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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1401

Michelle A. Krawczyk,
Respondent,

vs.

Gregory Scott Aberle, f/k/a Gregory Scott Peterson,
Appellant.

Filed July 26, 2021
Affirmed
Bratvold, Judge

Anoka County District Court
File No. 02-CV-16-6400

Daniel M. Eaton, Aaron D. Sampsel, Christensen Law Office PLLC, Minneapolis, Minnesota (for respondent)

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Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges a final judgment entered after a bench trial granting relief to respondent for breach of contract, breach of fiduciary duty, civil theft under Minn. Stat. § 604.14 (2020), and unjust enrichment, and awarding damages of $151,462. Appellant argues the district court erred by (1) determining that respondent commenced her claims

within the applicable statute of limitations; (2) denying appellant's motion for judgment as a matter of law (JMOL) on the civil-theft claim; and (3) determining that respondent prevailed on her unjust-enrichment claim when a contract governed the parties' relationship. Because the record supports the district court's determination that appellant's fraud tolled the statute of limitations for each claim, and because appellant is not entitled to JMOL on the civil-theft claim, we affirm. Because we determine that appellant's challenge to the district court's ruling on the unjust-enrichment claim was raised for the first time on appeal, and because appellant was not prejudiced by the ruling, we decline to decide this issue.

FACTS

The following summarizes the district court's written findings of fact and conclusions of law included in its 35-page decision. Respondent Michelle A. Krawczyk is a retired lieutenant colonel in the United States Army. She served for more than 20 years as an intelligence officer and liaison for the United States Defense Intelligence Agency to the United Kingdom. Appellant Gregory Scott Aberle is a self-taught investor. He formed InvestAnswers to provide advice and seminars on investing and to invest money on behalf of clients in exchange for a fee. He also wrote articles on investing and obtained a "Registered Financial Consultant" certificate, but this certificate required no classes, trainings, or exams.

In 2005, Krawczyk and Aberle met while she was on vacation. Krawczyk overheard Aberle give an interview and asked him about what he did. He told her "that he invested money in the stock market on behalf of others . . . and that his clients did not pay a

commission unless the investment "outperformed the S&P 500." Krawczyk believed Aberle "was competent and that he had the credentials to manage her money on her behalf and for her benefit." Krawczyk had "minimal" investment experience and relied on others to help her, including her ex-husband and her father.

Aberle and Krawczyk enter an investment agreement in 2005

In December 2005, Krawczyk deposited $50,000 with Aberle through InvestAnswers. Krawczyk and Aberle did not sign a written agreement; Krawczyk did not believe one was required, and Aberle did not provide one. Based on the evidence at trial, the district court found the terms of the parties' agreement—specifically finding that (1) Krawczyk and Aberle agreed to invest "Krawczyk's money in the stock market on her behalf and for her benefit," and (2) Krawczyk agreed to pay Aberle a commission if the rate of return on investment exceeded the S&P 500's performance. The district court also found that Krawczyk did *not* authorize Aberle to use her money "to his benefit," "to invest in land," or "to invest in [Aberle's] personal business operations." Aberle placed Krawczyk's money into an investment-club account that included money from other clients and from which Aberle made various trades on the stock market.

Aberle uses Krawczyk's money to redeem commercial property in 2008

In January 2008, Aberle took all the funds from the investment-club account, including Krawczyk's, to redeem his family's commercial property in Anoka County, where he and his family had operated an RV dealership (the property). In 2007, the property fell into foreclosure and was sold at a sheriff's sale, subject to redemption. Aberle and his uncle formed Northern Gaul Properties Inc. (NGP) to redeem the property.

Two weeks *after* NGP redeemed the property, Aberle sent Krawczyk an email stating that her investment funds were "on file with the accountant," and explaining that, in anticipation of an economic downturn, he had moved her money out of stocks to keep it "on the sidelines" until the market improved. The district court found that Aberle did not "mention that he used Ms. Krawczyk's money to redeem the Property."

In October 2008, Aberle sent Krawczyk a follow-up letter stating that her account balance was $51,260, and InvestAnswers would document her profits and losses when she made a withdrawal. The district court found that Aberle's letter "perpetuated Krawczyk's belief that her money was 'on the sidelines' . . . However, this was not the case [because] Aberle had already used her money to redeem his family's Property." The district court found that, because of Aberle's "material misstatements," Krawczyk "had no reason to believe in January 2008" that Aberle had acted "in contravention of their investment agreement or in breach of his fiduciary duty."

