RENDERED: JUNE 28, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000079-MR

THOMAS O. EIFLER, SR. — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 09-CI-001166

ARDIS E. GREENAMYER, II,
EIFLER TOWER CRANE CO., LLC,
AMERICAN ERECTORS CO., LLC,
EIFLER CONSTRUCTION HOIST
CO., LLC, EIFLER CRANE &
HOIST PROPERTIES LLC #2, EIFLER
TOWER CRANE & HOIST CO., LLC, and
THOMAS O. EIFLER, JR. — APPELLEES

AND NO. 2017-CA-000434-MR

THOMAS O. EIFLER, JR. — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 09-CI-001166

ARDIS E. GREENAMYER, II,
EIFLER TOWER CRANE CO., LLC,
AMERICAN ERECTORS CO., LLC,
EIFLER CONSTRUCTION HOIST
CO., LLC, EIFLER CRANE &
HOIST PROPERTIES LLC #2, EIFLER
TOWER CRANE & HOIST CO., LLC, and
THOMAS O. EIFLER, SR. APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.[1]

GOODWINE, JUDGE: Thomas Eifler, Sr. and Thomas Eifler, Jr.[2] separately appeal a judgment of the Jefferson Circuit Court[3] awarding Ardis Greenamyer, II, ("Greenamyer"), a multi-million-dollar jury verdict. After careful review of the voluminous record and applicable law, we affirm in part, reverse in part, and remand with instructions to dismiss Greenamyer's claims, except promissory estoppel and unjust enrichment against Jr., which may be retried.

[1] This case was originally assigned to another panel of this Court, which heard oral arguments on July 12, 2018. The presiding judge of that panel is no longer on the Court. Consequently, the case was administratively reassigned to this June 2019 panel. We have reviewed the oral arguments, but otherwise considered the appeals without input from the prior panel.

[2] To avoid confusion, and with no disrespect intended, we refer to Thomas Eifler, Sr. as "Sr." and Thomas Eifler, Jr. as "Jr."

[3] The trial court entered one judgment against the Eiflers. (R. at 1435).

BACKGROUND

Former schoolmates, Jr. and Greenamyer, flew helicopters in New Orleans in the aftermath of Hurricane Katrina. According to Greenamyer, seeing the devastation, and knowing the area would need to be extensively rebuilt, led them to discuss a crane and hoist joint venture. Those discussions culminated in each signing[4] a handwritten, one-page business agreement on April 9, 2006. It provided:

> It is our intention to form a crane & hoist rental companies [sic] that will eventually transfer ownership completely to Ardie [Greenamyer] after certain legal issues are resolved. This is to protect Tom [Jr.].
>
> To provide assurance against Tom's fear that Ardie will abandon the companies, both agree Tom will maintain company books & accounts, however both will have equal authority in all decisions. Tom will hold stock until transfer to Ardie within 5 years anticipated.
>
> To further protect Tom from Ardie's potential legal issues, & to protect Ardie & Tom's estate from family matters possible from divorce, Tom agrees to form a trust to protect & isolate all company assets from possible litigation.
>
> The companies & trust will be 50/50 between Tom & Ardie. Since Tom will be doing very little work & has other income, & Ardie's work will be extensive, the companies will pay Ardie when companies are functioning well.

[4] Jr. argued before the trial court that his purported signature on the agreement is not genuine. However, we are not asked to address its authenticity.

> Both Tom & Ardie agree this agreement will be kept private unless disagreemend [sic] arises or Ardie's death.

(R. at 29).

Greenamyer contends after signing the agreement, he began obtaining equipment and jobs for the fledgling companies, while Jr. continued to work as a financial advisor, participating only minimally in the crane and hoist enterprises. Greenamyer asserts the companies quickly became successful, but he received no salary or ownership interest in the companies for his efforts.

Meanwhile, Jr. created a Delaware Dynasty Trust, which came to "own" the several crane and hoist companies. It is unclear how, or when, the trust gained control of the companies, but no one disputes that it did. The trust lists Sr. as the grantor, Jr. as the investment advisor, and the Commonwealth Trust Company as the trustee. The only mention of Greenamyer in the trust is a curious clause giving Jr.'s sister a "special power of appointment" to "donate" up to "50% of the total equity ownership" in "business assets" owned by the trust to Greenamyer. (R. at 72). In other words, the trust does not facially mandate that Greenamyer be deemed an owner of the crane and hoist entities.

