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; MARRINER REAL ESTATE, LLC

Respondents.

APPEAL

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

APPELLANT'S REPLY BRIEF

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRC.com

RICHARD G. CAMPBELL, JR. (SBN 1832)
KAEMPFER CROWELL
50 W. Liberty Street, Suite 700
Reno, Nevada 89501
RCampbell@KCNVLaw.com

Attorneys for Appellant

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INTRODUCTION

Judge Flanagan erred and violated Yount's due process rights in ruling that there was a counterclaim and awarding damages based on it. While defendants contend Yount was well aware of a counterclaim of intentional interference against him they cannot even agree on what counterclaim Yount impliedly tried. It was impossible for Yount to have expressly or impliedly consented to a counterclaim where (1) defendants represented during trial they had not brought any counterclaims and (2) any evidence supposedly supporting a counterclaim was admitted as relevant to defendants' affirmative defense of unclean hands, which was an issue before the court. Under the circumstances, Yount did not consent to try an unpleaded stereotype.

In essence, Judge Flanagan awarded unsupported damages based on an affirmative defense, not a counterclaim that defendants never pleaded or proved and that Yount never consented to try. Judge Flanagan's oral pronouncement was flawed. The errors in the district court's conclusions demonstrate that Yount is entitled to a new trial.

I.

DEFENDANTS' PROCEDURAL ARGUMENTS FAIL

Defendants allege Yount impliedly consented to try a counterclaim and therefore the Court had authority under 15(b), 54(c), or 8(c) to award damages. None of the three district judges in this case made findings under these procedural rules. Further, these rules are not so broad as to permit a court to abandon the due process requirement of advanced notice. It is fundamental to the concept of due process that a party be given notice of the claims against him and notice of the specific relief which is sought. Here, Yount did not have any notice of a counterclaim against him and did not consent to try a counterclaim. In fact, defendants represented to Yount that there was no counterclaim against him.

A. Yount Did Not Expressly or Impliedly Consent Under 15(b) to Try a Counterclaim

Defendants contend Yount impliedly consented to try a counterclaim because he allegedly failed to object to the introduction of evidence of the Mosaic loan. (CR AB p. 34:9–12.) Defendants failed to give Yount adequate notice of an implied claim however, because the Mosaic

loan was relevant to issues in Yount's claims including Criswell Radovan's affirmative defense of unclean hands.

1. Defendants Cannot Even Agree Among Themselves Which Counterclaim Yount Allegedly Tried By Consent

Criswell Radovan and Marriner both contend that Yount tried a counterclaim by consent. Yet, they cannot even agree what counterclaim Yount allegedly consented to try. Criswell Radovan argues Judge Flanagan awarded damages based on an intentional interference with prospective business relations claim. (CR AB p. 50:1–11.) Criswell Radovan contend that Judge Flanagan "simply misspoke" when he used the phrase "interfere with … contractual relations." (CR AB p. 52:10.)

On the other hand, Marriner alleges Judge Flanagan based his damage award on an intentional interference with contractual relations claim. Marriner contends that he had a contractual relationship with Cal Neva LLC, that Yount was aware of Marriner's contract rights to receive payments, and that Yount intentionally interfered with the Mosaic Loan so that the project would fail. (Marriner AB p. 27:4–9.)

This confusion mirrors defendants' inconsistent arguments in the district court after the trial. Trying to make sense of Judge Flanagan's

post-trial ruling, Marriner first alleged Yount consented to try a civil conspiracy claim and later argued it was either intentional interference with a contract or civil aiding and abetting. (*Compare* 11 App. 2732 *with* 13 App. 3228 *and* 13. App. 3229.) On the other hand, Criswell Radovan inconsistently referred to three different alleged counterclaims. (11 App. 2704 intentional interference with contractual relations; 13 App 3197 intentional interference with prospective business; 13 App 3209 "interference claim.") This glaring discrepancy highlights that the defendants' positions after the fact are merely opportunistic attempts to keep the windfall they have obtained from the district court's errors.

2. Introduction of the Mosaic Loan Was Insufficient Notice of an Unpleaded Counterclaim Because the Loan was Relevant to Defendants' Affirmative Defense

Defendants argue that Yount impliedly consented to have a counterclaim tried against him because he did not object on the grounds of relevance to evidence related to the Mosaic loan. (CR AB pp. 35–38.) But that evidence was relevant to issues in his own claims and defendants' affirmative defense that were properly pleaded.

