busick agreed to purchase the same share. (5 App. 1226:20–24.) Rather than inform Yount and Busick of the conflict, however, Marriner and Radovan referred to the situation as the "perfect storm," a chance for Criswell and Radovan to receive an additional $1 million rather than leave it invested in Cal Neva Lodge, LLC. (5 App. 1227:1–8.) Radovan instructed Marriner not to mention anything to Yount. (5 App. 1227:7–14.)

Busick's $1 million investment came first. (5 App. 1228:1–8.) Criswell, Radovan, and Marriner never informed Yount that Busick had already purchased the last of the Founder's Shares. (7 App. 1729:3–11.) So less than two weeks later, Yount signed the same subscription agreement and wired $1 million to the trust account of Powell Coleman, the escrow agent. (7 App. 1573:3–10.)

Yount's Money is Converted, without his Knowledge, into a Different Share

Powell Coleman, rather than release Yount's funds to Cal Neva Lodge, LLC per the wiring instructions, released the funds to Criswell Radovan to cover the $900,000 it had previously loaned to the project. (7 App. 1574:15–17; 7 App. 1573:7–10.)

Rather than tell Yount what had happened, Criswell and Radovan

treated Yount's purchase of a Founder's Share as the purchase of a different equity interest then owned by CR, the management company. (7 App. 1530:5–16; 6 App. 1331:17–32:9.) The CR share was not a Founder's Share under the private placement memorandum.

The Conversion Violates the Operating Agreement

To ensure transparency and investor oversight, the operating agreement of Cal Neva Lodge, LLC prohibits members from selling their shares without the other members' express approval:

> No member may sell, transfer, assign or otherwise dispose of or mortgage, hypothecate or otherwise encumber or per or suffer any encumbrance of all of any part of its interest unless approved in writing by members holding at least 67% of the percentage interest in the company. . . .

(7 App. 1569:6–13; 10 App. 2446–47, Section 12.2.) Otherwise, the sale or transfer is void. (7 App. 1596–97:18–1; 10 App. 2246–47, Section 12.2.) This provision ensures that no individual investor, including CR, could unilaterally divest.

The Conversion Left Yount with a Materially Weakened Investment in a Less Capitalized Entity

Not only was the sale void under the operating agreement, but the share Yount received was materially different from a Founder's Share.

For example, CR's share did not have voting rights. (10 App. 2448–49, Section 12.6.2.) It gave Yount the bare economic benefits, if any, from the share, but excluded him from oversight, control, or management of Cal Neva Lodge, LLC. (10 App. 2448–49, 12.6.2, Section 12.6.4.) Yount did not have the rights and powers of the other founding members. (10 App. 2449, Section 12.6.3.)

Yount Discovers He Did Not Receive a Founder's Share

Criswell, Radovan, and Marrnier did not inform Yount or any other investor of the unauthorized "sale" of CR's share. (5 App. 1240:22–41:9.) Yount later learned that he never received a Founder's Share under the private placement memorandum (8 App. 1753:1–11), but Radovan and Criswell still did not tell Yount that his money—which was supposed to be directed to capital improvements under the private placement memorandum—had gone to enrich themselves and their company. (6 App. 1413:18–20; 8 App. 1766:2–19.)

Criswell and Radovan Create False Documents to "Paper" the Transaction

Even though the transaction's documentation was already complete, to cover their tracks, Criswell and Radovan tried to get Yount to

sign falsified documents. (6 App. 1424:8–18.) In February 2016, they sent Yount an additional set of documents back-dated to October 2015 to make it appear as though all along Yount had agreed to buy CR's share. (8 App. 1760:7–14.) Criswell and Radovan told Yount that *he* had executed the wrong documents. (6 App. 1424:8–18.)

Yount rejected the misleading documents and demanded his money back. (8 App. 1761:4–17.) Criswell and Radovan refused. (8 App. 1764:2–15.)

C. Criswell and Radovan Sink the Project

Over Objections from Investors, Criswell and Radovan Pursue a Risky Loan

While Yount was trying to exit the project, as Yount noted, "the financial wheels" "were coming off." (7 App. 1738:10–11.) During a member meeting, Radovan proposed refinancing with a loan from Mosaic Real Estate Investors. (7 App. 1612:18–24.) Some of the members, including Cal Neva Lodge's largest investment group, the Incline Men's Club ("IMC"), voiced their concerns about debt financing in general and the proposed Mosaic loan in particular. (7 App. 1617:18–21.)

Despite the concerns, Radovan scheduled a meeting with Mosaic. (7 App. 1618:21–22.)

Mosaic Withdraws a Preliminary Loan Offer because of Concerns with Mismanagement

Even though Radovan scheduled a Mosaic meeting, Criswell and Radovan failed to provide Mosaic with information necessary for Mosaic's due diligence. (8 App. 1937:22–1938:7.) Mosaic requested a separate pre-meeting with three members of the Cal Neva Lodge's executive committee, Paul Jameson, Brandon Chaney, and Les Busick. (8 App. 1996:1–4, 20 App. 4937; 8 App. 1996:13–15.) Phil Busick, Les Busick's father and the largest Cal Neva investor, also attended. (*Id.*) Mosaic excluded Criswell and Radovan, the other two members of the executive committee. (10 App. 2477, 8.4; 8 App. 1995:7–24; 8 App. 1996:1–4.)

Yount heard only rumors of the meeting but questioned its legitimacy without Criswell or Radovan's attendance. (8 App. 1755:11–14.) As Yount was not a member with any kind of governance or management control, however, Jameson told Yount that it was none of his business. (20 App. 4937.)

Further, Yount was highly motivated to support the refinancing effort. (8 App. 1922:13–17.) Criswell promised Yount that he would refund his $1 million as soon as the refinancing was completed. (7 App. 1736:6–22.)

After the pre-meeting, Mosaic told the five members of the executive committee that "there seems to be a little bit of a mess right now" but that once the ownership "figure[d] things out" the executive committee could reintroduce the deal to Mosaic. (20 App. 4939.) Mosaic withdrew its preliminary loan offer to the Cal Neva Lodge. (*Id.*)

Criswell and Radovan were unable to secure financing. The Cal Neva Lodge ultimately filed for bankruptcy.

D. Procedural History

Yount Sues for Damages

Having never received the Founder's Share he bargained for, Yount sued Criswell, Radovan, Marriner, and Cal Neva Lodge, LLC for breach of the private placement memorandum, breach of fiduciary duty, fraud, negligence, conversion, and securities fraud. (1 App. 171–75¶¶ 28-50.) Yount sought compensatory and punitive damages, not equitable relief.

Criswell and Radovan answered and asserted an affirmative defense of unclean hands, a defense to equitable claims. (1 App. 72, pg.8.) In this defense, defendants alleged that Yount and IMC intended to "tank" the Mosaic loan. (*Id.*) They further contended that Yount was in

communication with IMC members, who had expressed their displeasure with the Mosaic loan. (9 App. 2209:3–4.) Criswell and Radovan also alleged that Yount knew the pre-meeting with Mosaic was going to take place but did not warn Criswell or Radovan. (9 App. 2208:15–23.)

Marriner asserted the affirmative defense of independent investigation, in which he alleged that he could not be liable because Yount conducted his own independent investigation before investing. (1 App. 210–11, pgs. 9–10.)

Criswell, Radovan, and Marriner did not assert any counterclaims against Yount or pray for damages.

Defendants Expressly Disclaimed Any Counterclaims or Recovery

Throughout trial defendants conceded they had not brought any counterclaims.

> Q. [Mr. Campbell:] Did you file a compulsory counterclaim against Mr. Yount from his lawsuit?
>
> A. [Radovan:] No.

(7 App. 1668:18–20.)

Criswell and Radovan's counsel, Mr. Little, clarified that defendants were not pursuing any counterclaims but were instead pleading the affirmative defense of unclean hands.

> Q. [Mr. Little:] Sir, counsel asked you if you had filed a compulsory counterclaim against Mr. Yount in this litigation. You have through me in the pleading filed an affirmative defense for unclean hands, have you not?
>
> A. [Radovan:] Yes.

(7 App. 1671:17–21.)

In closing, defense counsel further clarified that there was no counterclaim.

> MR. LITTLE: * * * And, your Honor, importantly we pled—we haven't sued him for a counterclaim, but we have pled affirmative defenses and whether you call it—
>
> THE COURT: Unclean hands.
>
> MR. LITTLE: Unclean hands, estoppel, waiver, contributory fault, it's all the same failure to mitigate damages, all roads lead to the same path. He put himself in the position he is now. . . .

(9 App. 2210:16–19.)

Judge Flanagan Treats the Affirmative Defense as a Counterclaim

After a seven-day bench trial, Judge Flanagan issued an oral decision against Yount on all claims. (10 App. 2295:13.) To everyone's surprise, the court then awarded *defendants* damages on their affirmative defense of unclean hands. (10 App. 2296:22–24.)

In its oral pronouncement, the district court explained that "defendants' counterclaim is unclean hands." (10 App. 2295:13.) The district court stated that "it was the intent of the IMC to kill this loan." (10 App. 2296:12–15.) The district court further explained that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, LLC the project would have succeeded." (10 App. 2295:20–22.) The district court then granted defendants' unpleaded "counterclaim" and awarded Criswell and Radovan $1.5 million dollars each. (10 App. 2296:20–21, 2297:1.)

Still without a Counterclaim, Defendants are Awarded More Damages

A week after the oral ruling, the district court issued an amended order awarding another $1.5 million to Marriner and awarding CR and Criswell Radovan their lost development and management fees. (10 App. 2300.) Yount appealed.