From 2008 to 2010, Krawczyk was deployed or relocated three times, so her primary method of communication with Aberle was email, and she had "very limited access to reliable internet." It was not unusual for Krawczyk "to go many months" without checking the status of her bank accounts and investments.

Aberle tells Krawczyk that her money is in bonds in 2010

On May 17, 2010, Krawczyk emailed Aberle asking for the current value of her investment and how she could make a withdrawal. Aberle responded that he had placed her "cash" and "all the smaller accounts" he had been managing into two-year bonds because of a "long-drawn out recession." Aberle stated that her account balance was down

to $49,200, but her account would "be close to $52,600" by June 2011. Aberle explained this was when the next bond "'cycle' comes up." He added, "If you want to cash any or all of it out, I will have to search out someone to take your place, or buy you out myself."

The district court found that Aberle's response to Krawczyk "misrepresented the status of Ms. Krawczyk's money" and did not mention the property even though he had used Krawczyk's money to redeem it two years earlier. The district court also found that Krawczyk's "money was never actually invested into any bonds."

Aberle tells Krawczyk about "the building" for the first time in March 2011

On March 1, 2011, Krawczyk emailed Aberle to tell him that she was moving and needed her money to buy a house. Krawczyk told Aberle to cash out the "bonds" when they came due in June 2011. Aberle responded the same day, "The funds have been rolled over back into the *building* again. . . . So, what I will have to do is to try and find someone to replace your position and see if I can get it all back to you by the Summer." (Emphasis added.) The district court found Krawczyk "credibly testified" that she was confused and that Aberle's March 1, 2011 email was the first time he told her about a "building."

On March 2, 2011, Krawczyk emailed Aberle again asking for clarification, saying she was "confused and worried at this point." On March 10, Aberle responded that he had put her money and his own money into a building because it was "supposed to be a no-brainer," but then the bank withdrew financing for the prospective buyer. Aberle explained, "Without another investor or a sale, there is no way to get the cash out of the building. What was a short-term investment turned into a long-term one simply because I cannot yet find a buyer." Aberle provided details about the property and its appraised value

over the last four years, and stated he was "not worried about losing anything on it. [He was] mostly concerned with the timeliness."

The district court found that, throughout their March 2011 communications, Aberle did not disclose to Krawczyk "when, or how, he actually acquired the Property" and that Aberle did not mention the redemption or his family's former ownership. The district court also determined that Aberle's purchase of the property "was inconsistent with their investment agreement" and that "the full extent of how Mr. Aberle had used Ms. Krawczyk's money was unknown to her."

Aberle transfers the property in 2011 and does not tell Krawczyk

On March 14, 2011, Krawczyk told Aberle that "when[ever] he was able to sell the property, she needed her money." In May 2011, NGP sold the property to a new company, Aberle Holdings Inc., of which Aberle was the sole owner. The sale paid off Aberle's uncle's interest in the property. In May 2012, Krawczyk asked Aberle for an update, and he responded that he "had the building sold" but the city "intervened." Aberle stated that he would refinance the property but that could take six to eight weeks. In July 2012, Krawczyk again asked for an update, and Aberle told her he could not refinance the property and that he would look for other investors to take her "spot." The district court found that Aberle's response "did not inform" Krawczyk about the property's sale to Aberle Holdings Inc.

Aberle tells Krawczyk about money received for the property, but she receives nothing

On October 5, 2015, Krawczyk emailed Aberle that she would be retiring from the military and asked for an update. Aberle responded that the city took the property by eminent domain resulting in a $1,280,000 pay out, but that money was used to settle "two mortgages and legal fees," and that he was suing the city to get more money to recover her investment. The district court found that although Aberle received money from the eminent domain proceeding, the "entire sum" was not used to pay off the mortgages and legal fees, as Aberle had stated. Rather, "a significant portion went to pay Aberle Holdings, his relatives, and his girlfriend, while Ms. Krawczyk received nothing."

Krawczyk sues in 2016

By the end of 2016, Krawczyk still had not received any money from Aberle so she commenced this action. The district court observed that Aberle had filed for bankruptcy, so the case was put on "administrative hold." After the administrative hold was lifted, the district court held a two-day bench trial in March 2020. Although Krawczyk's complaint had ten counts, the parties agreed to try four claims; they dismissed some counts by stipulation, and Krawczyk chose to abandon other counts. At the time of trial, the district court identified four remaining counts—breach of contract, breach of fiduciary duty, civil theft, and unjust enrichment.

