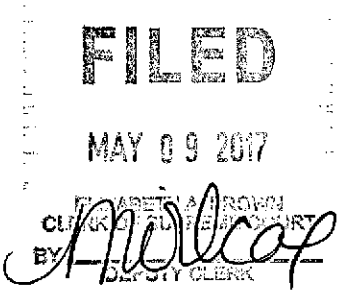
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PEDROLI RANCHES PARTNERSHIP, A NEVADA PARTNERSHIP; AND BARBARA PAGANINI, INDIVIDUALLY AND AS SOLE SURVIVING PARTNER OF THE PEDROLI RANCHES PARTNERSHIP,
Appellants/Cross-Respondents,
vs.
HONORINE L. PEDROLI, AN INDIVIDUAL; JACK WARN, AN INDIVIDUAL; AND HONORINE PEDROLI, AS EXECUTRIX OF THE ESTATE OF THOMAS C. PEDROLI,
Respondents/Cross-Appellants.

No. 67469



ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Barbara Paganini and Pedroli Ranches Partnership appeal from a final judgment and Honorine Pedroli cross-appeals from a special order after final judgment. Sixth Judicial District Court, Humboldt County: Robert E. Estes, Senior Judge.

Barbara Paganini, on behalf of Pedroli Ranches, sued her late uncle's wife, Respondent Honorine Pedroli, and the partnership's longtime ranch hand, Respondent Jack Warn ("respondents") alleging that the two conspired to steal partnership cattle.[1] Honorine filed two counterclaims alleging that Barbara converted partnership assets and breached her fiduciary duty. In the amended complaint, Barbara alleged that

[1]We do not recount the facts except as necessary to our disposition.

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respondents intentionally mislead her as to the number of partnership cattle so that Honorine and Jack could steal the cattle from the partnership. The case then proceeded to a jury trial. Following the close of Barbara's case-in-chief, respondents successfully moved for judgment as a matter of law on three claims.[2] Following the close of Honorine's case, Barbara unsuccessfully moved for judgment as a matter of law on Honorine's counterclaims. The jury then returned a verdict in favor of Honorine on all remaining claims and awarded damages to Honorine. Barbara filed a renewed motion for judgment as a matter of law or in the alternative a new trial. The district court granted Barbara judgment as a matter of law on Honorine's breach of fiduciary duty claim, but otherwise denied Barbara relief. Both sides appeal.

On appeal, this court must determine whether the district court erred by: (1) granting judgment as a matter of law on three of Barbara's claims,[3] (2) granting judgment as a matter of law on Honorine's breach of fiduciary duty counterclaim and denying Honorine's motion for a new trial, and (3) denying Barbara's motion for a new trial on Honorine's conversion counterclaim. We affirm in part, reverse in part, and remand.

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[2]The district court dismissed all claims asserted against Jack. Accordingly, only two of Barbara's claims against Honorine were submitted to the jury.

[3]The district court dismissed Barbara's claim that respondents violated NRS 568.350, her civil conspiracy claim, and her fraud/misrepresentation claim.

Assuming the district court erroneously granted judgment as a matter of law on the conspiracy and statutory claims, such error is harmless in light of the jury's verdict

This court reviews a district court's decision to grant judgment as a matter of law de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007). In reviewing a district court's order granting a motion for judgment as a matter of law, this court must "view the evidence and all inferences in favor of the nonmoving party." *See id.* at 222-23, 163 P.3d at 424. However, this court will not set aside an erroneous dismissal if the error is harmless. *See* NRCP 61; *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 7, 953 P.2d 24, 27-28 (1998) (concluding that the erroneous dismissal of the plaintiffs' strict liability claim was not harmless under NRCP 61).

Barbara argues the district court erred by ruling that NRS 568.350, does not create a private cause of action regarding cattle rustling. Next, Barbara contends she submitted sufficient evidence to defeat judgment as a matter of law on her civil conspiracy claim. Finally, Barbara submits that her fraud/misrepresentation claim alleged fraud relating to the cattle sale and was not limited to the sale of hay and thus improperly dismissed.