Judge Flanagan Dies

Shortly after the trial and before the preparation of written findings of fact and conclusions or law or a final judgment on damages, Judge Flanagan died. (12 App. 2754.) Although Judge Flanagan made obvious errors is his oral pronouncement, because of his death he did

not have the normal opportunity to examine his oral pronouncement and catch his mistakes when he entered a written order.

Judge Polaha Enters Findings that Simply Mirror Judge Flanagan's Oral Ruling, Shortcomings and All

Before the district court entered any written findings of fact and conclusions of law, Yount repeatedly objected to defendants receiving damages without a counterclaim. (10 App. 2385; 11 App. 2709; 10 App. 2321:4–18.)

Judge Jerome Polaha presided over this case pending the appointment of Judge Flanagan's successor. Judge Polaha rejected defendant's contention that he could rule they had a counterclaim:

> MR. LITTLE [defense counsel]: * * * Another alternative for this court would be to look at the objections that have been lodged by Mr. Campbell, review those and make decisions based on the findings based on that. . . .
>
> MR. POLSENBERG [Yount's counsel]: Let me say two things about that second course. First I think that it would be reversible error on its face and second our objections are a lot more than that expressed by Rick.
>
> THE COURT: I agree with you as far as reversible error.

(10 App. 2321:4–18.)

Instead, Judge Polaha entered findings of fact and conclusions of

law that simply mirrored Judge Flanagan's oral pronouncement, without addressing that defendants lacked a counterclaim.

Consistent with Judge Flanagan's oral pronouncement, Judge Polaha entered judgment for Criswell, Radovan, and Marriner for $1.5 million each. (12 App. 2756.)

Defendants Opportunistically Contend They Tried a Counterclaim

After Judge Polaha entered judgment, Yount moved to amend the findings and for a new trial. Defendants opposed Yount's motion and argued they had a counterclaim all along. (13 App. 3186.)

Yount Would Have Presented Evidence of the Mosaic Executives If There Had Been a Counterclaim

If defendants had a counterclaim, Yount would have called the Mosaic executives to testify that Mosaic withdrew the loan offer not because of any action by Yount but because Criswell and Radovan failed to provide the information required for Mosaic's due diligence. (21 App. 4975).

Sterling Johnson, Mosaic's vice president of investments, would have testified that Radovan did not send promised documents and information. (21 App. 4975).

Howard Karawan, an advisor for Mosaic, would have clarified that Mosaic called the meeting with the three executive-committee members. (21 App. 4975). And Ethan Penner, Mosaic's managing partner, would have explained that he led the meeting and expressed frustration with Radovan and the lack of communication. (21 App. 4975).

Judge Walker Questions the Efficiency of One District Judge Correcting the Error of Another

Judge Egan Walker, who was appointed to undertake Judge Flanagan's department, presided over post-judgment motions. He openly questioned whether a district judge should correct the improper rulings of the prior judge in this complex case. He pondered the efficacy of asking a successor judge "to act as a intermediate court of appeals." (20 App. 4832:6–7.) Judge Walker determined that the less he did the better.

> I began where I'm going to say again, I think we should end, which is the less I do right now, the better. If and until the Supreme Court acts, I believe all I'm going to do is build in layer upon layer upon layer . . . .

(20 App.4859:5–8.)

Judge Walker Agrees that the Damages are Speculative but Disclaims Jurisdiction to Correct the Judgment

Judge Walker expressed discomfort in Judge Flanagan's damages findings:

> But I can't say, from my own independent review, how Judge Flanagan got to 1.5, 1.5, 1.5. And the record doesn't reveal it. And I know the Supreme Court is going to say the same thing . . . So I can't say that I have any confidence—and please, Judge Flanagan forgive me. But I just can't say I have any confidence about how he got where he got. And that is troublesome to me.

(20 App. 4848:21–24; 4849:18–24.) Judge Walker noted that no evidence supported the $1.5 million award:

> . . . I think they [the Supreme Court] will share my view of the record in this case as to calling into question, for example, how the $1.5 million damage amounts were calculated…

(20 App. 4866:4–6.) Judge Walker wanted to "set a damages hearing" where "I would allow proof related to claims by the defendants made against Mr. Yount and allow Mr. Yount to answer those claims." (20 App. 4849:1–7.)

Judge Walker did not alter the damages award, though, because this Court had already ruled that it had appellate jurisdiction over this case (Order on Motion to Determine Appellate Jurisdiction) and he con-

cluded that he did not have jurisdiction. (20 App. 4864:20–24, 4865:1–10.)

Yount Requests Post-Judgment Discovery

Yount moved under Rule 27 for post-judgment discovery to preserve the Mosaic executive testimony while the case was pending appeal. (21 App. 4944). Yount wanted to preserve the evidence of the Mosaic executives to show this Court that defendants' theory cannot stand and that Judge Flanagan committed glaring errors. (Post Judgment Motion page 9).

Judge Flanagan believed the "solid evidence" of the alleged interference was an email from the Mosaic Vice President Sterling Johnson, in which he withdrew the preliminary loan offer. (9 App. 2196:1–4.) Yount sought to depose Sterling Johnson, and two other Mosaic executives, Ethan Penner, and Howard Karawan to clarify the reason why Mosiac withdrew its preliminary offer. (Post Judgment Motion pg. 8). Yount did not have an opportunity to present this evidence, which would have been lethal to a counterclaim, if defendants had brought one.

Judge Walker Orally Denies Yount's Rule 27 Motion

The district court declined to entertain the Rule 27 motion, concluding that it did not have jurisdiction. (20 App. 4865:16–20.) Yount's counsel argued that the district court had jurisdiction to hear the Rule 27 motion because Rule 27 expressly states that the district court can order discovery while the case is on appeal. (20 App. 4865:12–15.) The district court "declined to exercise that jurisdiction" but has not yet issued a written order. (20 App. 4865:16–20).

SUMMARY OF THE ARGUMENT

The district court erred in awarding damages to defendants who had never pleaded a counterclaim, only affirmative defenses of unclean hands and independent investigation. These affirmative defenses are not a basis to award damages.

Defendants never asked for—and the district court could not have granted—leave to amend their answer to assert a counterclaim. Rule 16(b) governs amendments of pleadings after a scheduling-order deadline has expired and requires the party seeking amendment to demonstrate "good cause" for missing the deadline. Defendants have no excuse for why they couldn't comply with this order.

Further, there is no support for defendants' claim that an unpleaded counterclaim of intentional interference with contractual relations was tried by implied consent under Rule 15(b). Throughout trial, defendants conceded they had no counterclaim. And the evidence defendants contend gave Yount notice of an implied counterclaim is identical to the evidence defendants used to prove their affirmative defense of unclean hands. This complete overlap with the evidence used to prove the pleaded defense of unclean hands defeats the due process requirement of advanced notice.

The trial court also erred in finding tortious conduct and awarding unsupported and speculative damages. Defendants' intentional interference with contractual relations claim fails on several elements, and the defendants who were awarded damages do not even have standing to bring it.

The evidence at trial could have only justified one conclusion as a matter of law. Yount was entitled judgment in his favor.

ARGUMENT

I.

THE PROBLEM: JUDGE FLANAGAN DIED BEFORE HE COULD RECOGNIZE HIS ERROR; HIS SUCCESSORS RECOGNIZED THE ERROR BUT DID NOT FIX IT

Part of the job of judging is "never failing, *each* time, to take at least one fresh look": to "see it fresh," "see it as it works," "see it clean," and "come back to make sure." KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 293, 510 (1960), *quoted in* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 600 (2001).

It is important for judges to think through their decisions rather than going with their gut. That is because judges approach their decisions with the same human frailties and assumptions as the rest of us:

> Judging begins . . . with a conclusion more or less vaguely formed; a [person] ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.

JEROME FRANK, LAW AND THE MODERN MIND 108 (Transaction Publishers 2009) (1930). Working through a written order, the judge is con-

fronted with these assumptions and has to examine them more carefully: a judge "who does not write his own opinions may not understand them very well." RICHARD A. POSNER, REFLECTIONS ON JUDGING 46 (2013).

Here, Judge Flanagan made an oral pronouncement from the bench that made incorrect assumptions he did not catch. In awarding the defendants damages in the absence of a counterclaim, he made an assumption, either that defendants had a counterclaim or that he could award damages on an affirmative defense. And because he died he never went back and corrected it. He never considered findings of fact and conclusions of law. Had he examined the proposed findings and Yount's objections to them, Judge Flanagan would have seen his errors.

The underlying error in this case—an award of damages to defendants who had no counterclaim—is obvious. But Judge Polaha and Judge Walker never corrected it, despite noting the numerous glaring errors in Judge Flanagan's oral pronouncement.

A. A District Court Cannot Simply Continue on an Erroneous Course

The district court is empowered to correct erroneous rulings at any time prior to the entry of final judgment. *Ins. Co. of the W.*, 122

Nev. at 466 n.4, 134 P.3d at 705 n.4 (Maupin, J., concurring). The district court remains free, prior to the entry of a final judgment, to reconsider and issue a written judgment different from its oral pronouncement. *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *cf. Smith's Food King No. 1 v. Hornwood*, 108 Nev. 666, 668–69, 836 P.2d 1241, 1242 (1992) (holding that where a judge has not made sufficient findings of fact and conclusions of law, a successor judge must rehear disputed evidence before rendering a decision).

B. Successor Judges Declined to Correct the Mistakes

Rather than correct a glaring error, the district court declined to fix the mistakes and necessitated an appeal. Judge Polaha and Judge Walker acknowledged errors in Judge Flanagan's oral proclamation but failed to correct them. Instead, the district court left an admittedly erroneous decision for correction in the appellate courts.