The relationship between Jr. and Greenamyer deteriorated over time, including accusations by Greenamyer that Jr. misused company funds. Ultimately, Greenamyer filed a *pro se* complaint in February 2009 against Jr., Sr., and the five

related crane and hoist companies, among others. Greenamyer's complaint contained five enumerated counts: (1) a request for a declaration that he owned 50% of the crane and hoist companies at issue; (2) breach of fiduciary duties by Jr.; (3) aiding and abetting by Sr. of Jr.'s breach of fiduciary duties; (4) compensation and reimbursement for work performed on behalf of the companies; and (5) punitive damages. The Eiflers filed a joint answer in March 2009.

In July 2009, without having first sought leave of court, Greenamyer, through counsel, filed an amended complaint.[5] It contains no factual background. Instead, it merely incorporates, by reference, the entirety of the original complaint, before setting forth nine claims for relief: (1) breach of contract; (2) promissory estoppel; (3) fraud; (4) quantum meruit;[6] (5) conversion; (6) wage and hour claims under Kentucky Revised Statutes (KRS) Chapter 337; (7) breach of fiduciary duty; (8) tortious interference with contractual and prospective contractual relationships; and (9) punitive damages.

[5] Because the Eiflers filed an answer, Greenamyer needed leave of court or the Eiflers' consent to file an amended complaint. *See* Kentucky Rule of Civil Procedure (CR) 15.01. Because Greenamyer obtained neither, the amended complaint was unauthorized. However, the Eiflers waived the irregularity when they failed to object. Regardless, the trial court ratified the unauthorized pleading by issuing a judgment pursuant to it. *Roadrunner Mining, Engineering & Development Co., Inc. v. Bank Josephine*, 558 S.W.2d 597, 598-599 (Ky. 1977).

[6] Greenamyer abandoned the quantum meruit claim at trial. However, the trial court instructed the jury on his claim of promissory estoppel (R. at 1267) and unjust enrichment (R. at 1268).

Of special relevance to these appeals is the fraud claim. That remarkably terse cause of action provides:

> 11. Plaintiff incorporates by reference, as set forth fully herein, each and every averment, allegation, or statement contained in the previous paragraphs of this Amended Complaint and the 117 paragraphs of the original Complaint.
>
> 12. Because Thomas Eifler, Jr. and the Eifler Defendants are now taking the position that the Plaintiff is not a 50% owner of the Eifler Entities, the Eifler Defendants have committed a fraud upon the Plaintiff by getting him to perform work and provide other contributions to the Eifler Entities for no compensation, no ownership interest or anything else of value.
>
> 13. The Plaintiff has been damaged by the Eifler Defendants' actions.

(R. at 405-06).

Sr. is mentioned by name in only one sentence of the body of the amended complaint. That sentence asserts Sr. "aided and abetted Eifler, Jr. in his breach of fiduciary duties owed to [Greenamyer] by his involvement in the scheme to deprive [Greenamyer] of his rightful ownership interest in the Eifler Entities and the failure to pay [Greenamyer] any compensation for his contributions to the Eifler Defendants." (R. at 407).

The case laboriously proceeded, eventually reaching a jury trial in June 2016. The court granted a directed verdict on multiple counts[7] and then submitted the following claims to the jury: (1) breach of written contract against Jr., (2) promissory estoppel against Jr., (3) unjust enrichment against Jr., (4) tortious interference with contract against Sr., accompanied by a punitive damages instruction; (5) tortious interference with prospective contractual rights against Sr., accompanied by a punitive damages instruction; (6) fraudulent misrepresentation against Jr., accompanied by a punitive damages instruction; (7) aiding and abetting fraud against Sr.,[8] accompanied by a punitive damages instruction; and (8) civil conspiracy against Jr. and Sr.