A defendant fails to give a plaintiff adequate notice of an implied claim when evidence relevant to the new claim is also relevant to the

claim originally pleaded. *McLeod v. Stevens*, 617 F.2d 1038, 1040–41 (4th Cir. 1980) ("But all evidence of harm to McLeod was germane to the equitable relief she sought. Its admission without objection, therefore, cannot be treated as implied consent to the trial of the issue of damages."); *see also Addie v. Kjaer*, 737 F.3d 854, 867 (3d Cir. 2013); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) *quoting Wesco Mfg. v. Tropical Attractions*, 833 F.2d 1484, 1487 (11th Cir. 1987) (noting that the introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues entered the case). Implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue rather than an issue already before the court. *Viox v. Weinberg,* 861 N.E.2d 909, 917 (Ohio Ct. App. 2006). Trial of unpleaded issues by implied consent is not lightly to be inferred under Rule 15(b). *Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001).

Here, the Mosaic loan was a "focus" of the trial because of defendants' unclean hands affirmative defense, which, Yount understood,

might affect his claim to damages but would not subject him to damages. Defendants expend pages of their brief discussing various trial exhibits, testimony, and proposed findings of fact that allegedly indicate Yount's consent to try a counterclaim. (CR AB pp. 35–39; Marriner AB pp. 11–15.) All of this evidence however, was relevant to defendants' affirmative defense of unclean hands. Yount could not have objected to its introduction on the grounds of relevance when he understood its purpose was to support the defense in the pleadings. Accordingly, Yount could not have had advanced notice that he faced a counterclaim and could not have impliedly consented to try a counterclaim.

3. Yount Could Not Have Consented to Try a Counterclaim Where Defendants Conceded They Had No Counterclaim

There is simply no way around defendants' express statements that they did not bring a counterclaim. Criswell Radovan attempt to argue that the multiple concessions throughout trial are taken out of context. (CR AB p. 44.) Marriner fails to address his concessions, alleging he made no such statements. (Marriner AB p. 40:24). But the record is clear: Criswell Radovan stated on three separate occasions that they had not brought counterclaims. (7 App. 1668; 9 App. 2210–11; 7 App.

1671.) Marriner's counsel expressly argued that the Mosaic loan was only relevant to the causation prong of Yount's own claims. (9 App. 1073–74.) Indeed, Yount's counsel argued during closing arguments that the parties had never brought a counterclaim against Yount. (9 App. 2172.) Defense counsel did not dispute that statement.

It was only after defendants were awarded millions in damages that defendants reversed course, contending that they had a counterclaim the whole time.

B. Defendants Did Not Mistakenly Plead a Counterclaim as an Affirmative Defense

Criswell Radovan contend that the district court converted Criswell Radovan's unclean hands affirmative defense into a counterclaim, but they do not argue the mistake that is the predicate for doing so. (CR AB p. 48.)

Under Rule 8(c), a party does not mistakenly plead a counterclaim as an affirmative defense when the request for relief clearly indicates otherwise. *Glob. Healing Ctr., LP v. Powell*, No. 4:10-CV-4790, 2012 WL 1709144, at *6 (S.D. Tex. May 15, 2012).; *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).

Here, however, the record is clear that Criswell Radovan did not mistakenly plead a counterclaim as an affirmative defense. Indeed, Criswell Radovan do not even argue the designation of unclean hands was a mistake; they simply contend, wrongly, that it was within the district court's discretion to convert "the same conduct into a reasonable counterclaim" under Rule 8(c). (CR AB p. 48.) Defendants never prayed for money damages nor presented any evidence at trial to substantiate a damage award.

C. No Counterclaims Were tried and Therefore it Would Be Improper to Grant Relief under 54(c)

Defendants further argue that a court may award defendants damages based on an unpleaded counterclaim under 54(c). (CR AB p. 49; Marriner AB p. 28.) However, similar to Rule 15(b)'s due process limitations, under Rule 54(c) "relief may be based on a theory of recovery only if the theory was presented in the pleadings or tried with the express or implied consent of the parties." *Idaho Res., Inc. v. Freeport-McMoran Gold Co.*, 110 Nev. 459, 462, 874 P.2d 742, 744 (1994) *quoting Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920 (3d Cir.

1984). Although Rule 54(c) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried. *Id*.