Despite Judge Polaha's extensive review of the transcripts and pleadings, he mirrors Judge Flanagan's oral ruling. Judge Polaha noted there was no counterclaim.

> THE COURT: * * * I read . . . the transcript of his oral pronouncement. I read the proposed findings of fact and conclusions. And then I started reading the

> pleadings, the Second Amended Complaint and the Answers to see what was listed in the Answers as far as affirmative defenses because there was no counterclaim.

(10 App. 2318:15–21.) He reviewed the transcript in its entirety (12 App. 2754:1–2.), and yet he entered a judgment that failed to address that defendants lacked a counterclaim.

Judge Walker recognized the unsubstantiated damage award but also declined to correct it. While Judge Walker concluded he did not have jurisdiction to rule on the post-judgment motions, he did have jurisdiction to grant Yount's post-judgment discovery motion.

The district court's had a responsibility to correct its own mistakes when it recognizes them. Rather than correct the erroneous decision, it left the mistakes for correction in the appellate courts.

II.

THE DISTRICT COURT ERRED IN AWARDING DAMAGES TO DEFENDANTS WITHOUT A COUNTERCLAIM[1]

The district court erred in awarding damages to Criswell, Radovan, and Marriner, three defendants who had no counterclaim. If they believed they were entitled to damages, they could have done one of three things: (1) plead a counterclaim within the timeframes set forth in Rule 15(a); (2) move for leave to bring a counterclaim, either within the deadlines set by the scheduling order for amendment or afterward, with a showing of good cause under Rule 16(b); or (3) obtain the plaintiffs' consent to try the counterclaim. Defendants never did any of these things. Whether the judge mistakenly thought that defendants had pleaded a counterclaim, or that damages can be awarded on a mere affirmative defense, awarding millions in damages in the absence of a counterclaim offends the basic principles of due process. The judgment

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[1] **Standard of review:** Although a district court has discretion to deny requests to amend the complaint or answer, *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993), whether a court can *sua sponte* award damages in the absence of a counterclaim is a legal question about the rules for pleading, which draws *de novo* review. *See Webb ex rel. Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009) (subjecting to plenary review a district court's determination about which defenses must be affirmatively pleaded).

must be reversed.

A. To Get Damages, a Defendant Must Have a Counterclaim, Not Just an Affirmative Defense

1. Affirmative Defenses Are Not Claims

Affirmative defenses and counterclaims are different things. An affirmative defense is a means to avoid liability. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997); *Douglas Disposal, Inc. v. Wee Haul LLC*, 123 Nev. 552, 557–58, 170 P.3d 508, 513 (2007) ("An affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true."); BLACK'S LAW DICTIONARY 60 (6th ed. 1990) (a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim"); *see* NRCP 8(c). An affirmative defense may entitle a defendant to dismissal or diminishment of the claims against her, but not damages. *Cf. N. Chester Cnty. Sportsmen's Club v. Muller*, 174 A.3d 701, 707 n.3 (Pa. Commw. Ct. 2017) (unclean hands is a basis only to *deny* equitable relief and cannot support a grant of affirmative equitable relief); *Sheardy v. Baker*, 35 N.W.2d 283, 284 (Mich. 1948) (noting in dicta that in the absence of a cross claim, a defendant is entitled only to a dismissal of the complaint).

2. It Takes a Counterclaim to Be a Claim

By contrast, a "counterclaim" is an actual cause of action that seeks affirmative relief, not just avoidance. *Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994) ("a counterclaim is a 'claim,'" which "essentially means 'an action asserting a right to payment.'" *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264 (11th Cir. 1999); *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 733 (Fla. 1991). In the absence of counterclaim, a court cannot award affirmative relief to a defendant. *Westfield Sav. Bank v. Leahey*, 197 N.E. 160, 162 (Mass. 1935).

3. A Defendant Must Have a Counterclaim to Claim Damages

Only a counterclaim can support an award of damages. *See Keystone Commercial Props., Inc. v. City of Pittsburgh,* 347 A.2d 707, 709 (Pa. 1975) (reversing a district court's award of affirmative relief based on the plaintiff's unclean hands); *McElhaney v. Singleton*, 117 So. 2d 375, 378 (Ala. 1960); *Westfield Sav. Bank*, 197 N.E. at 162 (holding that order requiring plaintiff to pay defendant damages was erroneous where defendants did not have a counterclaim); *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1161, 1168 (D. Nev. 2005) (finding

"no case under Nevada law" where a plaintiff has raised the affirmative defense of unconscionability as a cause of action).

In *Luria Brothers & Co. v. Alliance Assurance Co.*, for example, the Second Circuit reversed a district court for awarding restitution damages to defendants who had pleaded only the affirmative defense of settlement. 780 F.2d 1082, 1090 (2d Cir. 1986). There, the trial judge had *sua sponte* held that although the purported settlement of an indemnity claim was unenforceable, "equity require[d]" that the plaintiff return the payment received under that agreement to the defendants-underwriters. *Id.* at 1088. While the defendants argued that the trial judge was merely treating their affirmative defense as a counterclaim, the Second Circuit noted that the two are categorically different. *Id.* At trial the agreement had been introduced to determine "whether the [defendant] underwriters had to indemnify" the plaintiff, not whether payments to the plaintiff should be rescinded. *Id.* at 1089. Plaintiff "should have been entitled, through normal pretrial discovery, to explore . . . possible defenses to restitution. The absence of any opportunity to do so constitutes sufficient prejudice to warrant reversal . . . ." *Id.* at 1090 (citing *Int'l Harvester Credit Corp. v. E. Coast Truck*, 547 F.2d

888, 890–91 (5th Cir. 1977) and *Rosenwald v. Vornado, Inc.*, 70 F.R.D. 376, 377 (E.D. Pa. 1976)).

4. Unclean Hands and Independent Investigation Are Affirmative Defenses, Not Counterclaims

"The doctrine of unclean hands is a basis only for the denial of equitable relief and cannot support a grant of affirmative relief against the party who acted with unclean hands." *N. Chester Cnty. Sportsmen's Club*, 174 A.3d at 707 n.3.[2] Unlike the elements of a claim for intentional interference with contractual relations, the equitable defense of unclean hands applies to any "misconduct" that is unjust or in bad faith, regardless of damages. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008). Indeed, the misconduct that justifies Criswell and Radovan's defense of unclean hands need not be of such a nature as to justify legal proceedings. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*,

[2] *Accord Talton v. BAC Home Loans Servicing LP*, 839 F. Supp. 2d 896, 911 (E.D. Mich. 2012) ("the clean hands doctrine is an equitable defense, not a cause of action"); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 842 (N.D. Cal. 2005) ("unclean hands is an equitable defense, not a cause of action"); *see also Keystone Commercial Props., Inc.*, 347 A.2d at 707 (granting plaintiff relief because the defendant's unclean hands "is an inappropriate application of the unclean hands doctrine")

324 U.S. 806, 815 (1945).

Likewise, Marriner's allegation of independent investigation is a kind of affirmative defense against fraud or nondisclosure torts, not a claim for relief. *See Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987); *Epperson v. Roloff*, 102 Nev. 206, 211, 719 P.2d 799, 803 (1986).

B. Criswell, Radovan, and Marriner Had No Counterclaim for Damages, Just an Affirmative Defense

Defendants had no counterclaim for damages. Defendants Criswell and Radovan pleaded the affirmative defense of unclean hands. (1 App. 72; 3 App. 712; 5 App. 1131; 9 App. 2210:16–19.) Defendant Marriner pleaded the affirmative defense of independent investigation. (1 App. 210; 2 App. 377.) Indeed, before trial no defendant even asked for damages, just that unclean hands offset plaintiff Yount's own damages. In Criswell Radovan's proposed findings of fact submitted before trial, defendants requested that Yount's damages should be "offset by the significantly greater damages his conduct has caused Defendants." (5 App. 1141.)

And at trial, the parties—on both sides—repeatedly informed the

district court that defendants had no claims. (9 App. 2210:16–19.; 9 App. 2172:9–17.) Defendants twice testified that they only brought an affirmative defense, not a counterclaim. (7 App. 1668:18–20.; 7 App. 1671:17–21.) And in closing argument, both sides made clear that defendants had no counterclaim. (9 App. 2210:16–19.; 9 App. 2172:9–13.)

The district court had no basis to treat the affirmative defense of unclean hands as a counterclaim and to award damages to defendants.

C. Defendants Never Asked for—and the Court Could Not Have Granted—Leave to Amend under Rule 15(a) and 16(b)

Defendant's never moved to amend the pleadings to include a counterclaim. It was only after defendants received a windfall award that they advanced their disingenuous and opportunistic position.

1. As a Matter of Due Process, a Defendant Must Make A Motion to Amend the Pleading to Assert a Counterclaim

A party must file a motion to amend before the court will grant leave to amend. *Vestring v. Halla*, 920 F. Supp. 2d 1189, 1193 (D. Kan. 2013). This requirement is to ensure due process. *See Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014) (stating that the pleading requirements in the rules of civil procedure are to give parties

that advanced notice of the nature of the claim and the relief requested); *Kilbarr Corp. v. Bus. Sys., Inc., B.V.*, 679 F. Supp. 422, 428 (D.N.J. 1988), *aff'd*, 869 F.2d 589 (3d Cir. 1989) (Rule 15 does not relieve a party from his obligation to assert claims and defenses at some reasonable point in time); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465–66 (2000) (the rules of civil procedure are designed to further due process); *E.E.O.C. v. Orion Energy Sys. Inc.*, 145 F. Supp. 3d 841, 844 (E.D. Wis. 2015) (party seeking to amend pleadings must comply with Rules of Civil Procedure).