The jury awarded Greenamyer $5,660,000 in compensatory damages, as follows: (1) $2,800,000 against Jr. for breach of contract;[9] (2) $572,000 against Sr. for tortious interference with a contract; (3) $572,000 against Sr. for tortious interference with prospective contractual rights; (4) $572,000 against Jr. for fraudulent misrepresentation; (5) $572,000 against Sr. for aiding and abetting

[7] Greenamyer has not filed a cross-appeal regarding any directed verdict rulings.

[8] The trial court originally granted a directed verdict on the aiding and abetting claim but, with minimal explanation, later changed its mind.

[9] Greenamyer abandoned his breach of oral contract claims against Jr. and the trial court instructed the jury to not address the promissory estoppel and unjust enrichment claims if it found in favor of Greenamyer on the breach of contract claim.

fraud; and (6) $572,000 jointly against Jr. and Sr. for civil conspiracy.[10] The jury also awarded Greenamyer $750,000 in punitive damages against Sr. for tortious interference with contract and $5,000,000 against Jr. and $2,000,000 against Sr. for fraud. After the trial court substantively denied their motions for judgment notwithstanding the verdict, Jr. and Sr. filed these separate appeals, which we resolve in this combined opinion.

ANALYSIS

A. Breach of Contract and Related Claims

Because it impacts many other aspects of the jury's verdict, we begin by explaining why we conclude the one-page handwritten agreement is too indefinite to be an enforceable contract. "Not every agreement or understanding rises to the level of a legally enforceable contract." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). The "fundamental elements of a valid contract are offer and acceptance, full and complete terms, and consideration." *Energy Home, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013) (quotation marks and citation omitted). Terms are "full and complete" if they are

[10] For reasons unknown, counsel struggled to explain with complete precision at oral argument, the jury instructions capped the compensatory damages at $5,660,000, which was the exact amount of the jury award. No party attacks that cap here and so we decline to sift through the voluminous record to ascertain its origin or determine its propriety.

"definite and certain and . . . set forth the promises of performance to be rendered by each party." *Id.* (quotation marks and citation omitted).

Jr. and Greenamyer are sophisticated businessmen. Yet, the agreement between them leaves many more questions asked than answered. For example, the vague terms of the terse document do not answer any of the following illustrative questions:

1. When are the joint entities (or singular entity, since the agreement confusingly uses both the plural "companies" and singular "company") going to be created?

2. What legal form will it/they take (LLC? Partnership? Corporation?)?

3. By what deadline will full ownership be transferred to Greenamyer?[11]

4. Why is full ownership being transferred to Greenamyer (*i.e.*, why is Jr. involved only until the companies begin to flourish)?

5. What price, if any, would Greenamyer have to pay to obtain Jr.'s ownership interest?

6. What "certain legal issues" must be resolved before Greenamyer receives full ownership?[12]

7. What specific duties must each party perform for the joint entities?

[11] The agreement only indefinitely states that "stock" will be transferred to Greenamyer "within 5 years anticipated."

[12] Because it is unnecessary to the resolution of these appeals, we decline to address whether the agreement improperly attempts to shield/hide assets from potential creditors or spouses.

8. If Jr. and Greenamyer each possess "full authority" to make all decisions, how would any disagreements between them be resolved?

9. What are Greenamyer's "potential legal issues" from which Jr. needs protection?

10. What specific type/form of trust was Jr. required to create? What role, if any, would Greenamyer hold in that trust?

11. Did Greenamyer have any ability to dictate, or veto, the terms of the Trust?

12. Why was the agreement to be kept private?

13. How could a secret agreement provide a basis for either Greenamyer or Jr. to perform essential business tasks, such as hiring employees and determining their salaries, acquiring assets or borrowing money?

14. Since the agreement would be kept private, would Greenamyer or Jr. not be listed as an owner or member on any articles of incorporation, bylaws, etc.?