During trial, each party testified but called no other witnesses. In its written decision after trial, the district court noted that Aberle's "sole defense raised at trial was that Krawczyk brought her claims against him outside of the applicable statute of limitations."

Krawczyk contended her claims were governed by a six-year limitations period, which was tolled by Aberle's fraud. The district court found that Aberle first misused Krawczyk's funds in 2008, but "he concealed his misuse from [Krawczyk] through fraudulent misrepresentations from 2008 to 2011." The district court also found that the email from Aberle to Krawczyk dated March 1, 2011, "is the earliest possible date that Ms. Krawczyk could have discovered Aberle's breach of fiduciary duty and breach of contract because of Mr. Aberle's fraudulent statements." Thus, the district court determined that Krawczyk, who served her complaint on December 28, 2016, commenced her claims "within the statute of limitations period," which ended on March 1, 2017.

The district court also found for Krawczyk on each claim. The district court awarded Krawczyk $51,260 for breach-of-contract damages, $48,942 for "lost returns" due to breach of fiduciary duty, and $51,260 for punitive damages under the civil-theft statute. Aberle moved for posttrial relief, requesting the district court amend its findings of fact and grant JMOL on the civil-theft claim. The district court denied Aberle's motions. Aberle appeals.

DECISION

I. The district court did not err by determining that Aberle's fraudulent concealment tolled the statute of limitations for each of Krawczyk's claims.

Appellate courts review de novo the interpretation and application of statutes of limitations. *Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 232 (Minn. 2016). Findings of fact, however, "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn.

R. Civ. P. 52.01. Under the clearly erroneous standard, appellate courts examine the record to see if there is reasonable evidence to support the district court's findings. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013).

First, Aberle agrees that the statute of limitations for breach of contract, breach of fiduciary duty, and unjust enrichment is six years but argues for the first time on appeal that the statute of limitations for civil theft is two years. Second, Aberle contends that the limitations period was not tolled by fraud because he concealed no fact necessary for Krawczyk to bring her claims. We address both arguments in turn.

A. The six-year statute of limitations governs Krawczyk's claims.

The statute of limitations is six years for contract claims, fiduciary-duty claims, liabilities created by statute, and claims involving the taking of personal property. Minn. Stat. § 541.05, subd. 1(1)-(6) (2020). Aberle does not dispute that section 541.05 governs Krawczyk's claims for breach of contract and breach of fiduciary duty. He argues, however, that the statute of limitations for civil theft is two years. But Aberle did not raise this issue during district court proceedings, and the district court did not consider or determine the issue. Generally, appellate courts will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because Aberle did not raise this issue with the district court, we decline to decide it.

Even if we consider the civil-theft statute of limitations, Aberle's argument is not persuasive. Minn. Stat. § 541.07(2) (2020), establishes a two-year statute of limitations for actions "upon a statute for a penalty." The Minnesota Supreme Court has held that a "penalty" for statute-of-limitations purposes includes "punishment for an offense against

the public and not incident to the redress of a private wrong." *Freeman v. Q Petroleum Corp.*, 417 N.W.2d 617, 618 (Minn. 1988). Based on this caselaw, we conclude that the civil-theft statute is not a "statute for a penalty" under section 541.07(2) because it redresses a private wrong and does not include a punishment for an offense against the public. Also, section 541.05's six-year statute of limitations applies to liabilities "created by statute," and the civil-theft statute created a liability. *See* Minn. Stat. § 604.14. Thus, we agree with Krawczyk that the limitations period for each of her claims is six years.

B. Fraud tolls the statute of limitations.

Aberle argues the district court erred in determining that he fraudulently concealed the facts that put Krawczyk on notice of her claims. Aberle contends that, because he "agreed to invest Ms. Krawczyk's money in the stock market," Krawczyk had notice of her damages, and that therefore her claims accrued in 2008, or 2010 at the latest, when he informed her that her funds were "on the sidelines" or invested in bonds. Krawczyk contends that Aberle "concealed his misappropriation" with misrepresentations and omissions preventing her from discovering her causes of action.

We begin by observing that the statute of limitations starts to run when a claim accrues. *Hansen v. U.S. Bank Nat'l Ass'n*, 934 N.W.2d 319, 327 (Minn. 2019). A claim accrues at "the point in time when a plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Id.* (quotation omitted). Minnesota courts refer to this as the "damage rule." *Hempel v. Creek House Tr.*, 743 N.W.2d 305, 311 (Minn. App. 2007). This is because "[u]ntil there is some damage, there is no claim and certainly a statute prescribing the time in which suit must be filed can

never operate prior to the time a suit would be permitted." *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006) (quotation omitted). The focus is, thus, on *when* the damage occurred. Importantly, "[i]gnorance of the damage does not toll the limitations period." *Hempel*, 743 N.W.2d at 312. This rule rests on the theory "that ignorance is the result of want of diligence, and the party cannot take advantage of his own fault." *Id.* (quotation omitted).