Compliance with the restrictions on amending pleadings—especially when the amendment changes the fundamental relationship of the parties—is essential for due process. *See Sprouse v. Wentz*, 105 Nev. 597, 603, 781 P.2d 1136, 1139 (1989). The court cannot amend—or find implied consent to amend—when doing so deprives a party of "a fair opportunity to defend" or where the party might "offer any additional evidence if the case were to be retried on a different theory." *Int'l Harvester Credit Corp.*, 547 F.2d at 890.

2. Defendants Never Sought Leave to Amend their Answer to Assert a Counterclaim

Here, defendants are simply opportunistic. They never moved to

amend their answer to assert a counterclaim. Rather, after receiving a windfall award of 4.5 million dollars, defendants suddenly claimed they had a counterclaim all along.

3. Defendants Did Not Have Good Cause under Rule 16(b) to Amend

When a party seeks leave to amend a pleading after the expiration of the deadline for doing so, they must must satisfy *both* Rule 16's "good cause" standard for modifying the scheduling order *and* the standard for amendment under Rule 15(a). *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 131 Nev., Adv. Op. 34 (Ct. App. 2015).[3] Thus, even when an amendment might satisfy Rule 15(a)'s more liberal standard, the fact that the amendment "came too late" is enough to deny it. *See Janicki Logging Co. v. Mateer*, 42 F.3d 561, 566 (9th Cir. 1994); *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Ass'n*, 771 F.3d 1230, 1240–41 (10th Cir. 2014); *Pasternack v. Shrader*, 863 F.3d 162, 174 & n.10 (2d Cir. 2017) (citing 3-16 MOORE'S FEDERAL PRACTICE § 16.13 (2016)).

In determining whether "good cause" exists under Rule 16(b) the

[3] *Accord Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003); *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437-38 (8th Cir. 1999); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992).

basic inquiry is the diligence of the party seeking the amendment. *Id.* Disregard of the scheduling order disrupts the agreed-upon course of the litigation and rewards the indolent and the cavalier. *Id.* at 971. So if the party seeking amendment "was not diligent, the inquiry should end." *Johnson*, 975 F.2d at 609. Good faith—such as engaging new counsel—is not good cause. *Hicks-Fields v. Harris County*, 860 F.3d 803, 812 (5th Cir. 2017).

Here, defendants fail to show good cause in deviating from the scheduling order. They had a full month after the close of discovery to move to amend the pleadings. (1 App. 199.) They presented no evidence of diligence. They simply acted dilatorily in failing to seek to file the amendment months earlier. Without that showing of diligence, they were not entitled to amend.

D. Yount Did Not Consent to the Trial of a Counterclaim under Rule 15(b)[4]

Having failed to properly amend, defendants advance a disingen-

[4] **Standard of Review:** Whether a claim is tried by express or implied consent is a mixed question of fact and law. *Klabacka v. Nelson*, 133 Nev., Adv. Op. 24, 394 P.3d 940, 952–53 (2017). This Court reviews *de novo* whether actions taken during the litigation and at trial rise to the "high threshold" of demonstrating implied consent to an unpleaded claim. *Id.*

uous and opportunistic position that Yount impliedly consented to a counterclaim. While a pleading may be amended as a case proceeds, this principle cannot mean that a defendant may leave a plaintiff "to forage in forests of facts, searching at their peril for every legal theory that a court may some day find lurking in the penumbra of the record." *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995).

Throughout trial, defendants conceded they had no counterclaim. And the evidence relevant to any counterclaim was identical to the pleaded defense of unclean hands. To impliedly amend a claim in such a circumstance would circumvent due process.

1. The "High Threshold" of Implied Consent

Where an issue is not raised in the pleadings, a party must demonstrate the issue was tried by express or implied consent. NRCP 15(b); *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985). "Implied consent is a high threshold." *Klabacka*, 133 Nev., Adv. Op. 24, 394 P.3d at 952. This high bar is "meant to insure procedural due process and a fair trial to parties." *Sprouse*, 105 Nev. at 603, 781 P.2d at 1139.

The consenting party must have adequate notice that an issue not

raised in the pleadings is actually being tried. *Sprouse v. Wentz*, 105 Nev. 597, 603, 781 P.2d 1136, 1139 (1989). The party seeking the unpleaded claim must show that the evidence at trial is being used to support a new claim. *Int'l Harvester Credit Corp.*, 547 F.2d at 890. And consent cannot be implied when evidence is admitted over objection. *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979).

Certain acts will defeat notice. For example, evidence relevant to an unpleaded claim is not notice of that claim if the evidence is also relevant to pleaded claims or defenses. *Addie v. Kjaer*, 737 F.3d 854, 867 (3d Cir. 2013); *Viox v. Weinberg*, 861 N.E.2d 909, 917 (Ohio Ct. App. 2006); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994); *Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987); *In re Cumberland Farms, Inc.*, 284 F.3d 216, 225–26 (1st Cir. 2002) ("[I]mplied consent will be found only when the opposing party did not object to the introduction of evidence or introduced evidence himself that was relevant *only* to the affirmative defense." (emphasis in original, brackets and quotation marks omitted)). In addition, a party that disavows its intent to seek the unpleaded relief forfeits the right to later say that the unpleaded claim was tried by consent. *Int'l Harvester*

Credit Corp., 547 F.2d at 890.

In *Klabacka v. Nelson*, for example, this Court reversed a judgment based on implied consent of an unjust-enrichment claim where the defendant had moved to dismiss that claim, demonstrating an objection to the admission of evidence on the issue. 133 Nev., Adv. Op. 24, 394 P.3d at 952–53. Similarly, in *Ivory Ranch v. Quinn River Ranch*, this Court rejected the argument that the trial court could find an affirmative defense of mutual mistake when the issue was not raised in the pleadings or the trial statements, and the district court did not notify the parties that it was considering the issue. 101 Nev. 471, 473, 705 P.2d 673, 675 (1985); *see also Sprouse*, 105 Nev. at 603, 781 P.2d at 1139 (holding if the district court did base its decision on a wrongful-repossession cause of action, the court never notified the parties).

By contrast, in *Poe v. La Metropolitana Compania Nacional De Seguros, S.A.*, the defendant had raised the issues in his opening argument, counsel for plaintiff had specifically referred to the matter as an issue in the case, it had been explored in discovery, and there was no objection to the admission of evidence relevant to the issue at trial. 76 Nev. 306, 309, 353 P.2d 454, 456 (1960); *Schwartz v. Schwartz*, 95 Nev.

202, 205, 591 P.2d 1137, 1140 (1979).

2. Defendants Expressly Denied Having a Counterclaim

It is essential that a litigant understand what is at stake. And here, when Mr. Yount questioned the purpose behind some of the evidence at trial, he was told by defendants that they only pleaded an affirmative defense. Indeed, Yount's counsel directly asked whether Criswell and Radovan brought a counterclaim and was told they had not.

> Q. [Mr. Campbell:] Did you file a compulsory counterclaim against Mr. Yount from his lawsuit?
>
> A. [Radovan:] No.

(7 App. 1668:18–20.) Criswell and Radovan's counsel clarified that defendants were not pursuing any counterclaims but were instead pleading the affirmative defense of unclean hands.

> Q. [Mr. Little]: Sir, counsel asked you if you had filed a compulsory counterclaim against Mr. Yount in this litigation. You have through me in the pleading filed an affirmative defense for unclean hands, have you not?
>
> A. [Radovan]: Yes.

(7 App. 1671:17–21.)

In closing argument, Criswell and Radovan again conceded they had not brought any counterclaims.

> MR. LITTLE: * * * And, your Honor, importantly we pled—***we haven't sued him for a counterclaim*** . . . .

(9 App. 2210:16–19.) Turning the argument around to Yount, who argued for but had not pleaded alter ego, defendants made clear that

> [y]ou can't spring that at somebody at trial. . . . And more importantly, it hasn't been pled. It's trial by ambush. You can't do that.

(9 App. 2204:8–14.) They are right. Defendants did not plead or try a counterclaim; to hold otherwise would be trial by ambush.

3. Yount Did Not Acquiesce to a Trial of a Counterclaim

Yount never consented to a trial of a claim of intentional interference with contractual relations. Indeed, Yount's counsel emphasized that there was no counterclaim:

> I think the Mosaic loan issue is a red herring. That happened way after the fact. **There was no counterclaim against Mr. Yount** for somehow derailing that loan and there's no evidence that he was involved in any discussions with Mosaic.

(9 App. 2172:9–13.)

4. The Evidence at Trial was Relevant to the Pleaded Defense of Unclean Hands

Yount did not have notice of a counterclaim because the evidence used to prove defendants counterclaim and the evidence to prove the pleaded defense of unclean hands is identical.

Defendants contended that Yount had unclean hands because he allegedly "conspired" with other investors to interfere with a potential loan from Mosaic Real Estate Investors to the Cal Neva. (5 App. 1141.) The evidence to prove that affirmative defense included a string of emails between Yount and other investors regarding their concerns with the loan and evidence of a meeting in which Mosaic withdrew its preliminary offer. (9 App. 2176:3–21.)

Defendants base their unpleaded counterclaim for intentional interference with contractual relations on the same string of emails and the Mosaic meeting. (13 App. 3226; 13 App. 3195–97.) Marriner's counsel reassured Yount that evidence of the Mosaic loan was being introduced only to rebut Yount's prima facie case of fraud: "It's Mr. Yount's own inaction in this case . . . that contributed to his own damage . . . ." (9 App. 2230:5–18.)