We conclude that it is unnecessary to determine whether the district court erred by dismissing these two claims asserted by Barbara for lack of evidence because any such error is harmless in light of the jury's verdict rejecting Barbara's conversion claim.[4] Assuming *arguendo* NRS

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[4]Barbara also contends that she is entitled to a new trial on her conversion and unjust enrichment claims as the jury must have disregarded the jury instructions in order to render a defense verdict. Having carefully reviewed the record, we conclude the district court did

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568.350 creates a private cause of action, the district court's error would be harmless because the defense verdict on Barbara's conversion claim necessarily implies that it would have also rejected her civil remedy provided by NRS 568.350. Because the jury found that Honorine did not "wrongfully exert" a "distinct act of dominion" over the cattle so as to establish a conversion, it follows that there was insufficient evidence showing that Honorine 'remove[d]' the property, for the purposes of proving the elements of NRS 568.350. *See* NRS 568.350(1) (providing that it is unlawful to remove any animal that is the property of another person from the range on which it is permitted to run in common); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)). Accordingly, even assuming the dismissal was erroneous, it was harmless under NRCP 61. *See* NRCP 61 (the court must disregard any error that does not affect the substantial rights of the parties); *Maduike*, 114 Nev. at 7, 953 P.2d at 27-28 (applying NRCP 61 to an involuntary dismissal).

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not abuse its discretion in denying her request for a new trial. *See Nelson*, 123 Nev. at 223, 163 P.3d at 425 (noting that this court reviews the denial of a motion for a new trial for abuse of discretion). Here, substantial evidence supports a finding that Honorine became a partner in a new partnership and was holding the proceeds from the sale of cattle in trust. *See Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (holding that an appellate court will uphold a jury's determination if the decision is supported by substantial evidence); *cf. Dieleman v. Sendlein*, 99 Nev. 768, 769, 670 P.2d 578, 579 (1983) (holding that the question of whether an oral partnership was created is a question of fact). Accordingly, the jury may have concluded that Honorine was not unjustly enriched as substantial evidence showed that she deposited the proceeds of the cattle sale in a related probate account and never spent the partnership's assets.

Next, assuming the district court erroneously dismissed the civil conspiracy claim, this dismissal was harmless in light of the jury's verdict. To prevail on her civil conspiracy claim, Barbara must show the respondents had an agreement "to accomplish an unlawful objective[.]" *Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). However, as the jury rejected the conversion claim, it would have also found that respondents did not make an unlawful agreement for the purposes of Barbara's conspiracy claim. Specifically, to prove a conspiracy, Barbara must demonstrate that respondents agreed to commit an unlawful act, namely the theft of partnership cattle. However, as the jury found that Honorine did not convert the cattle, the jury implicitly rejected the *objective* of the civil conspiracy Barbara alleged. *See Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP*, 356 P.3d 121, 135 (Or. App. 2015) (recognizing the erroneous grant of a directed verdict does not require reversal when "the verdict on claims that were submitted to the jury demonstrates that the jury necessarily would have rejected one or more elements of the claim that was taken away from it"), *review denied*, 370 P.3d 502 (Or. 2016).

The district court did not err by granting judgment as a matter of law on Barbara's fraudulent misrepresentation claim

In the complaint, Barbara alleged that Jack fraudulently induced them to sell hay for below market value based upon his misrepresentation regarding the number of partnership cattle. However, Barbara's counsel conceded before the district court that Barbara presented no evidence of damages. Accordingly, we conclude the district court did not err by granting judgment as a matter of law on the fraudulent misrepresentation claim. *See Bulbman, Inc. v. Nevada Bell*,

108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (noting a fraud claim requires damage to the plaintiff).

Barbara argues that the district court erred by concluding that the fraudulent misrepresentation claim did not include the allegations relating to the concealment of partnership cattle. Having reviewed the complaint, we conclude that the fraudulent misrepresentation claims regarding the concealment of cattle were not actually pled in light of the particularity requirement, and thus the district court did not err in rejecting Barbara's argument. *See* NRCP 9(b) (requiring that fraud claims be pled with particularity).

Finally, because Barbara failed to include the parties' opening statements on appeal, or proper hearing transcripts, we cannot conclude that the district court abused its discretion by refusing to amend the fraudulent misrepresentation claim to include partnership cattle. *See Connell v. Carl's Air Conditioning*, 97 Nev. 436, 439, 634 P.2d 673, 675 (1981) (reviewing a decision to deny a motion to amend the pleadings for abuse of discretion); NRCP 15(b) (issues not raised by the pleadings may be tried with the implied consent of the parties); *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 11340 (1979) (holding an issue is tried by implied consent when the issue is raised in an opening argument and opposing counsel "specifically referred to the matter as an issue in the case[.]").