15. What salary would Greenamyer receive once the entities are "functioning well?"

16. Would that salary include back pay for work performed before the entities began to "function[] well?"

17. How would it be determined when the entities are "functioning well" and who would make that determination?

18. Is the transfer of full ownership to Greenamyer conditioned on the entities "functioning well?"

An agreement that contains far more crucial questions than answers is not definite and certain enough to be a legally enforceable contract. Thus, the trial

court erred by submitting the breach of contract claim to the jury because Jr. could not be liable for allegedly breaching a legally nonexistent contract. Consequently, the jury's related award of compensatory damages for Sr.'s alleged interference with a contract must also be reversed, since one of the elements of interfering with a contract is, unsurprisingly, the existence of a contract. *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5 (Ky. App. 2012). In turn, the jury's award of punitive damages for Sr.'s interference with a contract must also be reversed.[13]

Similarly, the trial court erred in not granting a JNOV to Sr. on the interference with prospective contract claim. "Tortious interference with a prospective business advantage does not require the existence of a contract." *Id.* at 6. Instead, it requires "(1) the existence of a valid business relationship or expectancy; (2) that [Sr.] was aware of this relationship or expectancy; (3) that [Sr.] intentionally interfered; (4) that the motive behind the interference was improper; (5) causation; and (6) special damages." *Id.* The "analysis turns primarily on motive" and Greenamyer, thus, was required to "show malice or some significantly wrongful conduct." *Id.* (quotation marks and citations omitted).

[13] The punitive damage awards would be reversed even if the contract was valid and enforceable. *See Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018) (punitive damages are not ordinarily recoverable in breach of contract claims). Moreover, the punitive damages' instructions did not contain the requisite "clear and convincing" language, the omission of which amounts to reversible error.

When reviewing the denial of a directed verdict we must "take as true" the evidence which "favors the prevailing party" and give that party "all reasonable inferences which may be drawn from the evidence." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

Greenamyer's interference with prospective contract claim fails because he points to no specific prospective business relationship/contract, which Sr. impaired or harmed. Sr. cannot be liable for non-specifically impairing an unspecified future business relationship, which caused Greenamyer to suffer unspecified damages. Indeed, Greenamyer points to no specific evidence showing Sr. was even cognizant of Greenamyer's future business relationships.

Greenamyer makes much of the uncontested fact that he was once ordered by Sr. to leave a building owned by Sr. in which the crane and hoist entities rented office space.[14] But Greenamyer has not shown how that ejection materially impacted his then-current or prospective business affairs. Indeed, Greenamyer admitted he later continued to work on behalf of the companies, and Sr. testified without contradiction that Greenamyer returned to the premises the next day. Thus, the trial court erred in instructing the jury on Greenamyer's interference with prospective contract claim.

[14] Sr. could not have removed Greenamyer from any role in the crane and hoist entities because, as Greenamyer admits, Sr. "had no formal responsibilities with the business . . . ." Appellee's Brief at 34.

B. Fraud and Related Claims

Turning to the fraud claims, we conclude Greenamyer's complaint(s) facially failed to satisfy the heightened pleading requirements of Kentucky Rule of Civil Procedure (CR) 9.02. That rule requires "all averments of fraud" to be "stated with particularity." CR 9.02 does not require a recitation of "each minute detail" but does require a recitation of "the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Scott v. Farmers State Bank*, 410 S.W.2d 717, 722 (Ky. 1966). Or, in other words, "[c]ompliance with the particularity required by CR 9.02 merely commands that the claimant set forth facts with sufficient particularity to apprise the defendant fairly of the charges against him or her." *Denzik v. Denzik*, 197 S.W.3d 108, 110 (Ky. 2006). Pleadings which do not satisfy those particularity requirements are "not cognizable." *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008). To show fraud in the inducement, a party "must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." *Bear, Inc. v. Smith*, 303 S.W.3d 137, 142 (Ky. App. 2010).

Against that formidable backdrop, Greenamyer's amended complaint is plainly lacking. It only substantively alleges Jr. committed fraud by "taking the

position" that Greenamyer is not the half-owner of the crane and hoist entities at issue—period. That scant allegation, devoid of all necessary detail, woefully fails to satisfy CR 9.02 because it lacks the requisite time, place and similar information.

Generally, an amended complaint serves to "supersede the original complaint." *Faller v. Goess-Saurau*, 490 S.W.3d 363, 366 (Ky. App. 2015). However, without objection, the amended complaint also incorporated by reference and re-averred the allegations in the original complaint. But that does not help Greenamyer here, since his original complaint did not contain a cause of action for fraud. Instead, that complaint only conclusorily asserted that Jr.'s alleged violation of his fiduciary duties was fraudulent. However, the trial court granted a directed verdict on the breach of fiduciary duty claims, so a breach of non-existent fiduciary duties cannot provide a basis for a fraud claim.