5. No District Court Judge Made Findings Under Rule 15(b)

None of the three district court judges in this case made findings under Rule 15(b). Judge Flanagan did not mention Rule 15(b) in his oral pronouncement. And Judge Polaha declined to enter defendants proposed findings of fact and conclusions of law that contained findings under 15(b).

> MR. LITTLE [defense counsel]: * * * Another alternative for this court would be to look at the objections that have been lodged by Mr. Campbell [Yount's counsel], review those and make decisions based on the findings based on that…
>
> MR. POLSENBERG [Yount's counsel]: Let me say two things about that second course. First I think that it would be reversible error on its face and second our objections are a lot more than that expressed by Rick.
>
> THE COURT: I agree with you as far as reversible error.

(10 App. 2321:4–18).

In entering written findings, Judge Polaha did not conclude that the pleadings had been—or should be—amended. Judge Walker also declined to rule, finding he did not have jurisdiction.

E. Allowing Recovery on an Unpleaded, Unconsented-to Counterclaim Violates Due Process

Yount did not have the opportunity to present vital evidence because he did not know defendants had a counter claim. Yount did not have notice of a counterclaim against him. As such he was denied "a meaningful opportunity to present [his] case." *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010).

1. Yount Did Not Preserve or Present the Mosaic Executives Because He Had No Notice of A Counterclaim

If Yount had known defendants would contend they had a counterclaim, he would have presented the Mosaic Real Estate Investors executives at trial who would testify that Yount did not interfere with the Mosaic loan. (21 App. 4944). Ethan Penner, the Managing Partner of Mosaic Real Estate Investors would have explained that Mosaic was frustrated with Radovan and the lack of communication. (21 App. 4975). He would have reiterated that Mosaic did not proceed with the loan in light of Mosaic's frustration with Radovan. (*Id.*)

Sterling Johnson, the VP of Investments at Mosaic Real Estate Investors, would have testified that Radovan failed to communicate with Mosaic and did not provide any of the necessary documents for

Mosaic's due diligence. (21 App. 4975). Howard Karawan, the advisor for Mosaic Real Estate Investors LLC, would have clarified that Mosaic, and not any of the investors, called for the meeting. (21 App. 4975).

Mosaic lacked confidence in Criswell and Radovan's management of the project, not because of any action by Yount. (*Id.*) This evidence alone would have defeated their counterclaim, if defendants had one. Which is why defendants did not call the Mosaic members themselves.

Notice of a counterclaim would have prompted different legal arguments, too. Yount would have argued against the standing of Criswell, Radovan, and Marriner to assert a contractual-interference claim on behalf of Cal Neva. And he would have pointed out the absence of an existing contract between Mosaic and Cal Neva, a prerequisite to a contractual-interference claim. In this case, there was no valid an existing contract. These arguments were unavailable to Yount facing just an affirmative defense of unclean hands.

But without a counterclaim, Mosaic was relatively tangential to the suit, so Yount made the reasonable decision not to preserve or present evidence on Mosaic's state of mind.

2. Yount Conducted Discovery Proportional to a Case Where he Faced no Counterclaim

The surprise award of $4.5 million dollars with no counterclaim is a perverse result—with even more perverse implications for the law. In this case, it punished Yount for focusing discovery and trial on the pleaded claims and defenses.

It makes sense why Yount did not preserve and present information surrounding the Mosaic loan offer. Yount expended resources in this litigation proportionately to the amount in controversy. The worst outcome he faced at trial was a defense judgment (i.e., a recovery of zero) on his claims. Trial preparation—and discovery, in general—are matters of proportionality. Parties rightfully expend resources based on the claims actually asserted. Rule 26 itself sets out this proportionality principle:

> Parties may obtain discovery . . . that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit.

NRCP 26(b)(1) (emphasis added). Rule 16.1, in turn, requires any party seeking damages to disclose "without awaiting a discovery request . . .

computations of any category of damages claimed," to enable a party defending against the claim to gauge proportionality. NRCP 16.1(a)(1)(C); s*ee Pizzaro-Ortega v. Cervantes-Lopez*, 133 Nev., Adv. Op. 37, 396 P.3d 783, 786-87 (2017).

Discovery is conducted relative to the claims and defenses of a case. *Bailey v. Nat'l Union Fire Ins. Co. of Pittsburgh,* No. 1:12-CV-4206-KOB, 2014 WL 12603133, at *3 (N.D. Ala. Apr. 17, 2014). Wasteful consumption of client money serves no purpose. *M. Perez Co. v. Base Camp Condominiums Assn. No. One*, 3 Cal. Rptr. 3d 563, 569 (Cal. Ct. App. 2003); *Rollins v. Hopkins*, No. 566 EDA 2015, 2016 WL 164540, at *3 (Pa. Super. Ct. Jan. 14, 2016). It is appropriate to balance the amount in controversy, the parties' resources, and the issues at stake when conducting discovery. *Bailey*, No. 1:12-CV-4206-KOB, 2014 WL 12603133, at *3.

3. After Learning of a Surprise Counterclaim, Yount Asked for Post-Trial Discovery

Following Judge Flanagan's surprise award of damages, Yount sought limited post-judgment discovery under Rule 27 to depose the Mosaic Executives. Judge Walker initially wanted to set a "damages hearing" and stated that the damages trial was going to require discov-

ery.

> THE COURT: * * * And that trial is going to involve discovery, because I'm likely to grant postjudgment discovery for the reasons Mr. Polsenberg has identified in his motion. Because candidly, as the finder of the fact I want to know what the Mosaic people are going to say about what Yount did or didn't say to them, because that to me is a part of the damages nexus. That's a reopening of the evidence.

(20 App. 4859:15–21.) Although Judge Walker was initially going to grant Yount's motion for post-judgment discovery, he concluded he did not have jurisdiction to do so.

4. It Was an Error To Deny the Motion

Rule 27 expressly provides that a district court may allow discovery while a case is pending appeal. Pursuant to Rule 27, while a case is pending appeal the district court "may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court."

Here, it was an error to deny Yount's motion for post-judgment discovery. Judge Walker concluded that post-judgment discovery was necessary. Despite Rule 27's express provision that the district court may order discovery while a case is pending on appeal, the district court

refused to do.

F. The Court Should Reject Defendants' Novel Procedural Arguments

The Court should summarily reject defendants other novel procedural contentions. The purpose of Rule 54(c) and Rule 8(c) is to allow a court to fill in relief, not new claims.

1. Rule 54(c) and 8(c) Are for Fixing Technical Pleading Mistakes, Not Transforming Proper Affirmative Defenses into Entirely Different Claims

The purpose of Rule 54(c) and 8(c) is to address technical errors. *Nashef v. AADCO Med., Inc.*, 947 F. Supp. 2d 413, 418 (D. Vt. 2013) (the purpose of Rule 8(c) is to correct technical pleading errors); *E.J. Brooks Co. v. Cambridge Sec. Seals*, 105 N.E.3d 301, 325 (N.Y. 2018) (noting the purpose of 54(c) is to allow the court to give relief without regard to the constraints of the antiquated and ridged forms of action).

These rules do not supersede the notice requirements of due process. *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 929 (N.D. Iowa 2003) (noting a party should recover on valid claim regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not

prejudice the other party in maintaining his defense in the merits), *aff'd*, 382 F.3d 816 (8th Cir. 2004); *Venters v. City of Delphi*, 123 F.3d 956, 968 (7th Cir. 1997) (noting a technical pleading error is not fatal so long as the record confirms that the plaintiff had adequate notice of the defense and was not deprived of the opportunity to respond).

2. Defendants Did Not Ask for 54(c) Relief, and it Does Not Apply Because Defendants Had No Prayer for Damages

Rule 54(c) is intended to apply where "the allegations properly pled and proven support a theory and type of relief not specified in [the] demand for judgment." *Pinkley, Inc. v. City of Frederick, MD.*, 191 F.3d 394, 400 (4th Cir. 1999). When a defendant pleads only affirmative defenses without seeking any affirmative relief, however, Rule 54(c) does not apply. *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1241–42 (5th Cir. 1984). In that situation, the defendant had not merely claimed an inappropriate *form* of relief; he has not sought relief at all. *Id.*; *see also Cooper v. Gen. Am. Life Ins. Co.*, 827 F.3d 729, 732 (8th Cir. 2016) (a party will not be given relief not specified where the failure to ask for particular relief prejudiced the opposing party).

A party whose delay in seeking a form of permissible relief causes

prejudice may forfeit that right. *Engel*, 732 F.2d at 1241–42; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975); *Int'l Harvester Credit Corp.*, 547 F.2d at 891 ("[o]ne of the exceptions exists where the failure to demand the relief granted prejudiced the opposing party"); *Gilbane Bldg. Co. v. Fed. Reserve Bank*, 80 F.3d 895, 901 (4th Cir. 1996) (a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice).

In addition, the discretion under Rule 54(c) presumes that the theory of relief has been tested adversarially: "squarely presented and litigated by the parties at some stage or other of the proceedings." *Idaho Res., Inc. v. Freeport-McMoran Gold Co.*, 110 Nev. 459, 462, 874 P.2d 742, 744 (1994) (quoting *Evans Prod. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 923 (3d Cir. 1984)); *Peterson v. Bell Helicopter Textron, Inc.* 806 F.3d 335 (5th. Cir. 2015). In *Idaho Resources, Inc. v. Freeport-McMoran Gold Co.*, this Court reversed a district court that invoked Rule 54(c) to apply an estoppel defense that had not been pleaded or tried by consent. 110 Nev. at 462, 874 P.2d at 744.