Yount never expressly or impliedly consented to try any un-pleaded issues. Yount had no notice of the claims against him or the type of relief sought. It would be improper to grant relief under 54(c).

D. Yount Was Prejudiced Because He Was Unable to Present a Defense or Rebut Defendants' Damage Calculation

Defendants contend that Yount's presentation of evidence was not prejudiced because he allegedly introduced some evidence relevant to the unpleaded claim. (CR AB pp. 39–40; Marriner AB p. 36:9–28.) But this does not eliminate the prejudice: Yount was unable to present any evidence to rebut the defendants damage calculation. He would have called the Mosaic executives if he knew he faced a counterclaim.

1. Yount Would Have Rebutted the Amount of Defendants' Damages and Presented Evidence on the Mosaic Withdrawal

A party is prejudiced when he is unable to present evidence on an element of the claims against him. *Consol. Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385, 398–99 (9th Cir. 1983) (finding

that party suffered substantial prejudice where the district court allowed amendment to include an intentional interference with a contract claim because the party never received a proper opportunity to contest the existence of the contract). In determining the existence of such prejudice courts consider whether the complaining party had a fair opportunity to litigate the issue at trial and whether such party could have offered additional probative evidence on that issue if the case were retried. *Int'l Harvester Credit v. E. Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977). Thus, the concept of prejudice in this context is a refinement of the fundamental right of due process. *United States v. Texas*, 523 F. Supp. 703, 722 (E.D. Tex. 1981). A party must have actual or constructive knowledge of the scope of proceedings, as well as an adequate opportunity to present evidence on all issues embraced therein. *Id.*

Here, Yount was prejudiced because he was unable to rebut the damages, which included speculative future projections. Further, Yount was unable to present evidence on why Mosaic withdrew its loan offer, including by calling the Mosaic executives that attended the meeting. In awarding damages, Judge Flanagan relied on an email in which Ster-

ling Johnson withdrew the Mosaic offer. (10 App. 2296.) However, Johnson also indicated in the email that he had concerns regarding Criswell Radovan's due diligence and noted he had not heard from Criswell Radovan for three months. (20 App. 4941.) In an affidavit, Yount's counsel indicated that Johnson discussed the Mosaic meeting with Yount's counsel after trial. (21 App. 4874.) He informed Mr. Campbell that Mosaic withdrew its preliminary offer because they had not received due diligence paperwork from Radovan. (21 App. 4975.)

Indeed, Yount requested limited post-trial discovery on these issues. Judge Walker agreed that the damages were speculative and wanted to set a hearing on damages. (20 App. 4859.) Judge Walker noted that he wanted to know "what the Mosaic people are going to say." (20 App. 4859.)

2. Chaney's Testimony Was Not Offered to Defend Against a Counterclaim

Defendants allege Yount was not prejudiced because he was able to present Chaney's testimony. (CR AB p. 40.) Defendants allege that Yount's witness, Brandon Chaney, testified about the Mosaic meeting and therefore Yount was not prejudiced. (CR AB p. 40:25–26). Chaney,

a member of the Incline Men's Club and a member of the Cal Neva executive committee, testified on various topics including executive committee meetings (8 App. 1978), budget overruns (8 App 1983; 1988), and the sale of the CR share to Yount (8 App. 1990). It was not "entirely devoted" to an interference counterclaim as defendants contend. (CR AB p. 40:25). And while Chaney offered his perspective on the Mosaic meeting (8 App. 1996), he could not attest to the motivations of the Mosaic executives in withdrawing the Mosaic Loan offer.

Further, Criswell Radovan's reliance on *Liberty Mut. Ins. Co. v. Leroy Holding Co., Inc.*, to support this argument is misplaced. 226 B.R. 746, 758 (N.D.N.Y. 1998). First, the defendant in that case did not challenge that it consented to trial of the unpleaded issue. *Id.* Second, the defendant argued it was prejudiced because it would have negotiated a different settlement of its bankruptcy claim and not that it was deprived of an opportunity to defend itself. *Id.*

Accordingly, if Yount had notice of a counterclaim against him, Yount could have presented additional evidence.

E. Yount Did Not Judicially Admit Defendants Tried a Counterclaim

Marriner is simply wrong when he argues that Yount judicially

admitted that defendants tried a counterclaim by consent. (Marriner AB p. 8.) Judicial admissions are limited to deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011). Theories of law and legal opinions are not judicial admissions. *See id.*; *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 341 (6th Cir. 1997).