The district court erred by granting judgment as a matter of law regarding Honorine's breach of fiduciary duty claim

This court reviews a grant of judgment as a matter of law pursuant to NRCP 50(b) de novo. *Nelson*, 123 Nev. at 223, 163 P.3d at 425. "To establish entitlement to judgment as a matter of law, defendant

need only negate one element of plaintiff's case[.]" *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997). Further, "[t]his court will affirm a damages award that is supported by substantial evidence." *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010). Although damages need not be proved with "mathematical exactitude," the plaintiff must still provide "an evidentiary basis for determining a reasonably accurate amount of damages." *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co. Inc.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989).

The jury found in favor of Honorine on her breach of fiduciary duty counterclaim and awarded $8,500.00 in damages. Finding that the damage award bore no logical relation to the evidence presented at trial, the district court granted Barbara's renewed motion for judgment as a matter of law. Honorine, however, presented evidence that on the same day she requested an accounting of partnership assets, Barbara removed approximately $8,000.00 from the partnership checking account and ultimately placed it in a private account. We conclude that such evidence, along with other evidence, provided a sufficient basis for the jury award.[5] Accordingly, we reverse the order of the district court and order the court reinstate the jury award of $8,500.00

Barbara is entitled to a new trial on Honorine's conversion counterclaim

"The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not

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[5]We are sympathetic to the district court as the parties failed to direct the court's attention to this particular evidence. However, after engaging in our own review of the record, we have determined that the jury could have relied on such evidence in deciding a damage award.

disturb that decision absent palpable abuse." *Nelson*, 123 Nev. at 223, 163 P.3d at 424-25 (footnote omitted) (quoting *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1026, 923 P.2d 569, 576 (1996)) (internal quotation marks omitted). This court "review[s] de novo the claimed error that a proffered instruction is an incorrect statement of the law." *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008) (footnote omitted). This court will not reverse a verdict based on an incorrect statement of law in the jury instructions unless the error was prejudicial. *Id.* at 1006, 194 P.3d at 1219. To establish prejudicial error, the complaining party must demonstrate that, "but for the error, a different result might have been reached." *Id.* (footnote omitted).

Here, Honorine's counterclaim centered on the ownership of a savings account. Honorine contended, and the jury apparently agreed, that the account was a partnership asset and Barbara wrongfully converted the funds. Barbara argued that the account was not a partnership asset and, because it was labeled a "JT-OR" account, it was a joint tenancy account with a right of survivorship. Further, because Barbara was the last surviving signor, she contended that she received the account by operation of law and did not convert it. Barbara requested a jury instruction that would have established that the rebuttable presumption of joint tenancy applied to the account and that this presumption could be rebutted by only clear and convincing evidence. The district court rejected the instruction after finding the presumption did not apply. Therefore, the jury was never instructed that the presumption might apply, nor were the jurors ever instructed on the clear and convincing evidentiary standard.

In denying Barbara's motion for a new trial, the district court relied on *Starr v. Rousselet*, which held that "a simple reference to a 'joint' account and to joint access or control on a bank signature card will not suffice for purposes of establishing a joint tenancy under NRS 100.085[(1)]." 110 Nev. 706, 712, 877 P.2d 525, 530 (1994) (footnote omitted). The district court reasoned that labeling an account "JT-OR" was insufficient to invoke the presumption of joint tenancy under NRS 100.085(1), and thus it was unnecessary to give the clear and convincing instruction.[6]

The district court, however, failed to recognize that *Starr* was explicitly rejected by the Nevada Legislature in 1995. *See* Legislative Counsel's Digest, 68th Leg., S.B. 424 (1995) (noting the Legislature found *Starr* to be "contrary to the traditional creation of a joint tenancy [account]"). In response to the *Starr* decision, the Legislature added NRS 100.085(4) which holds that labeling an account a joint account indicates that the depositor(s) intended the account be held in joint tenancy. *See* NRS 100.085(4).