Here, Rule 54(c) is inapt. Defendants never requested affirmative relief in their pleadings, in any of the pre-trial findings, or even at trial.

Like the estoppel defense in *Idaho Resources*, the counterclaim for millions "was a surprise to all parties" and prejudiced Yount.

Indeed, not a single element of the tort of intentional interference with contractual relations is mentioned during the seven-day bench trial. Most glaringly, defendants conceded on three separate occasions that they had not brought a counterclaim. Accordingly, Yount could not have consented to defendant's theory of relief.

3. Defendants Did Not Ask for 8(c) Relief, and it Does Not Apply Because Unclean Hands is a Proper Affirmative Defense

Rule 8(c) allows the district court to redesignate a counterclaim that has been mislabeled as an affirmative defense, and vice versa. It does not apply when the Court can determine that the defense or counterclaim was not mistaken. *VP Properties & Developments, LLP v. Seneca Specialty Ins. Co.*, 645 F. App'x 912, 916 (11th Cir. 2016) (holding the affirmative defense was not a mistakenly designated counterclaim because it failed to set forth any legal theory of recovery but rather merely requested a stay); *Textron Financial Corp. v. Ship and Sail, Inc.*, 2011 WL 344134, *6 (D.R.I. 2011) (noting that because the defendants alleged that they suffered monetary damages as a result of duress in-

flicted by the plaintiff, and duress is not recognized as an independent cause of action under Rhode Island law, the court treated the counterclaim as a defense raised in the pleading); *Las Vegas Dev. Grp., LLC v. SRMOF II 2012-1 Tr., US Bank Tr. Nat'l Ass'n*, No. 2;13-cv-02194, 2018 WL 1073385, at *3 (D. Nev. Feb. 26, 2018) (noting that the affirmative defense could be converted to a counterclaim because the answer contained a prayer for affirmative relief).

In *Global Healing Center, LP v. Powell*, for example, the court rejected defendants' argument that their fraud counterclaim was actually an affirmative defense, noting that the answer's request for affirmative relief and damages are the "two traits which clearly qualify it as a counterclaim." No. 4:10-CV-4790, 2012 WL 1709144, at *6 (S.D. Tex. May 15, 2012).

Here, it is the reverse situation. Unclean hands is a recognized affirmative defense. It is neither a request for affirmative relief nor a prayer for damages, and it is not a cause of action. All signs point to its proper designation as an affirmative defense, not a mislabeling of what should have been a counterclaim. Far from correcting a technical mistake here, applying Rule 8(c) would deprive Yount of fair notice of his

exposure to millions in liability.

G. The Lack of Due Process at Least Requires a New Trial

The judgment against Yount on a nonexistent counterclaim violated due process and at the very least calls for a new trial on the counterclaim of which he had no notice.

A new trial may be granted if there was an "[i]rregularity in the proceedings of the court . . . or any order of the court . . . or abuse of discretion by which either party was prevented from having a fair trial." NRCP 59(a)(1). "Accident or surprise which ordinary prudence could not have guarded against" is also grounds for a new trial. NRCP 59(a)(3). That relief is also called for when"[e]xcessive damages appear[] to have been given under the influence of passion or prejudice" or when the trial proceeds on an "[e]rror in law" after objection. NRCP 59(a)(6), (7).

The award of damages on the affirmative defense was irregular, surprising, and erroneous. Indeed, even Judge Walker considered a new trial necessary but deferred to this Court's resolution of the appeal:

> THE COURT: * * * Because candidly, as the finder of the fact I want to know what the Mosaic people are going to say about what Yount did or didn't say to

> them, because that to me is a part of the damages nexus.

(20 App. 4849:11-20). Yount also did not have the opportunity to rebut the value of defendants' damages. Accordingly, Yount is entitled a new trial on the counterclaim.

III.

EVEN IF DEFENDANTS HAD A CLAIM, THEY DID NOT PROVE IT[5]

Although no district judge has stated what sort of counterclaim, if properly pleaded, might have supported an award of damages to defendants, defendants now contend that they have a claim for intentional interference with contractual relations. This is likely based on Judge Flanagan's comment that "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, LLC the project would have succeeded." (10 App. 2295:20–22.)

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[5] **Standard of review:** Substantial evidence must support every element of a claim for intentional interference with contractual relations. *M & R Inv. Co., Inc. v. Goldsberry*, 101 Nev. 620, 623, 707 P.2d 1143, 1145 (1985). If any one element is missing, the claim fails as a matter of law. *Id.*; *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev., Adv. Op. 49, 376 P.3d 151, 160 n.12 (2016). When written findings are inconclusive as to the sufficiency of the evidence, a remand is appropriate to develop a record suitable for meaningful appellate review. *See Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 823, 710 P.2d 1387, 1388 (1985).

A claim of intentional interference with contractual relations requires proof of (1) the existence of a valid contract, (2) the defendant's awareness of the contract, (3) intentional acts intended to disrupt the contractual relationship, (4) actual disruption of the contract and, (5) resulting damage. *Sutherland*, 105 Nev. at 196, 772 P.2d at 1290.

This claim fails on several elements, and the defendants who were awarded damages do not even have standing to bring it.

A. Criswell, Radovan, and Marriner Are the Wrong Parties to Bring an Intentional Interference Claim[6]

Criswell, Radovan, and Marriner are the incorrect parties to bring a claim for intentional interference with contractual relations. That tort protects parties to the contractual relationship from interference by a stranger. *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1007 (9th Cir. 2014). It does not create a cause of action for a third party who would not be able to sue on the contract itself. *Willard v. Claborn*, 419 S.W.2d 168, 170 (Tenn. 1967); *Williamson, Picket, Gross, Inc. v. 400 Park Ave. Co.*, 405 N.Y.S.2d 709, 711 (N.Y.

[6] **Standard of review:** "Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

App. Div. 1978), *aff'd*, 91 N.E.2d 296 (N.Y. 1979) ("This court knows of no precedent that would extend this tort theory to cover claims of a stranger to the contract interfered with."); RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("The person protected by the rule stated in this Section is the specified person with whom the third person had a contract that the actor caused him not to perform.").

Here, Mosaic's loan would have been with Cal Neva Lodge, LLC, not Criswell, Radovan, or Marriner. Any claim of tortious interference belongs to Cal Neva Lodge LLC, but the district court awarded no damages to that defendant. (Amended Order). The others lack standing.

B. There Was No Valid Existing Contract

In an action for intentional interference with contractual relations, a plaintiff must establish a valid and existing contract. *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003), *quoted in Sunridge Builders, Inc. v. Old Blue, LLC*, No. 56335, 2013 WL 485831, at *1 (Nev. Feb. 6, 2013) (potential loan increase is not a valid and existing contract). "A valid and existing contract" is a necessary element of an intentional interference with contractual relations claim. *LT Int'l Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238, 1249 (D. Nev. 2014)

(noting a "valid and existing contract" must be alleged in the complaint in order for the claim to survive a motion to dismiss); *Goldston v. AMI Invs.*, 98 Nev. 567, 569, 655 P.2d 521, 523 (1982) (noting the court must first determine whether there is a valid and existing contract); *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989).

Here, defendants failed to prove Yount interfered with a valid and existing contract. Mosaic withdrew its loan offer during preliminary negotiations. Defendants never introduced a contract between Cal Neva Lodge and Mosaic, and the district court never found such an agreement, defeating a claim for intentional interference with contractual relations claim. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 707, 692 P.2d 1282, 1285 (1984) (describing this Court's plenary review to determine whether the parties' agreement constitutes a valid contract).

C. There Was No Evidence of Intentional Interference, Just Inaction

Defendants also failed to establish the claim's second element: an intentional act of interference.

The heart of an intentional interference with contractual relations action is an intentional act designed to disrupt a contractual relationship. *J.J. Indus., LLC*, 119 Nev. at 275, 71 P.3d at 1268 (2003). "[A]n

affirmative or threatened act of interference, as distinguished from a refusal or failure to carry out a particular promise, is an essential element" of this cause of action. *Cf. Griese-Traylor Corp. v. First Nat. Bank of Birmingham*, 572 F.2d 1039, 1045 (5th Cir. 1978) (applying similar Alabama law). "Allegations of *inaction* do not satisfy the requirement that a plaintiff plead affirmative, intentional acts of interference." *Nanko Shipping, USA v. Alcoa, Inc.*, 107 F. Supp. 3d 174, 183 (D.D.C. 2015) (emphasis added), *rev'd on other grounds*, 850 F.3d 461 (D.C. Cir. 2017).

Here, Yount did not directly interfere with the Mosaic loan. Defendants contend that Yount was in communication with the Incline Men's Group and that they wanted the Mosaic loan to fail. The primary evidence of this "conspiracy" is the meeting in which Mosaic withdrew their preliminary offer. Because Yount did not arrange or attend the meeting, defendants do not accuse Yount of actively persuading Mosaic to withdraw its offer, only that Yount was aware of that possibility and did not do enough to stop it. (9 App. 2208:15–23.) Defendants referred to this as "Mr. Yount's own inaction," not active interference. (9 App. 2230:5–18.) This kind of failure to intervene is not the kind of inten-

tional interference for which the law creates a damages claim.

At best, Yount is only distantly connected to the Executive Committee, and the Incline Men's Club ("IMC"). Indeed, if Criswell and Radovan believed that the IMC interfered with the loan they would have filed suit against the IMC, which they have not.