At trial, Greenamyer generally argued that Jr. committed fraud by inducing Greenamyer to enter into the "contract" while having no intention to honor its terms. Those allegations track the general elements of fraud in the inducement. *See, e.g., Major v. Christian County Livestock Market, Inc.*, 300 S.W.2d 246, 249 (Ky. 1957) ("One may commit 'fraud in the inducement' by making representations as to his future intentions when in fact he knew at the time

the representations were made he had no intention of carrying them out . . . .").[15] But the complaints do not contain well-pled fraud in the inducement counts.[16]

"A pleading is sufficient if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Denzik*, 197 S.W.3d at 110. Instead, the complaints here contain only "general assertions of fraud or fraudulent conduct" which "do not provide the notice that is required and are consequently insufficient to raise the question of fraud without supporting particularity." *Id.* at 111.

In addition, Greenamyer also points to no specific evidence showing the damages he suffered by relying upon Jr.'s alleged fraudulent promises. The amended complaint contains no specific damages Greenamyer suffered by allegedly relying upon the allegedly fraudulent promises. And Greenamyer points to no specific testimony or evidence at trial that specifies his damages. For

[15] Fraud in the inducement may lie for representations of future conduct made without an intent to carry out the representation(s) because the promise is conceptually premised upon the promisor's state of mind/intent when the promise was made—which is a present fact. *See* 26 *Williston on Contracts* § 69:11 (4th ed. 2018). Thus, Jr.'s argument to the contrary notwithstanding, fraud in the inducement is an "exception to the fraud rule involving misrepresentations as to future intentions." *Bear, Inc.*, 303 S.W.3d at 143-44.

[16] Counsel for the Eiflers did state in a directed verdict motion that Greenamyer had never previously advanced the theory that the Eiflers made promises with no intention of ever fulfilling them. Video, 6/6/16 at 4:50:52. Greenamyer did not formally move to conform his pleadings to the evidence. However, a failure to so move "does not affect the result of the trial" under CR 15.02. Our conclusion is based upon a failure to satisfy CR 9.02, not necessarily on Greenamyer's shifting theory at trial, unaccompanied by a motion to amend the pleadings at trial to conform with the evidence.

example, as Jr. notes in his brief, Greenamyer does not cite to the record to answer pertinent damages-based questions such as: "What business opportunities did Greenamyer lose or willingly forego because Eifler, Jr. promised to make him an owner of the Companies? What was the value of those opportunities? What salary could Greenamyer have earned elsewhere . . . ." Appellant Jr.'s Brief at 14. Indeed, the fact Greenamyer operated his own crane and hoist business, while also working for/with the Eifler hoist and crane businesses, considerably muddies the waters regarding whether Greenamyer suffered damages. The lack of proof of damages is a separate and independent reason the trial court erred by submitting the fraud claims to the jury. *Hardaway Management Co. v. Sutherland*, 977 S.W.2d 910, 917 (Ky. 1998) (holding that the "general rule" is "that fraud is actionable only if it results in damage to the complainant . . . ."); 37 Am. Jur. 2d *Fraud and Deceit* §263 (2019) ("Fraud, without damage, ordinarily gives no cause of action either at law or in equity, and if the evidence fails to show that the plaintiff suffered any damage under the applicable rules of law as to the measure of damages for fraud, the plaintiff cannot recover in an action for deceit.") (footnote omitted).[17]

[17] Though it was not the primary focus of their motion for directed verdict, counsel for the Eiflers stated Greenamyer failed to meet the heightened pleading requirements of CR 9.02. Video, 6/6/16 at 4:49:01 *et seq*.

Additionally, the trial court erred by permitting Greenamyer to seek damages from the jury for both breach of contract and fraud.[18] Under longstanding Kentucky precedent:

> one claiming to have been defrauded into making a contract has an option either to disaffirm the contract and seek its rescission or to affirm the contract and seek his remedy by an action for damages; he may not follow inconsistent remedies. He has but one election, and if he affirms the contract, his election is irrevocable and he condones the fraud.