A defendant's fraudulent misrepresentation or concealment, however, may toll the statute of limitations. *Schmucking v. Mayo*, 235 N.W.2d 633, 634 (Minn. 1931); *Hempel*, 743 N.W.2d at 312 (noting that a defendant's fraud tolls a limitations period). The district court and the parties focused on fraudulent concealment, so we will likewise consider Krawczyk's claim that Aberle fraudulently concealed facts that would have provided her with notice of when her damages occurred.

To establish that a defendant's fraudulent concealment has tolled a limitations period, a plaintiff must prove: (1) the defendant's affirmative act or statement concealed a potential cause of action, (2) the defendant's statement was known to be false or was made in reckless disregard of its truth or falsity, and (3) the defendant's concealment could not have been discovered by plaintiff's reasonable diligence. *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). When a plaintiff reasonably should have discovered fraud is a question of fact. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (explaining that fraudulent misrepresentations tolled statute of limitations until discovery of damages from breach of fiduciary duty).

C. The district court did not err in its fraudulent-concealment analysis.

Aberle does not contend that the district court made erroneous findings of fact. Rather, he argues that the district court used faulty reasoning. As a result, we consider whether the findings support the district court's conclusion of law that Aberle fraudulently concealed the facts that would have given Krawczyk notice of her claims. *See Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn. App. 2006) (stating that our review is limited to examining whether evidence supports factual findings and whether findings support legal conclusions). We consider Krawczyk's claims in turn, except for unjust enrichment, which Aberle challenges on different grounds that we discuss later in this opinion.

1. Breach of contract

The district court found that Krawczyk and Aberle entered into an oral contract and that Aberle breached the contract. Specifically, the district court found that they agreed Aberle would invest Krawczyk's money "in the stock market and to make prudent investment decisions on that basis." The district court determined that Aberle breached their contract by using Krawczyk's money to redeem the property for his own benefit, which was "inconsistent with the terms of the investment agreement," and in doing so caused Krawczyk "to lose all of her money." The district court next found that Aberle made affirmative statements, which he knew to be false, to conceal his breach of contract. The district court found that Aberle concealed his use of Krawczyk's funds to redeem the property and that he did not disclose this to Krawczyk until March 2011.

Aberle contends that his statements in 2008 about taking Krawczyk's money out of the stock market should have put Krawczyk on notice that her money was no longer in the

stock market, as they had agreed. Aberle is correct that the district court found that Aberle represented to Krawczyk in 2008 that her money was "on the sidelines" and out of the stock market. We are not persuaded by Aberle's argument, however, because it ignores other central findings. For example, the district court determined that their agreement was to invest Krawczyk's money "on her behalf and for her benefit." The district court also determined that Krawczyk did not authorize Aberle to invest her money in land or his personal business operations.

The district court found that Aberle concealed his breach of contract by stating, first, that he had placed Krawczyk's money with his accountant and, later, that he used the money to purchase bonds, even though he had actually used her money to redeem the property for his own benefit. The district court also found, and Aberle testified, that Krawczyk's money was never used to purchase bonds and that Aberle did not tell her he had used her money to buy the property until 2011. Thus, the district court's findings support its conclusion that Aberle made affirmative false statements, which he knew to be false, to conceal Krawczyk's breach-of-contract claim. *See Haberle*, 480 N.W.2d at 357.

The district court also found that Krawczyk could not have discovered Aberle's fraud by reasonable diligence. The district court concluded:

> No amount of reasonable diligence on Ms. Krawczyk's part would have made her aware of Mr. Aberle's breach prior to March 1, 2011, because Mr. Aberle made material misrepresentations to her to conceal his misappropriation, and she had no reason up to that point to doubt the advice she received from Mr. Aberle as an expert and investment professional.

Preliminarily, we note that Aberle concedes he was in a fiduciary relationship with Krawczyk. Here, the district court found that "Krawczyk placed considerable trust in Mr. Aberle that he would act on her behalf and for her benefit because of her inexperience in making investment decisions." Fiduciary relationships arise when one person trusts and confides in another who has superior knowledge and authority. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009). A fiduciary relationship delays the claimant's duty to discover a cause of action by reasonable diligence. *Toombs*, 361 N.W.2d at 810. The existence of a fiduciary relationship is also a question of fact. *Id.* at 809. Thus, Krawczyk's duty to discover her cause of action was delayed.