D. There Was No Evidence that Yount Intended to Disrupt the Loan

Reducing intentional interference to a kind of negligence by omission also distorts the requirement that the actor had a specific motive and purpose to induce breach of the contract by his interference. *J.J. Indus., LLC*, 119 Nev. at 275, 71 P.3d at 1268 (2003) (*citing Nat'l Right To Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 814 (D. Nev. 1990)). If an actor does not have the intent of causing interference, the actor's conduct does not subject the actor to liability even if the actor's actions have the unintended effect of deterring the third person from dealing with the other. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158, 1164 (Cal. 1984), *overruled on other grounds by Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 900 P.2d 669 (Cal. 1995). It is not enough that the actor intended to perform the acts that caused the result—the actor must have intended to

cause the result itself. *Id.*

Here, there is no evidence that Yount had the intent to sink the Mosaic loan. Beyond Yount's own testimony that he favored the loan and believed the purpose of the meeting was to save it (8 App. 1925:6–9, 8 App. 1922:13–17), even defendants conceded that Yount did not intend to interfere with the Mosaic loan.

> MR. WOLF: [Marriner's counsel]: * * * ***I don't believe Mr. Yount conspired to interfere with that loan***, however he had an opportunity, he knew the meeting that was about to happen was probably not legit, in his words, and he had an opportunity to head off the CR people [IMC People] at the pass and maybe avoid what happened.

(10 App. 2229:20–24) (emphasis added). The essential element of intent is missing.

E. Criswell and Radovan's Own Actions, Not Yount's Inaction, Caused Mosaic to Withdraw

Finally, defendants did not establish that Yount, rather than Criswell and Radovan, caused Mosaic to withdraw its preliminary offer. *See J.J. Indus.*, 119 Nev. at 274, 71 P.3d at 1267 (claim for intentional interference with contractual relations requires the interference to result in damages). Mosaic, not Yount, had called for the meeting. (8 App. 1995:1-4.) And Mosaic itself indicated that the reason for with-

drawing the loan was Criswell and Radovan's own unresponsiveness during the due-diligence period. (8 App. 1937:22–38:7):

> We also told them [members of the Executive Committee] that for the better part of three months we have not heard much from you or your team…

(20 App. 4941.) Mosaic was concerned that "there seems to be a little bit of a mess right now" but once the ownership "figure[d] things out" they could reintroduce the deal to Mosaic. (20 App. 4941.) Defendants' mismanagement of the project and failure to communicate with Mosaic led Mosaic to "take a step back." (*Id.*) None of this makes Yount's failure to intervene a legal cause of Mosaic's withdrawal. The absence of causation defeats defendants' counterclaim as a matter of law.

IV.

THE DAMAGES AWARD IS UNSUPPORTED[7]

The district court awarded Criswell, Radovan, and Marriner $1.5

[7] **Standard of Review:** The district court's award of damages is reviewed for abuse of discretion, *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000), but an improper extrapolation of damages gets no deference, *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, 102 Nev. 139, 142, 717 P.2d 35, 37 (1986). "Since the purpose of a general damage award is to compensate the aggrieved party for damage actually sustained, an identical award to multiple plaintiffs who are dissimilarly situated is erroneous on its face." *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450, 514 P.2d 1180, 1182 (1973).

million each. Defendants never introduced any evidence to support this award.

A. The Award was Speculative

1. Evidence of Damages Cannot Be Speculative

Testimony on the amount of damages must not be speculative. *Clark Cty. Sch. Dist. v. Richardson Const., Inc.,* 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). Although that amount need not be mathematically certain, it must have a reasonable basis in concrete fact. *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc*., 102 Nev. 139, 142, 717 P.2d 35, 37 (1986); *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). And that evidence must be in the record and available for meaningful appellate review. *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 956 (1989).

2. Defendants Never Disclosed or Introduced Any Evidence of the Amount of their Damages

Here, Criswell, Radovan, and Marriner presented no evidence quantifying their individual damages. Over seven days, defense counsel asked just ***one question*** on damages: "how CR Cal Neva has been damaged by Mr. Yount and IMC's interference?" (7 App. 1649:6–8.)

Over Yount's objection for lack of foundation, Radovan speculated that he and Criswell would had made "at least 1.6 million" and that his operating company would have made a million dollars a year—"roughly." (7 App. 1649:8–16.) That's it.

The absence of competent evidence on damages was glaring enough to prompt Yount's counsel to again clarify that defendants were not pursuing a counterclaim, making the speculation on damages irrelevant. (7 App. 1668:18–20.) Indeed, the lack of any proof on damages was assurance to Yount that no counterclaim was at issue, only the affirmative defense.

B. Proof of Lost Anticipated Profits Must Include Evidence of the Business's Success

The district court's amended order improperly awarded Criswell and Radovan management fees "if applicable." There is no competent evidence to support any award.

1. Only an Established Business Can Claim Lost Profits or Management Fees

Lost profits and lost future management fees by their very nature are speculative and therefore to be awardable they must be well substantiated. *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 282 F.

Supp. 2d 126, 129 (S.D.N.Y. 2003). This is usually impossible for a *new* business: a new hotel's projected revenues and operating profits, for example, are simply too speculative to permit recovery. *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp. 906, 932 (E.D. Va. 1989), *aff'd in relevant part, rev'd in part on other grounds*, 911 F.2d 723 (4th Cir. 1990); *Mullen v. Brantley*, 195 S.E.2d 696, 700 (Va. 1973) (noting that where a new business or enterprise is involved "such a business is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages").

Indeed, in Nevada, "[w]here the loss of anticipated profits is claimed as an element of damages, *the business claimed to have been interrupted must be an established one* and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable." *Knier v. Azores Const. Co.*, 78 Nev. 20, 24, 368 P.2d 673, 675 (1962) (emphasis added); *cf. Eaton v. J. H., Inc.*, 94 Nev. 446, 450, 581 P.2d 14, 17 (1978) (a record of past profits used to calculate lost profits).

2. Lost Management Fees Have to Be Based on CalNeva's Future Profits—which were Unproved

Here, defendants did not introduce any of the evidence necessary to prove their future anticipated management fees. Criswell and Radovan's management fees would have been 3% of the Cal Neva's revenue and 10% of the Cal Neva's net operating income before reserves and debt service. (12 App. 2785.) Similarly, Marriner would have been paid 3% of the gross revenue of the project. (10 App. 2331.)

Calculating revenue and net operating income of a hotel that never opened is speculative. Its success would depend on market conditions, average room rates, the hotel's seasonal occupancy patterns, the hotel's expenses, and other contingencies. Criswell and Radovan made no showing that their never-launched hotel operation was an "established" business that could substantiate an award of lost profits and management fees.

And even if this Court were inclined to expand the availability of these damages to untested businesses, defendants failed to provide any of the expert testimony that is required to quantify those anticipated revenues and fees. *See Houston Expl. Inc. v. Meredith*, 102 Nev. 510, 728 P.2d 437 (1986) (admitting expert testimony concerning profits lost

by new venture); *Mid Continent Lift & Equip., LLC v. J. McNeill Pilot Car Serv.*, 537 S.W.3d 660 (Tex. App. 2017) ("Proof of lost profits must be made with competent evidence, and, as a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained."). The damages award was speculative.

C. The Court's Identical Damage Award To Dissimilarly Situated Defendants Confirms the Lack of Evidence

The district court improperly awarded identical damages to differently situated defendants.

1. Identical Awards Are Facially Erroneous

A telltale sign that a damage award is speculative is an "identical award to multiple plaintiffs who are dissimilarly situated." *See Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450-51, 514 P.2d 1180, 1182 (1973). Since damages are to compensate injuries actually sustained, such an award is "erroneous on its face." *Id.*; *cf. Central Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, 102 Nev. 139, 142, 717 P.2d 35, 37 (1986) (error to use the plaintiff's payment on one drilling job to determine payment owed for a second, different job).

2. The Court's Identical Awards Were Erroneous

Similarly here, there is no support for the district court's award. Criswell, Radovan, and Marriner were differently situated: they had invested different capital contributions and held different roles in the LLC. For example, Criswell Radovan LLC invested $2,000,000, while Marriner Real Estate LLC invested just $187,500. (10 App. 2475, Schedule 4.2). Yet the district court simply awarded Criswell, Radovan, and Marriner $1.5 million each. (10 App. 2300:1–11.) As Judge Walker observed, there is no evidence as to how the 1.5 million in damages was calculated.

> Because I think they [the Supreme Court] will share my view of the record in this case as to calling into question, for example, how the $1.5 million damage amounts were calculated…

(20 Ap. 4866:4–6.)[8] The award was an error that warrants reversal.

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[8] The amended order nominally awarded unspecified development fees, which were not part of Judge Flanagan's oral pronouncement. This is error. At trial, Criswell Radovan did not ask that Yount should be liable for this development fee, and the district court's amended order contained no analysis for this item of damage. *See Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (citing *Bing Constr. v. Vasey-Scott Eng'r*, 100 Nev. 72, 674 P.2d 1107 (1984)) (findings in a bench trial "must be sufficient to indicate the factual basis for the court's ultimate conclusions.")

V.

YOUNT IS ENTITLED TO JUDGMENT OR A NEW TRIAL ON HIS CLAIMS

This argument ends where it began, with the fundamental flaws in Judge Flanagan's oral pronouncement. Judge Flanagan's oral proclamation was unreliable. The cumulative error in his oral ruling from the bench entitled Yount to a new trial.

A. The Court Misapplied the Equitable Defense of Unclean Hands

The district court misapplied the equitable defense of unclean hands to Yount's legal claims.