Hampton v. Suter, 330 S.W.2d 402, 406 (Ky. 1959) (citation omitted). *See also RadioShack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007) ("Where an individual is induced to enter into the contract in reliance upon false representations, the person may maintain an action for a rescission of the contract or may affirm the contract and maintain an action for damages suffered on account of the fraud and deceit."). Therefore, though it was permissible for Greenamyer to plead breach of contract and fraud in the alternative, the trial court erred by submitting both claims to the jury. *See Nami Resources*, 554 S.W.3d 323, 336-37. *LV Ventures, LLC v. Schott*, 2011-CA-000473-MR, 2012 WL 5039235, at *4 (Ky. App. Oct. 19, 2012) ("An award of damages upon claims of both fraudulent inducement and breach of contract is clearly improper. However, a party may

[18] Though not a reversible error given our conclusion that the agreement was not a contract and the fraud allegations fail to satisfy CR 9.02.

alternatively plead both a fraudulent inducement claim and a breach of contract claim in his or her complaint; however, a party may not recover upon both claims.").

Because Greenamyer's fraud claims against Jr. failed to satisfy CR 9.02, the trial court should not have instructed the jury on the related aiding and abetting fraud claim against Sr.[19] Similarly, the punitive damage awards for fraud and aiding and abetting fraud must be reversed.

C. Civil Conspiracy

The jury's award for civil conspiracy must also be reversed. Civil conspiracy is "a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co., LLC*, 277 S.W.3d 255, 261 (Ky. App. 2008) (quotation marks and citation omitted). However, "civil conspiracy is not a free-standing claim; rather, it merely

[19] In addition, there is no indication that Sr. made promises about future conduct to aid Jr. in fraudulently inducing Greenamyer to sign the agreement at issue. Indeed, it is uncontested that Sr. was not present when the agreement was made, and the agreement states that it is to be kept secret. Moreover, neither complaint contains an aiding and abetting fraud claim against Sr. The only aiding and abetting claim was for aiding and abetting breach of fiduciary duty in the original complaint, but the underlying breach of fiduciary duty claim against Jr. did not survive the directed verdict stage. How was Sr. fairly apprised of the aiding and abetting fraud claim such that he could have prepared an adequate answer when that claim first appeared in Greenamyer's pretrial memorandum? In short, even if the fraud claims against Jr. were somehow deemed sufficient to be submitted to a jury, the aiding and abetting fraud claim against Sr. was independently, fatally flawed.

provides a theory under which a plaintiff may recover from multiple defendants for an underlying tort." *Stonestreet Farm, LLC v. Buckram Oak Holdings, N.V.*, 2008-CA-002389-MR, 2010 WL 2696278, at *13 (Ky. App. July 9, 2010) (citing *Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79, 184 S.W.2d 887, 888 (1945)).[20] In addition, Greenamyer did not raise a civil conspiracy claim in either complaint. The trial court erred by submitting a freestanding civil conspiracy claim to the jury, and its award of damages for that claim is reversed.

D. Other Alleged Errors Which May Reoccur on Remand

We briefly address some issues raised by the Eiflers, which do not impact the result of these appeals but may reoccur on remand. First, the trial court instructed the jury to not address Greenamyer's claims for promissory estoppel and unjust enrichment, if they found for Greenamyer on the breach of contract claim. No party takes issue with the trial court's approach to those two claims. Thus, we affirm as to those claims, which remain viable for retrial on remand.

The trial court erred in permitting Greenamyer to introduce a newspaper article in which Jr. referred to Greenamyer as his "partner." First, the

[20] CR 76.28(4)(c) permits citation to unpublished opinions "if there is no published opinion that would adequately address the issue before the court." We conclude this is such a situation. In so concluding, we break no new ground as *Stonestreet Farm* has been cited over thirty times in various courts, especially federal courts, for the proposition that there is no freestanding civil conspiracy tort in Kentucky. We recently explicitly held that civil conspiracy is not a freestanding claim in a "to be published" opinion which is not yet final. *Dickson v. Shook,* No. 2017-CA-000023-MR and 2017-CA-001115-MR, 2019 WL 1412497 at p. 45 (Ky. App. March 29, 2019).