Here, Yount never made a "clear, unequivocal" statement that he had notice of a counterclaim. In fact, he stated just the opposite.

> MR. CAMPBELL: <u>There was no counterclaim against Mr. Yount</u> for somehow derailing that loan and there's no evidence that he was involved in any discussions with Mosaic.

(9 App. 2172) (emphasis added.) Marriner contends that Yount judicially admitted that defendants tried a counterclaim when Yount stated "Defendants answered and asserted … that Mr. Yount conspired with other investors to interfere with the Project's refinancing loan" in a post-judgment motion. (Marriner AB p. 8.) Notably, Marriner omits a vital portion of this quote. Yount actually stated, "Defendants answered <u>and asserted unclean hands</u>. Defendants alleged that Mr. Yount conspired with other investors to interfere with the Project's refinancing

loan." (21 App. 4946) (emphasis added.) In other words, Yount understood that any allegation of interference would be used solely to support Criswell Radovan's affirmative defense of unclean hands as asserted in their Answer, which could not be the basis of any request for damages. (1 App. 72.) The statement mirrors language used in Criswell Radovan's Proposed Findings of Fact and Conclusions of Law submitted before trial. (5 App. 1141.)

Marriner further contends that Yount judicially admitted defendants tried a counterclaim because Yount quoted Judge Flanagan's oral findings. (Marriner AB p. 8.) Obviously, quoting the record is not a judicial admission. Application of these statements to the law is necessary to make legal arguments. Yount did not judicially admit defendants tried a counterclaim by implied consent.

II.

DEFENDANTS FAILED TO PROVE A COUNTERCLAIM

Even if defendants could demonstrate a counterclaim tried by implied consent, defendants failed to prove the elements of the counterclaim.

A. Criswell Radovan Did Not Prove an Intentional Interference with Prospective Advantage Claim

The record does not support a counterclaim of intentional interference with a prospective economic advantage. Interference with prospective economic advantage requires a party to demonstrate five factors: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct. *In re Amerco Derivative Litig.*, 127 Nev. 196, 226, 252 P.3d 681, 702 (2011). Criswell Radovan failed to prove the elements of this claim, especially the defining elements of intent and improper means.

1. Criswell Radovan Cannot Demonstrate Intent

Intent is the essential element of the tort of intentional interference with prospective contractual relations. *M & R Inv. Co. v. Goldsberry*, 101 Nev. 620, 622, 707 P.2d 1143, 1144 (1985). The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is

certain or substantially certain to occur as a result of his action. *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nevada*, 106 Nev. 283, 288, 792 P.2d 386, 388 (1990).

Here, defendants failed to demonstrate Yount intended to interfere with the Mosaic loan. Yount testified that he believed the Mosaic meeting was to discuss terms and that he hoped the financing would go through. (8 App. 1925:6–9, 8 App. 1922:13–17.) Yount was not part of the Mosaic meeting, was not a member of the Incline Men's Club or Executive Committee, and was only in the communication loop with some members who attended the meeting. (8 App. 1995:22–24.) This evidence is insufficient to establish intent.

2. Criswell Radovan Cannot Demonstrate Improper Means

A tortious interference with prospective advantage claim requires the defendant's conduct be wrongful by some legal measure other than the interference itself. *Crockett v. Sahara Realty Corp.*, 95 Nev. 197, 591 P.2d 1135 (1979) (noting that appellants failed to allege or offer facts from which an inference could be drawn of any resort by respondents to unlawful or improper means); *see also Las Vegas-Tonopah-Reno Stage Line*, 106 Nev. at 289, 792 P.2d at 389 (noting that improper or illegal

interference, had been established by the competitor's violation of regulations by paying excess commissions); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1133 (9th Cir. 2015) (applying California law and holding the failure to sufficiently allege a wrongful act outside of the interference itself forecloses an interference with prospective economic advantage claim); *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d 1169, 1189 (W.D. Wash. 2019); (interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession).

The gravamen of such a cause of action is conditioned upon the wanton, malicious, and unjustifiable acts of others. *Crockett*, 95 Nev. at 199, 591 P.2d at 1136 *quoting George F. Hewson Co. v. Hopper*, 130 N.J.L. 525, 33 A.2d 889 (1942). To succeed on this claim, plaintiffs must allege that defendant resorted to unlawful or improper means. *See id.*; *Jhangmen Kinwai Furniture Decoration Co. Ltd*, *Kinwai USA Inc. v. Int'l Mkt. Centers, Inc.*, No. 215-CV-1419-JCM-PAL, 2016 WL 697112,

at *5 (D. Nev. Feb. 18, 2016). Courts require an act other than interference to prevent infringing on free competition in an economy where businesses vie for economic advantage. *Crockett*, 95 Nev. at 199, 591 P.2d at 1136.