1. Unclean Hands Does Not Apply to Yount's Legal Claims

Unclean hands is an equitable defense that does not even apply to legal claims, such as breach of contract or conversion.[9]

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[9] *Tracy v. Capozzi*, 98 Nev. 120, 123, 642 P.2d 591, 593 (1982) (noting unclean hands is a "well-established defense to *equitable* claims" (emphasis added)); *Las Vegas Fetish & Fantasy*, 124 Nev. at 275, 182 P.3d at 766 ("unclean hands doctrine precludes a party from attaining an *equitable* remedy" (emphasis added)); *see also Cattle Nat'l Bank & Tr. Co. v. Watson*, N.W.2d 906, 921 (Neb. 2016) (no unclean-hands defense to legal claim on a contractual guaranty); *Weiss v. Smulders*, 96 A.3d 1175, 1198 (Conn. 2014) ("the equitable defense of unclean hands bars only equitable relief," not breach-of-contract claim); *W. Bend Mut. Ins. Co. v. Procaccio Painting & Drywall Co.*, 928 F. Supp. 2d 976, 987 (N.D. Ill. 2013) ("The defense of unclean hands is also an equitable defense,

Here, Yount brought only legal claims: breach of contract, fraud, negligence, conversion, breach of fiduciary duty, and securities fraud. He pleaded no claims in equity. The unclean hands defense to suits in equity was inapplicable, and the district court erred in applying it.

2. Even if Unclean Hands Could Apply, Defendants Did Not Prove it

Unclean hands "precludes a party from attaining an equitable remedy when that party's '*connection with the subject-matter or transaction in litigation* has been unconscientious, unjust, or marked by the want of good faith.'" *Las Vegas Fetish & Fantasy*, 124 Nev. at 275, 182 P.3d at 766 (emphasis added) (quoting *Income Investors v. Shtelton*, 101 P.2d 973, 974 (Wash. 1940)). In other words, the litigant must have committed misconduct during the actual transaction for which the litigant seeks relief. *Id.*[10]

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not applicable to a claim for money damages for a breach of contract."); *Swisher v. Swisher*, 124 S.W.3d 477, 483 (Mo. Ct. App. 2003) ("The unclean hands doctrine is not available as a defense to proceedings at law, even though based on equitable principles."); *Ligon v. E. F. Hutton & Co.*, 428 S.W.2d 434, 437 (Tex. Civ. App. 1968) (unclean hands inapplicable to conversion, which is a common-law action).

[10] *See also Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010) ("It is fundamental to the operation of the doctrine that the alleged misconduct by the party relate

Here, even if allowing a loan from Mosaic to fall through constituted egregious misconduct, that alleged failure happened months after—and independent of—Yount's execution of the subscription agreement that forms the basis of his claims. The district court's order contains no analysis to the contrary. Those unrelated allegations do not constitute unclean hands barring Yount's legal claims.

B. The Evidence at Trial Established Yount's Claims Against Cal Neva and Criswell Radovan as a Matter of Law

Yount contracted to purchase a Founder's Share. The evidence at trial was unequivocal: Criswell and Radovan breached the agreement when they unilaterally decided to sell Yount a CR Cal Neva share.

1. Courts Cannot Rewrite Contracts

It has long been the policy in Nevada that contracts will be enforced as written. *Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). Courts "are not free to modify or vary the terms of an unambiguous agreement." *Golden Rd. Motor Inn, Inc. v. Islam,* 132 Nev., Adv. Op. 49, 376 P.3d 151, 156 (2016) (quoting *All Star*

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directly to the transaction concerning which the complaint is made."); *Powell v. Mobile Cab & Baggage Co.*, 83 So. 2d 191, 194 (Ala. 1955); *Barr v. Petzhold*, 273 P.2d 161, 166 (Ariz. 1954).

Bonding v. State, 119 Nev. 47, 51, 62 P.3d 1124, 1126 (2003) and citing *Kaldi v. Farmers Ins. Exch.,* 117 Nev. 273, 278, 21 P.3d 16, 20 (2001)); *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 111, 424 P.2d 101, 104 (1967). To respect the expectations of contracting parties, courts have no *power* to second-guess the contract the parties themselves created. *Golden Rd. Motor Inn, Inc. v. Islam,* 132 Nev., Adv. Op. 49, 376 P.3d 151, 156 (2016) (citing *Reno Club., Inc. v. Young Inv. Co.,* 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947)).; *Erwin v. Cotter Health Centers*, 167 P.3d 1112, 1124 (Wash. 2007).

2. The Sale of the Share Was Void and Breached the Subscription Agreement

The subscription agreement granted Yount a Founder's Share of Cal Neva Lodge, LLC. (20 App. 4928). He did not receive the bargained-for share, however, because Criswell and Radovan had already sold it to another investor.

Instead, Criswell and Radovan substituted Yount's Founder's Share for a share of CR that—without the express approval of two-thirds of the other membership interests—CR was not authorized to transfer to Yount. Indeed, Criswell Radovan's assistant told Powell Coleman, the escrow agent, that they had approval from the necessary

member, when they did not. (7 App. 1571:8–12.) That unauthorized transaction breached Yount's subscription agreement and was void under Cal Neva Lodge, LLC's operating agreement.

3. The Share Yount Received had Diminished Rights and Privileges Compared to the Original Founder's Shares

The district court had no power to change the parties' contract and consider CR's share close enough to the Founder's Share that Yount had paid for. (10 App. 2289:1–7.)

The CR share was materially weaker: it had no voting rights and left the shareholder without any of the rights and powers of the other members. These fundamental differences defied Yount's expectations under the contract. The district court had no discretion to strip Yount of a remedy for the breach.

4. Criswell Radovan Converted Yount's $1 Million

Criswell Radovan's actions also constitute conversion as a matter of law. Conversion does not require "wrongful intent," just an act of dominion over someone else's property inconsistent with the true owner's rights to that property. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008).

Here, Criswell Radovan's converted Yount's $1 million cash investment by taking it in exchange for a CR share, which Yount had not authorized. Even if Criswell Radovan had demonstrated good faith or ignorance, that would not excuse the conversion. *Id.*

C. Yount is Entitled to Judgment on His Fraud Claim against Criswell, Radovan and Marriner

Yount also established his fraud claim as a matter of law. Fraud includes inducing action by suppressing a material fact that is required to be disclosed. *Nelson v. Heer,* 123 Nev. 217, 163 P.3d 420 (2007); *Collins*, 103 Nev. at 397, 741 P.2d at 821.

Here, defendants suppressed information critical to Yount's investment decision. They did not tell Yount that he could no longer purchase a Founder's Share under the private placement memorandum and that he instead was purchasing a nonvoting share from CR. They concealed from Yount Cal Neva's financial straits, including (1) that the LLC was in desperate need of funding; (2) that Radovan was seeking a total refinance of the previous loans; (3) that without a refinance the project could not go forward; and (4) that the project would fail without an additional $20 million. (7 App. 1722:12–22; 7 App. 1517:10–13.)

Had Yount known his investment actually was a bailout of CR's

investment in the project and his $1 million was not going to support the project, as intended, he would never have invested. (7 App. 1730:6–10; 7 App. 1729:9–12.)

D. Yount is Entitled to Judgment on His Claims against Powell Coleman

An "escrow agent must strictly comply with the terms of the escrow agreement and may not use the proceeds in any manner that is not authorized by contract or deposit." *Broussard v. Hill*, 100 Nev. 325, 329, 682 P.2d 1376, 1378 (1984). Releasing the funds in escrow to a third party in violation of the escrow instructions constitutes a breach of fiduciary duty and conversion. *Mark Properties, Inc. v. Nat'l Title Co.*, 117 Nev. 941, 947, 34 P.3d 587, 592 (2001). An escrow agent can likewise be liable for negligently releasing escrowed funds. *See, e.g.*, *Perkins v. Clinton State Bank*, 593 F.2d 327, 332 (8th Cir. 1979); *Johnson v. Allright New Orleans, Inc.*, 357 So. 2d 1210, 1212 (La. Ct. App. 1978) (escrow agent's "duty is to exercise due care in its preservation" and "a presumption arises that [a loss of deposited property] resulted from the depositary's lack of due care, negligence or fault, and the burden is then placed on the depositary to exonerate himself from negligence").

Here, Powell Coleman breached its fiduciary duties and duties of care by releasing Yount's $1 million in escrow to Criswell Radovan, contrary to Yount's instructions. (7 App. 1574:15–17; 7 App. 1573:7–10.) No evidence at trial refuted that breach. Yount was entitled to judgment against Powell Coleman.

E. Yount is Entitled to a New Trial

A new trial is necessary to prevent manifest justice. NRCP 59(a); *Bevevino v. Saydjari*, 76 F.R.D. 88, 94 (S.D.N.Y. 1977), aff'd, 574 F.2d 676 (2d Cir. 1978); *Clark v. Esser*, 907 F. Supp. 1069, 1073 (E.D. Mich. 1995). This is true even where no party is entitled to judgment as a matter of law. *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 993 (E.D.N.Y. 1992), *aff'd sub nom. United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993).

In combination, the errors and irregularities in the district court's conclusions demonstrate that Yount did not receive a fair trial. NRCP 59(a)(1); *see Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 851, 963 P.2d 459, 463 (1998) ("Considered in isolation, the district court judge's comments may not have risen to the level of reversible error; however,

reversal of this case is required when these errors are coupled with the other errors noted in this opinion."). In misunderstanding how the unclean-hands defense works, the district court ignored the evidence on Yount's claims. Even if Yount were not entitled to judgment as a matter of law, for this miscarriage of justice Yount deserves a new trial.

CONCLUSION

This Court should reverse the district court's decision.

DATED this 21st day of February, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

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DATED this 21st day of February, 2019.

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