We need not determine under these facts whether the statutory presumption applies when parties label an account with an abbreviation. Here, the jury should have been instructed that if it determined "JT" was an abbreviation for joint tenancy, Honorine was required to demonstrate, by clear and convincing evidence, that the

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[6]The presumption of joint tenancy created by an instrument that purports to create an interest "in the form of joint tenancy" may be rebutted by only clear and convincing evidence. *Graham v. Graham*, 104 Nev. 472, 474, 760 P.2d 772, 773 (1988).

signors did not intend the account to be a joint tenancy account. *See* NRS 47.070.

Honorine contends that while a court may "surmise" that "JT" stands for joint tenancy, using an abbreviation is insufficient to trigger the statutory presumption. Honorine fails to support this argument with relevant authority and thus we need not address it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 331 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding this court need not address arguments unsupported by relevant authority). Further, the parties failed to present any evidence relating to banking procedures. This court is cognizant of the fact that the Legislature overturned *Starr* in part, because the decision failed to consider standard banking procedures and had "shocked" the banking industry by rendering existing signature cards obsolete. *See Revises Provisions Governing Deposits Held in Joint Tenancy*: Hearing on S.B. 424 Before the S. Comm. on Judiciary, 1995 Leg., 68th Sess. (Nev., May 5, 1995) (statements of Mr. Sande, Senator Adler, and Mr. Wehking). Thus, we are reluctant to accept the argument advanced by Honorine as doing so could significantly impact the banking industry, she failed to present relevant authority requiring this court do so, and the statute on its face identifies non-exclusive methods for creating joint tenancy accounts.

The district court committed reversible error by refusing to issue Barbara's proposed instruction or a similar alternative one and abused its discretion by failing to grant Barbara a new trial. The district court found that even if it had erroneously refused to issue the instruction, such error was harmless in light of the substantial evidence presented. Nonetheless, the district court abused its discretion as this court is unable to conclude that the evidence supporting the verdict was sufficient to

render the error harmless. The jury was confronted with a case in which each side presented substantial evidence in support of its position.

Further, the uncontroverted evidence shows that unlike the partnership's checking account, the disputed savings account was not titled in the partnership's name but remained under the siblings' individual names. While the partnership's accountant testified that the partnership paid the income tax for the interest earned on the savings account, Barbara contended that this was because the partnership benefited from loans that the siblings provided from the savings account. Finally, Barbara demonstrated that she was added as a signor to the account nearly two years before becoming a partner in Pedroli Ranches. Based upon this evidence, we conclude that "but for the error, a different result might have been reached." *Cook*, 124 Nev. at 1006, 194 P.3d at 1219 (footnote omitted).[7]

As this case was procedurally complicated, and to ensure clarity, on remand the district court is to reinstate the jury award of $8,500.00 for Honorine's breach of fiduciary duty counterclaim. The district court is also instructed to set a new trial on Honorine's conversion

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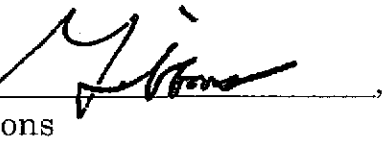
[7]Barbara additionally contends that she is entitled to judgment as a matter of law on Honorine's conversion counterclaim as the account is labeled a "JT-OR" account. We reject this claim as labeling an account a joint account creates a *rebuttable* presumption of joint tenancy. *See Graham*, 104 Nev. at 474, 760 P.2d at 773 (holding that the joint tenancy presumption is rebuttable). As discussed in this order, there is conflicting evidence regarding the ownership of the account. Accordingly, Barbara is not entitled to judgment as a matter of law because taking all evidence in a light most favorable to Honorine, there is sufficient evidence to rebut the presumption. *Nelson*, 123 Nev. at 222, 163 P.3d at 424.

counterclaim only. All other appealed orders of the district court are affirmed. Accordingly, we

ORDER the judgment of the district court AFFIRMED in part, REVERSED in part, and REMANDED.[8]

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., concurring:

I concur in the judgment in all respects except as to Barbara's fraud claim, where I agree with my colleagues' disposition of the issue but based upon somewhat different reasons than those cited in the principal order.

I.