Criswell Radovan do not offer a single piece of evidence of wrongful conduct other than the alleged interference itself. Criswell Radovan contend the evidence demonstrated "that he was conspiring with IMC to sabotage that loan and oust Defendants from the Project." (CR AB 55.) This evidence is insufficient to establish an intentional interference with prospective advantage claim.

Further, Yount testified that he was in favor of the Mosaic deal. (8 App. 1922.) And while Yount expressed concerns that the Mosaic executives were "sharks" and the terms may be unfavorable (20 App. 4937), Yount's financial concerns do not give rise to improper means. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1166 (9th Cir. 1997) (noting that "[a]sserting one's rights to maximize economic interests does not create an inference of ill will or improper purpose" and holding defend-

ants perception that the acquisition conflicted with its economic interests was not an improper objective).[1]

Defendants have failed to demonstrate this element and thus cannot demonstrate they proved a counterclaim of intentional interference with prospective advantage.

B. Marriner Cannot Prove Intentional Interference With Contractual Relations

Marriner also fails to prove a counterclaim. 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 v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989).

1. Marriner Cannot Demonstrate an Intentional Act

The heart of an intentional interference with contractual relations action is the intentional act that was designed to disrupt a contractual

[1] Defendants also contend Yount attempted to arrange alternative financing through North Light. (CR AB p. 55.) Yount never spoke to North Light (8 App. 1863). Even if he had, comparing competitors for more favorable terms is not improper. *Crockett*, 95 Nev. at 199, 591 P.2d at 1136; *Omega*, 127 F.3d at 1166.

relationship. *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003). While Marriner contends there is evidence to support Judge Flanagan's ruling, he does not cite any authority to support his contention that being in the communication loop with the IMC is an "intentional act."[2] (Marriner AB p. 31.) Indeed, Marriner's own counsel 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.

(9 App. 2229.) An "opportunity" to prevent is not intent. Marriner cannot demonstrate this vital element.

2. Marriner's Alleged Contractual Relationship with Cal-Neva is Irrelevant

Marriner attempts to establish the existence of a valid contract by

[2] This Court has noted that an e-mail exchange cannot give rise to a civil aiding and abetting claim. *See LVRC Holdings, LLC v. Brekka*, 128 Nev. 915, n.5 , 381 P.3d 636 (2012)(affirming district court's dismissal of civil aiding and abetting claim because the court reasoned receipt of e-mails was not evidence of substantial assistance, encouragement, or contribution").

pointing to Marriner Real Estate, LLC's Real Estate Consulting Agreement and the Operating Agreement. (Marriner AB p. 31). These contracts are irrelevant.

First, David Marriner, an individual, still faces the same standing issues, *i.e.*, he was not a party to the contract. *See Williamson, Picket, Gross, Inc. v. 400 Park Ave. Co.*, 63 A.D.2d 880, 881, 405 N.Y.S.2d 709, 711 (1978), *aff'd*, 47 N.Y.2d 769, 391 N.E.2d 296 (1979) ("This court knows of no precedent that would extend this tort theory to cover claims of a stranger to the contract interfered with."). Marriner Real Estate, LLC executed the Operating Agreement and contributed the $187,500. (10 App. 2471; 2475.) Marriner Real Estate, LLC also executed the Real Estate Consulting Agreement. (1 RA. 1–4.) But David Marriner cannot establish any contractual relationship with Cal Neva.

Second, those contracts were not the basis for the award. Judge Flanagan awarded Marriner Real Estate, LLC its attorney fees. (10 App. 2300.) As his oral pronouncement makes clear, he did not award the $1.5 million in damages to the LLC for an alleged interference with its Real Estate Consulting Agreement or the Operating Agreement. Rather, he found "but for the intentional interference with the contractual

relations between Mosaic and Cal Neva, LLC the project would have succeeded." (10 App. 2296.)

Marriner's attempt to establish an intentional interference with contractual relations claim fails.

III.