term partner has different meanings in different contexts, not all of which invariably conform to the legal meaning of someone who shares ownership of an entity. *See, e.g.*, *Ingram v. Deere*, 288 S.W.3d 886, 900 (Tex. 2009) ("The term 'partner' is regularly used in common vernacular and may be used in a variety of ways. Referring to a friend, employee, spouse, teammate, or fishing companion as a 'partner' in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership.") (citation omitted).[21] *Accord T.G. Plastics Trading Co. Inc. v. Toray Plastics (America), Inc.*, 958 F.Supp.2d 315, 327 (D.R.I. 2013) (" Use of the word 'partner' in the colloquial sense does not establish a legal partnership."). Second, longstanding precedent clearly holds that newspaper articles are inadmissible hearsay. *See, e.g.*, *Shirley v. Commonwealth*, 378 S.W.2d 816, 818 (Ky. 1964); *Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 342 (Ky. 2005).

Next, the trial court permitted the parties to elicit financial status testimony about the opposing party, contrary to longstanding prohibitions on such irrelevant, potentially prejudicial testimony. *See, e.g.*, *Walden v. Jones*, 289 Ky. 395, 158 S.W.2d 609, 612 (1942) ("There is no law applicable to the poor that is

[21] The trial court nonetheless permitted the jury to conclude Jr. committed fraud by, among other things, stating Greenamyer "was a partner in the Eifler Companies . . . ." (R. at 1274). The instructions did not define the term "partner." The jury could have premised liability upon Jr. colloquially referring to Greenamyer as his partner.

not likewise applicable to the rich, nor is any law applicable to the rich that is not likewise applicable to the poor, and an endeavor on the part of an attorney or litigant to inflame the minds of the jury by referring to the financial status of either of the parties is improper."). We need not determine whether the financial status testimony was prejudicial. Instead, we caution the trial court on remand to guard against permitting similar testimony.

We also agree with the Eiflers that the punitive damages instructions were fatally flawed. KRS 411.184(2) permits punitive damages to be awarded "only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Elevated evidentiary standards in civil cases must be included in jury instructions. *Hardin v. Savageau,* 906 S.W.2d 356, 358 (Ky. 1995). Nonetheless, the trial court's instructions here did not contain the "clear and convincing evidence" standard. Omitting that language was plainly erroneous.[22] On remand, any punitive damage instruction must require a finding based upon clear and

[22] We have expressly held, albeit in an unpublished opinion, that "because the statute specifically requires punitive damages to be proven by clear and convincing evidence, such language must be included in the jury instruction." *Harrod Concrete and Stone Co. v. Melton*, 2005-CA-001712-MR, 2007 WL 3121282, at *4 (Ky. App. Oct. 26, 2007). We cite to that unpublished case under CR 76.28(4)(c) only as a specific, relevant example of how the general rule set forth in *Hardin* should be implemented.

convincing evidence.[23] *See* 2 Palmore & Cetrulo, *Kentucky Instructions to Juries*, Civil § 39.15 (6th ed. 2017).

CONCLUSION

Based on the foregoing analysis, we affirm in part and reverse in part the judgment of the Jefferson Circuit Court. The case is remanded with instructions to dismiss all claims against Sr. and all claims against Jr. except promissory estoppel and unjust enrichment, which may be retried in accordance with the instructions set forth herein.

ALL CONCUR.

[23] Because the issue is not before us, we express no opinion on whether punitive damages are potentially appropriate for Greenamyer's promissory estoppel and unjust enrichment claims.

BRIEFS FOR APPELLANT
THOMAS EIFLER, JR.:

Kevin C. Burke
Jamie K. Neal
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLANT THOMAS
EIFLER, JR.:

Kevin C. Burke
Louisville, Kentucky

BRIEFS FOR APPELLANT
THOMAS EIFLER, SR.:

Frank P. Doheny, Jr.
Louisville, Kentucky

Michael P. Abate
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLANT THOMAS
EIFLER, SR.:

Michael P. Abate
Louisville, Kentucky

BRIEF FOR APPELLEE
ARDIS GREENAMYER, II:

Theodore W. Walton
Garry R. Adams
A. Pete Lay
Louisville, Kentucky

ORAL ARGUMENT FOR
APPELLEE ARDIS
GREENAMYER, II:

Theodore W. Walton
Louisville, Kentucky