This case presents a heifer of a problem. The meat of the appellant's complaint asserts that, in connection with winding up a family partnership involving Pedroli Ranch and its assets, the appellant (Barbara) directed the respondents (Honorine and Jack) to lasso up the ranch's 76 head of cattle and herd them to market. But when the appellant saw the profits from the sale, she didn't exactly jump over the moon but instead has a beef with how things turned out: she claims that

[8]We have considered all other arguments raised on appeal and conclude that they are unpersuasive.

the respondents unfairly milked the opportunity beyond its worth and hornswoggled her out of 53 head which they sold on their own for $28,000 before trying to hoof it out of town without sharing the proceeds.

The respondents, not wanting to be branded as desperados, say that the allegations are bull and make a lot of hay over nothing because it's common to miss some cattle during round-ups out on the open range. But, this not being the appellant's first rodeo, she contends that, while respondents can claim honest mistake until the cows come home, missing nearly 70% of the herd seems unlikely, if not udderly dishonest. So, the appellant prodded herself to action, took the bull by the horns, and stampeded down to the county courthouse to file her complaint for conversion; violation of NRS 568.350; fraud/misrepresentation; interference with business expectancy; civil conspiracy; unjust enrichment; agency; accounting; and injunctive relief.

II.

Bovine humor aside, I'm of a mind that the question whether Barbara's fraud claim was tried "by consent" to include the sale of cattle, and not merely hay, is considerably closer than my colleagues think. Whatever the complaint originally said about the fraud, the plaintiff's pre-trial statement pretty clearly defines the fraud as cattle-driven ("Plaintiffs allege that Defendants committed fraud by intentionally misrepresenting the true number of cattle that existed . . . the partnership's damages are the value of the cattle that were sold").

Including a matter within a pre-trial statement, especially when done without objection, is usually considered pretty strong evidence that the matter's now in the case "by consent"; several published cases consider it important whether the matter was framed within the pre-trial

statement. *See City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 755 n. 12, 191 P.3d 1178 n. 12 (2008) (matters are waived and not tried by consent when not raised in "any pleadings or any other papers filed with the court, including its answer, pretrial statement, or post-trial brief," *citing Idaho Resources, Inc. v. Freeport-McMoran Gold Co.*, 110 Nev. 459, 461, 874 P.2d 742, 743 (1994)); *Sprouse v. Wentz*, 105 Nev. 597, 603, 781 P.2d 1136, 1139 (1989) (claim was not tried by consent when it was not raised in motions or the pre-trial statement).

In *Elliot v. Resnick*, 114 Nev. 25, 30, 952 P.2d 961, 964-65 (1998), the Nevada Supreme Court came very close to holding that a matter is automatically tried by consent if it's outlined the pre-trial statement without objection even if it's mentioned nowhere else in the case ("Elliot first raised the illegality issue in a pre-trial memorandum, and Resnick did not object to its contents"); but then blurred this conclusion by going on to say that "in addition" both parties also referred to it during the trial. *Id.* In any event, there's more to the question of whether Barbara's fraud claim was "tried by consent" than first meets the eye.

But in the end it makes no difference to the ultimate outcome of this appeal because there's a causation problem in Barbara's claim: she can't identify any damages particularly arising from the fraud she alleges to have been victimized by. She calculates her damages to be the sale price of the 53 head of cattle wrongfully taken, but those damages logically arise from the taking of the cattle itself and not from the *concealment* of the taking of the cattle. She also can't quite identify how she relied upon (i.e. changed her position in response to) the concealment, or how her asserted damages arise from that reliance. The only changes in position that she identifies in her pre-trial statement are that, in reliance upon the

belief that all cattle had been sold, she placed grazing permits into non-use status and eventually sold hay to Jack instead of selling it on the open market. But how all of this pencils out to monetary damages equal to the total value of the 53 head of cattle is where her claim falls apart; from what I can see in the record, she proved no real injury proximately arising from reclassifying the grazing permits or selling hay to Jack rather than someone else.

Accordingly, I agree that the district court did not err in disposing of Barbara's fraud claim under NRCP 50, but for different reasons than employed by my colleagues.

Tao, J.
Tao

cc: Presiding Judge, The Sixth Judicial District Court
Hon. Robert E. Estes, Senior Judge
Lansford W. Levitt, Settlement Judge
Holland & Hart LLP/Reno
Snell & Wilmer, LLP/Reno
Humboldt County Clerk