DEFENDANTS DO NOT SUBSTANTIATE THEIR DAMAGES

Even if there were a counterclaim, defendants pointed to no evidence in the record that can substantiate their damage award. The record is devoid of any analysis or calculation by Judge Flanagan. Defendants rely on speculative future projections of revenue that, if used for the purpose of proving damages, are hearsay.

A. Defendants Rely on Hearsay Evidence that Is Not Admissible For Their New Purpose

Criswell Radovan contend that the financial pro forma in the Confidential Offering Memorandum formed the basis for their lost management fees. (CR AB p. 56:26; 20 App. 4900.) Marriner alleges that the future projected sales income listed in the same document demonstrates his lost real estate commission. (Marriner AB p. 6; 20 App. 4901.) This document was admitted to establish whether Yount conducted his due

diligence before investing. For defendants' new purpose, proving the value of their damages, however, the document is hearsay.

1. The Financial Pro Forma Was Relevant to the Question of Yount's Due Diligence

It is well established that evidence must be relevant and admissible to support a party's claim. NRS 48.015; *Burton v. State*, 84 Nev. 191, 194, 437 P.2d 861, 863 (1968). At trial, the financial pro forma was relevant and admissible only to the question of what Yount reviewed prior to investing. (8 App 1787–88.) In other words, it came in only to show that Yount received what purports to be an analysis of future performance, regardless of whether its contents were accurate.

The document was probative, for what it was worth, only to whether Yount received documents that might enable due diligence. It is squarely within the record that Yount's accountant, Tratner, assessed the entire pro forma (of which this financial chart was a small part) to determine whether the investment was reasonable overall. (9 App. 2005–06.) Indeed, Judge Walker noted this evidence was never introduced to prove damages.

> That was introduced at trial really to impeach Mr. Yount. And that's a prediction by a financial analyst to what might be earned in the future.

(20 App. 4849.)

2. The Financial Pro Form is Hearsay for the Purpose of Proving Damages

Criswell Radovan now contend, however, that the financial pro forma substantively proves the actual value of the future lost management fees.[3] (CR AB 56:26). Likewise, Marriner alleges the document substantively proves actual value of his future lost real estate commission. For this purpose, the chart is hearsay, an out of court statement purporting to prove the truth of the document's contents. NRS 51.035. Further, this document does not meet any of the hearsay exceptions; defendants do not even argue that any apply. *See* NRS 51.135 (requiring that proof that a document is a business record requires proper foundation including that it was made "at or near the time … by a person with knowledge in the course of a regularly conducted activity.")

Defendants cannot use inadmissible hearsay to substantiate the

[3] The timing of the financial pro forma further demonstrates its speculative nature. The pro forma that defendants rely on was drafted in 2014, long before the Mosaic loan was considered. It does not include the additional $20 million in debt that Criswell and Radovan needed to cover cost overruns or the Mosaic loan's huge fees and rates. It also projected the hotel would open in 2015 and includes partial revenue for 2015. (20 App. 4879–4925.)

lost future fees. *Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1287 (10th Cir. 2012) (upholding grant of summary judgment on intentional interference with prospective advantage and holding that the expert report submitted to establish future profits relied on a hearsay pro forma); *see also Diamond v. Beltman N. Am. Van Lines,* 29 F. App'x 49, 50 (2d Cir. 2002) (holding plaintiff was unable to prove damages because her relevant evidence—including the appraisal report and other documents in which salespeople or businesses purportedly noted the value of the damaged furniture—was properly excluded on hearsay grounds); *Howells Elevator, Inc. v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (Neb. 1990) (holding written estimate of cost to repair damaged conveyor was inadmissible hearsay); *Wagner v. Alford*, 34 So. 3d 1018, 1023 (La. App. 3 Cir. 2010) (holding plaintiff failed to prove element of damages because the appraisal used to demonstrate property value was inadmissible hearsay evidence).

The financial pro forma is inadmissible hearsay. Whether Yount was diligent in reviewing the pro forma is unrelated to whether future profits and future real estate sales projections have been calculated at trial with reasonable certainty. Accordingly, this financial pro forma is

insufficient to prove damages.

B. Even if the Pro Forma Were Admissible, Defendants Fail To Demonstrate the Future Projections Were Reasonable

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). The amount of damages 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).

Here, Criswell Radovan allege they are entitled to management fees pursuant to the Hotel Management Agreement, an agreement that was never introduced at trial. (*See* 12 App. 2785 alleging the key provision of the Management Agreement through Criswell's declaration; 20 App. 4869–78.) Marriner contends he is entitled a commission fee pursuant to the Real Estate Consulting Agreement.[4] Both agreements require a calculation of future profits and future sales income. (12 App.