Aberle argues that Krawczyk should have discovered the facts leading to her breach-of-contract claim earlier because she was a military intelligence officer. We reject Aberle's argument as an attempt to persuade us to reweigh the evidence, which is inappropriate on appeal. *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 757 (Minn. App. 2019). Thus, Aberle's challenge to the district court's finding of reasonable diligence is unavailing. The district court found that from 2008 to 2010, Krawczyk was relocated or deployed three times, her primary method of communication with Aberle was email, and that she had "very limited access to reliable internet." The district court also found that it was not unusual for Krawczyk to go months without checking the status of her bank accounts and investments. And the district court found that "Krawczyk's prior investment experience was minimal." The district court also meticulously considered and made findings about the reasonableness of Krawczyk's understanding from each of Aberle's communications.

The district court's findings, therefore, support its conclusion that Krawczyk could not have discovered Aberle's misconduct through reasonable diligence before March 1, 2011, when he first informed her about using her money to purchase the property, because that was "the 'first indication' that her money was not being invested as she and Mr. Aberle had agreed." Thus, we affirm the district court's determination that Aberle's fraudulent concealment tolled the statute of limitations for Krawczyk's breach-of-contract claim until March 1, 2011.

2. Breach of fiduciary duty

The district court determined that Aberle breached his fiduciary duties of "loyalty and good faith" to Krawczyk by engaging in "an insider transaction" and "self-dealing." *See, e.g.*, *In re Revocable Tr. of Margolis*, 731 N.W.2d 539, 546 (Minn. App. 2007) (explaining that breach of fiduciary duty is sufficiently proven by evidence that a fiduciary comingled trust funds with personal funds, engaged in insider transactions, and misrepresented the status of trust assets). The district court found that Aberle's "intention to use the investment-club money for his own ends is clear. He had Krawczyk and the investment club's funds at his command, he needed money to rescue his family's Property, and he thought he could turn a quick profit for himself in the process." Aberle does not argue that these findings are insufficient to prove breach of fiduciary duty.

The district court also determined that Aberle's concealment from Krawczyk of his insider transactions breached his fiduciary duty and tolled the statute of limitations. Aberle argues that the district court erred because Krawczyk had notice of her breach-of-fiduciary-duty claim on May 19, 2010, when he told her that her funds were in

bonds and her account was valued at less than her initial investment. But Aberle overlooks the district court's finding that Aberle's representations in May 2010 (that he used Krawczyk's money to purchase bonds) were *consistent* with "their investment agreement—namely, that Mr. Aberle would handle her money with her best financial interest in mind." Yet Aberle did not buy any bonds with Krawczyk's money.

As a result, we affirm the district court's determination that Aberle's statements about buying bonds amounted to fraudulent concealment that tolled the statute of limitations for Krawczyk's breach-of-fiduciary-duty claim until at least March 1, 2011, when she first learned Aberle used her money to redeem the property, which breached their investment agreement. Still, we note that, even at that time Aberle did not disclose his self-dealing to Krawczyk.

3. Civil theft

The district court determined that Aberle's fraudulent concealment tolled the statute of limitations for Krawczyk's civil-theft claim. The civil-theft statute provides, "A person who steals personal property from another is civilly liable to the owner of the property." Minn. Stat. § 604.14, subd. 1. To "steal" means that "a person wrongfully and surreptitiously takes another person's property for the purpose of keeping it or using it." *TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 431 (Minn. App. 2017). If the property at issue is money, "the property is 'used' only if a person spends the money or invests it." *Id.* Here, the district court found that Aberle concealed his theft of Krawczyk's money by affirmatively and falsely stating that he placed Krawczyk's

money into bonds when he actually used Krawczyk's money to redeem his family's property.

Aberle argues that Krawczyk was on notice of her civil-theft claim on May 19, 2010, when Aberle told Krawczyk he had used her money to buy bonds and "she could not withdraw her funds at any time and would need to be replaced by another investor to do so. At that point, [Krawczyk] was no longer in control of her funds." We disagree because the May 2010 statements were false and concealed Aberle's actual use of Krawczyk's money. Thus, we affirm the district court's determination that fraudulent concealment tolled the statute of limitations for Krawczyk's civil-theft claim.

II. The district court did not err by denying JMOL on the civil-theft claim.

In denying Aberle's motion for JMOL, the district court quoted *TCI*, 890 N.W.2d at 429, and determined that Aberle "stole [Krawczyk's] money because he used the money 'without right or leave' and 'with intent to keep or make use of [Krawczyk's money] wrongfully.'" Aberle argues that he is entitled to JMOL on the civil-theft claim because Krawczyk's money was not "tangible" and he obtained her money lawfully and voluntarily without a wrongful act. Krawczyk contends that civil theft may involve electronic transactions and that the theft occurred when Aberle used her funds for improper purposes.

The district court's denial of JMOL is a question of law subject to de novo review. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). JMOL is appropriate when a verdict has no support in fact or is contrary to law. *Id.* The verdict will not be set aside if it can be sustained on any reasonable theory of the evidence. *Id.* Aberle makes two arguments that he is entitled to JMOL on the civil-theft claim; we address each in turn.

First, relying on *TCI*, Aberle argues that Krawczyk's claim fails because "[a] civil theft claim is viable with respect to money only if the money is in a tangible form (such as a particular roll of coins or a particular stack of bills) and is kept separate from other money." Thus, Aberle argues, "an electronic financial transaction cannot be the basis for a civil theft claim." Aberle, however, misconstrues *TCI*, which considered an employer's claims of conversion and civil theft, among others, against its employee. 890 N.W.2d at 427-28. With respect to TCI's *conversion* claim, this court explained that:

> [A] *conversion claim* is viable with respect to money *only if the money is in a tangible form* (such as a particular roll of coins or a particular stack of bills) and is kept separate from other money . . . . [A]n electronic financial transaction cannot be the basis of a conversion claim.

Id. at 429 (emphasis added). *TCI*'s analysis of conversion does not apply to Krawczyk's claim for civil theft.

Second, Aberle argues that "there was no civil theft here, as there was no 'stealing.' [Krawczyk] gave the money in question to [Aberle] for him to manage . . . . Because [Aberle] acted with a claim of right, under the active consent of the previous owner of the funds, there was no 'theft' by him." Aberle's argument is unavailing, first, because *TCI* held that to "steal" under the civil-theft statute means that a person wrongfully and surreptitiously takes another person's property for the purpose of keeping it or using it. *Id.* at 431. *TCI* specifically stated: "If the property at issue is *money in an intangible form*, the property is 'used' only if a person *spends* the money or *invests* it." *Id.* (emphasis added). *TCI* therefore supports the district court's conclusion that Aberle stole Krawczyk's money by spending and investing it in his family's property.

Aberle's second argument also relies on the criminal general-theft statute, which applies to "movable property." Minn. Stat. § 609.52, subd. 2(a) (2020). Even if we assume Minn. Stat. § 609.52, subd. 2(a) applies to intangible property such as money and electronic funds, Aberle's argument still fails.[1] Minn. Stat. § 609.52, subd. 2(a)(1), provides that one who "intentionally and without claim of right takes, *uses*, transfers, conceals *or retains possession* of movable property . . . without the other's consent and with intent to deprive" is guilty of theft. (Emphasis added.) Here, the district court found that Aberle used and retained Krawczyk's money when he redeemed the property and kept her money even though she asked for it back. Aberle therefore has not met his burden of showing that the "verdict has no reasonable support in fact or is contrary to law," and we affirm the denial of Aberle's motion for JMOL on the issue of civil theft. *See Longbehn*, 727 N.W.2d at 159.

III. We need not decide the unjust-enrichment issue.

Aberle's final argument is that he is entitled to JMOL on Krawczyk's claim for unjust enrichment because this equitable claim is not allowed when a district court has determined that the parties had entered a contract. We need not address this issue for two reasons. First, the district court did not award damages for unjust enrichment, so Aberle was not prejudiced by the district court's decision on this issue. An appellant must establish both error and prejudice to prevail. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (explaining appellate courts do not reverse unless the error harmed the

[1] Also, Minn. Stat. § 609.52, subd. 2(a) is a criminal statute that does not provide a civil cause of action nor apply to Krawczyk's civil-theft claim. Indeed, "there is no textual basis for interpreting the civil-theft statute" as incorporating the definition of criminal theft. *TCI*, 890 N.W.2d at 431.

appellant). Second, Aberle raises this issue for the first time on appeal and did not mention it in his JMOL motion. Appellate courts seldom consider matters not raised before the district court, *Thiele*, 425 N.W.2d at 582, and we decline to do so here.

Affirmed.