[4] Marriner contends his damages are not implicated by any profitability of the project. (Marriner AB p. 42.) This is simply incorrect. (Marriner AB p. 6.) Marriner's commission was based on the future sales income of 28 Cal Neva condos. Calculating future real estate sales depends on market conditions and whether the Project successfully opened.

2785; 1 RA 2.)

Calculating revenue and net operating income of a hotel that never opened is entirely speculative. Defendants do not point to any evidence in the record that establishes their projections were reasonably calculated. *See Houston Expl. Inc. v. Meredith*, 102 Nev. 510, 513, 728 P.2d 437, 439 (1986) (admitting expert testimony concerning profits lost by new venture); *Tri-G, Inc. v. Burke, Bosselman & Weaver,* 222 Ill. 2d 218, 248, 856 N.E.2d 389, 407 (2006) ("The law requires only that the plaintiff seeking recovery for lost profits approximate the claimed lost profits by competent evidence."); *Mid Continent Lift & Equip., LLC v. J. McNeill Pilot Car Serv.*, 537 S.W.3d 660, 665 (Tex. App. 2017) ("Proof of lost profits must be made with 'competent evidence' and, '[a]s 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."). Accordingly, these future projects cannot form the basis of a damage award.

C. Radovan's Single Unsupported Statement is Insufficient to Substantiate Defendants Damages

The amount of damages need not be mathematically certain, but the injured party must establish a reasonable basis for ascertaining

their damages. *Cent. Bit Supply, Inc. v. Waldrop Drilling & Pump, Inc.*, 102 Nev. 139, 142, 717 P.2d 35, 37 (1986). 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).

Here, Criswell Radovan allege there is "more than sufficient evidence" to support the $1.5 million award simply because Radovan stated that he believed the project's failure cost him $1.6 million. (CR AB p. 55.) Radovan's unsupported speculation—a figure seemingly pulled from thin air—cannot support a multimillion dollar damage award. Radovan provided basis for the $1.6 million dollar figure. He also provides no reasonable basis as to why that figure should apply to all the defendants.[5] There is no evidence in the record to support the damage award.

[5] *See Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450–51, 514 P.2d 1180, 1182 (1973) (noting that 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.)

IV.

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

Defendants allege Judge Flanagan analyzed each of Yount's claims and properly determined he was not entitled to judgment in his favor. (Marriner AB p. 42; CR AB p. 61.) However, Judge Flanagan's oral pronouncement was fundamentally flawed. The cumulative errors entitle Yount to a new trial.

A. Criswell Radovan Never Sought Authorization to Sell Yount a CR Share

Every word in a contract must be given effect if at all possible. *United Rentals Hwy. Techs. v. Wells Cargo*, 128 Nev. 666, 677, 289 P.3d 221, 229 (2012). An interpretation which renders one of its provisions meaningless should be avoided. *Mendenhall v. Tassinari*, 133 Nev. 614, 624, 403 P.3d 364, 373 (2017); *Flores v. Barr*, 934 F.3d 910, 915 (9th Cir. 2019).

Criswell Radovan nonetheless contend that this Court should ignore the express requirements of the Operating Agreement. (CR AB p. 61.) The Operating Agreement expressly provides that no member may sell their interest unless approved in writing by 67% of members. (10 App. 2446–47, Section 12.2.) In an attempt to circumvent the express

requirements of the Operating Agreement, Criswell Radovan allege that the Executive Committee pre-authorized the sale of a CR share at the time the Operating Agreement was approved. (CR AB p. 61.) Criswell Radovan contend that the Operating Agreement only required CR to hold $1 million of equity. *Id*. They argue that because CR held two shares, valued over $1 million, the Executive Committee must have always contemplated the sale of a CR share when it approved the Operating Agreement. *Id*.

This argument fails. Criswell Radovan cannot point to any evidence that the Executive Committee believed its approval of the Operating Agreement pre-authorized CR to sell its share to anyone at any time. This purely speculative argument cannot overcome the express terms of the Operating Agreement.

Criswell Radovan also attempt to blur the timeline of when authorization was required and contend authorization was required after the sale closed. (CR AB p. 62.) Criswell Radovan argue that a meeting was planned to authorize the sale but Yount's Complaint rendered the meeting moot. (CR AB p. 63.) Criswell Radovan's speculative argument misses the point that regardless of when authorization was required, it

never occurred.

B. Yount Was Damaged Because He Was Induced Into Purchasing a Share With a Diminished Value

Criswell Radovan contend Yount is not entitled to a new trial because Yount was not damaged. They allege Yount cannot demonstrate damages because voting opportunities were minimal and the project's financing was not adversely affected. (CR AB p. 64–5.) Criswell Radovan ignore that they breached the subscription agreement that required the sale of an original Founders Unit, not a CR share. Damages for a breach of contract awards the non-breaching party a monetary award sufficient to place that party in the position it expected to find itself had all parties honored the contract. *Cain v. Price*, 134 Nev. 193, 197, 415 P.3d 25, 30 (2018).

Here, had the contract been performed Yount would have received a Founders Unit, with voting rights, and his funds would have been released directly to Cal Neva. Instead, Yount received an unauthorized CR share that did not include the same rights and powers of the other founding members. (10 App. 2249, Section 12.6.3.) Further, Yount's funds were released 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.)

Marriner and Radovan knew that Yount and Busick both agreed to purchase the final founders share. Rather than inform Yount and Busick of the conflict, however, Marriner and Radovan took advantage of the "perfect storm" and accepted Yount's $1 million. (5 App. 1227:1–8.) Accordingly, Yount was damaged.

C. Yount Proved His Fraud Claims Against Marriner

To establish a cause of action for fraud in the inducement, a plaintiff must establish that (1) defendant made a false representation, (2) defendant had knowledge of the falsity of the representation, (3) defendant intended to induce plaintiff to rely on the representation, (4) plaintiff justifiably relied on the representation, and (5) plaintiff suffered damages as a result of this reliance. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004).

Here, Marriner contends that Judge Flanagan found Yount's claims were unsupported. (Marriner AB p. 44.) However, Yount provided ample evidence to support his fraud claims. Yount demonstrated that defendants concealed from Yount Cal Neva's financial straits, including (1) that the LLC was in desperate need of funding; (2) that Ra-

dovan 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; (5) that the project was on track to open on December 12, 2015. (7 App. 1722:12–22; 7 App. 1517:10–13; 5 App. 1186:18–24; 5 App. 1186:12–15.) These material omissions are sufficient to establish fraud. *See Carson Meadows Inc. v. Pease,* 91 Nev. 187, 533 P.2d 458 (1975) (finding that evidence established fraud where investors were induced to purchase shares of capital stock on representations by corporation's president that corporation was financially sound, that money was needed to assist in obtaining construction loan, that money would be used for such purpose, but that part of money was in fact deposited by corporation president to his personal account).

D. A New Trial is Necessary to Prevent Injustice

Defendants cannot demonstrate Yount was not prejudiced by the numerous errors in the district court's conclusions. A new trial is necessary to prevent manifest injustice. NRCP 59(a). Individually and 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).

Judge Flanagan's oral pronouncement was flawed. Accordingly, Yount is entitled to a new trial.

CONCLUSION

This Court should reverse the district court's decision.

DATED this 21st day of October, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)

By: */s/ Adrienne Brantley- Lomeli*
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

RICHARD G. CAMPBELL, JR.
Nevada Bar No. 1832
KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501
(775) 852-3900

Attorneys for Appellant

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.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,165 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 21st day of October, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Adrienne Brantley-Lomeli*

RICHARD G. CAMPBELL, JR.
Nevada Bar No. 1832
KAEMPFER CROWELL
50 West Liberty Street
Suite 700
Reno, Nevada 89501
(775) 852-3900

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
3993 Howard Hughes Parkway Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on October 21, 2019, I submitted the foregoing APPELLANT'S REPLY BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

MARTIN A. LITTLE
ALEXANDER VILLAMAR
HOWARD & HOWARD
3800 Howard Hughes Parkway
Suite 1000
Las Vegas, Nevada 89169

Attorneys for Respondents Cal Neva Lodge, LLC, CR Cal Neva, LLC, Criswell Radovan, LLC, Robert Radovan and William Criswell

MARK G. SIMONS
SIMONS LAW, PC
6490 S. McCarran Boulevard
Suite #20
Reno, Nevada 89509

Attorneys for Respondents David Marriner, Marriner Real Estate, LLC, and Powell Coleman and Arnold, LLP

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP