

2005

Wasatch Property Management, Inc., JDJ
Properties, Inc. v. Aris Vision Institute, Inc. a
California corporation, d/b/a ARIS VISION INC
: Writ of Certiorari

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WASATCH PROPERTY
MANAGEMENT, INC., a Utah
corporation, JDJ PROPERTIES, INC., a
Utah corporation,

Petitioners/Appellants,

vs.

ARIS VISION INSTITUTE, INC., a
California corporation, d/b/a ARIS
VISION, INC.,

Respondent/Appellee.

**BRIEF OF RESPONDENT
ARIS VISION, INC.**

No. 20050693-SC

WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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FILED
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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3) and (5) and Rule 45 of the Utah Rules of Appellate Procedure.

ISSUE PRESENTED FOR REVIEW

Issue: Whether damages awarded for loss, damage, and depreciation to personal property may be trebled pursuant to Utah Code Ann. § 78-36-10(3). Order Granting Certiorari (Nov. 3, 2005).

Standard of Review: “On certiorari, [this Court] review[s] the court of appeals’ decision for correctness, focusing on whether that court correctly reviewed the trial court’s decision under the appropriate standard of review.” Hansen v. Eyre, 2005 UT 29, ¶ 8, 116 P.3d 290 (internal quotation omitted). This appeal presents a question of statutory construction, which is reviewed for correctness. See John Holmes Constr. v. R.A. McKell Excavating, 2005 UT 83, ¶ 6, ___ P.3d __.

Preservation: Wasatch failed to preserve before the trial court the issue of whether treble damages may be awarded for harm caused to personal property. See Point II, below. As a result, while the court of appeals was entitled to affirm the award of treble damages on the merits, as it did, it was also entitled to affirm for lack of preservation. This Court may likewise affirm on preservation grounds. See American Fork City v. Pena-Flores, 2002 UT 131, ¶ 7, 63 P.3d 675 (holding that this Court “‘may affirm the court of appeals’ decision on any ground supported in the record.’”) (quoting Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, ¶ 11, 52 P.3d 1267); see also, e.g., State v. Stubbs, 2005 UT 65, ¶ 3, 123 P.3d 407 (affirming judgment on “alternate grounds” to

those expressed by court of appeals); Anderson v. Wilshire Invs., L.L.C., 2005 UT 59, ¶ 6, 123 P.3d 393 (same).

DETERMINATIVE PROVISIONS

The interpretation of Utah Code Ann. § 78-36-10 (2002), and other relevant portions of Chapter 36 of Title 78. The entire statute is attached for the Court’s reference as Addendum C.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Aris commenced this action against its landlord, JDJ Properties, and JDJ’s property manager and agent, Wasatch Property Management, (collectively “Wasatch”), claiming that Wasatch had wrongfully evicted Aris from its laser eye surgery center when Wasatch forcefully prevented Aris from entering its premises, changed the locks to the premises, and thereby held hostage Aris’s lasers and other surgical equipment for five months. In addition to damages for common-law conversion and wrongful eviction, Aris sought damages under the forcible detainer statute for the depreciation, loss, and damage of its personal property that Wasatch had locked within the premises.

After a three-day bench trial, the trial court entered its Memorandum Decision [R.369–75],¹ along with Findings of Fact and Conclusions of Law [R.480–504], holding Wasatch liable for wrongful eviction, forcible detainer, and conversion, and concluding

¹ References to the trial court record appear as [R.]. Relevant pages from the four volumes of trial transcripts, which are marked as part of the record as R. 526, 527, 528, and 529, are cited by the page of the record and the page of the transcript, e.g., [R.527 at 56].

that Wasatch's wrongful acts proximately caused the depreciation, loss, and damage of Aris's personal property [R.500]. The trial court entered Judgment for damages, and trebled these damages under the forcible detainer statute. [R.500.]

Wasatch appealed, and the court of appeals affirmed in all respects. This Court granted a writ of certiorari on the limited issue of "[w]hether damages awarded for loss, damage, and depreciation to personal property may be trebled pursuant to Utah Code Ann. § 78-36-10(3)." Order Granting Certiorari (Nov. 3, 2005).

II. STATEMENT OF FACTS

Aris owned and operated a laser eye surgery center located in a suite within the Woodlands Business Park in Murray, Utah (the "Premises"), which Aris leased from Wasatch pursuant to a written lease agreement (the "Lease"). Aris employed David Skalka as center manager and contracted with four physicians (the "Doctors") who performed surgeries on the Premises using Aris's three lasers and other equipment. [Findings of Fact ¶¶ 1–5, 7–9, 84.]²

Skalka and the Doctors had been Wasatch's tenants long before Aris opened its center, and Wasatch principals were the Doctors' patients. In mid-2001, Wasatch began negotiating with Skalka and the Doctors to set up a competing center in vacant space in the same building at a more advantageous rent. Unbeknownst to Aris, this culminated in a January 1, 2002, lease for Skalka and the Doctors elsewhere in the same building. Skalka and the Doctors later negotiated with Wasatch to build out a new, larger surgery

² For the Court's convenience, the trial court's Findings of Fact and Conclusions of Law [R.480–504], which are cited extensively herein, are attached as Addendum A. The Judgment [R.505–07] is attached as Addendum B.

center in an expensive, premium suite in an adjacent building. [Findings of Fact ¶¶ 10, 19, 41–42, 93.]

After an industry downturn, Aris determined to close its doors. On January 4, 2002, Aris terminated Skalka, but permitted Skalka and the Doctors to remain in the Premises performing surgeries while Aris negotiated to sell them Aris's surgical laser equipment and have them assume the Lease. Sometime after the 4th of January, Wasatch's building manager, Dennis Peacock, confronted Skalka because Aris had missed its January rent payment. Skalka told him about his termination and Aris's financial trouble, and Peacock responded that Aris's equipment and furniture could not be removed under any circumstances. [Findings of Fact ¶¶ 11–19.]

Aris's negotiations with Skalka and the Doctors proved unsuccessful, and Aris arranged to sell its personal property to pay escalating debts. Aris sent Richard Enright, a manager, to remove and store Aris's laser equipment and other property pending its sale. On January 22, 2002, Enright proceeded to the Premises, met Skalka, and stated that he had come to enter the Premises and remove Aris's property. Enright was able to inventory Aris's property, but Skalka told him that the landlord had seized all of it. [Findings of Fact ¶¶ 20–24.]

Skalka referred Enright to Peacock, who confirmed that Wasatch had seized Aris's property. Enright tendered a rent check, but Peacock refused it and refused to release Aris's property. When Enright insisted on entering the Premises and removing Aris's property, Peacock directed him to leave the Premises immediately and threatened to have

the police forcefully remove Enright if he ever returned. Pursuant to Peacock's demand, Enright promptly left without removing Aris's property. [Findings of Fact ¶¶ 24–33, 35.]

The next day, Aris brought this action and commenced settlement negotiations with Wasatch's counsel, who quickly proposed that Aris and Wasatch pursue an asset sale and lease assignment to Skalka and the Doctors. He did not disclose to Aris that Skalka and the Doctors had already obtained a lease for a new, competing center. Not surprisingly, Skalka and the Doctors eventually declined to take over Aris's Lease and to purchase its equipment. They instead relocated directly to their new space under a new lease with Wasatch. Then, on two separate occasions, Peacock changed the locks to the Premises, but never told Aris and never provided a key. [Findings of Fact ¶¶ 37–42, 45–47, 70.]

When negotiations with Wasatch failed, Aris proceeded with a motion for writ of replevin seeking the return of its equipment. However, when Wasatch's counsel expressed opposition and insisted on a sizeable bond that Aris could not afford, Aris postponed the replevin hearing and continued to work with Wasatch to locate a new tenant. [Findings of Fact ¶¶ 48–56.]

During the ensuing few months, Aris was provided limited access to the Premises, supervised throughout by Peacock, who kept the keys, unlocked the Premises, and stood guard to ensure that Aris removed nothing from the Premises. During these supervised visits, Enright inventoried Aris's property and discovered that various pieces of equipment and inventory worth \$16,118.82 had been removed since his inventory of

January 22, 2002. Enright also discovered that two of Aris's lasers had been damaged while in Wasatch's custody. [Findings of Fact ¶¶ 57–62, 80–81.]

Aris attempted on one occasion to sell a few pieces of its equipment while it was in Wasatch's custody, but Wasatch would only permit it if Aris paid all the proceeds to Wasatch. Because of Wasatch's refusal the sale fell through. After this episode, Aris determined to proceed with the litigation. On or about June 25, 2002, Wasatch finally relented and directed Peacock to let Aris remove its personal property—a change from its previous instructions to Peacock. [Findings of Fact ¶¶ 64–68, 70, 73–76.]

Unfortunately, by that time, Aris's equipment had depreciated dramatically. Laser surgery equipment depreciates extremely rapidly and becomes obsolete because new models are released every 12 to 18 months. Aris could have obtained \$200,000 per laser in January 2002, but only \$55,000 to \$60,000 in July 2002. Aris paid off loans on the lasers, sold one to VISX for a loss, and sold the two damaged lasers to VISX for a credit against Aris's debt. Based on the damage that the two lasers had sustained, VISX deducted \$53,000 from the credit Aris received. [Findings of Fact ¶¶ 77–78, 82–83.]

This case proceeded to a bench trial. Aris presented fact testimony detailing the loss and damage to Aris's property. Aris also offered unrebutted expert testimony that Aris's equipment and other property depreciated by \$118,568.81 while in Wasatch's custody. [Findings of Fact ¶ 79; R.112–51; Pl. Ex. 51.]

The trial court issued a memorandum decision, findings of fact, conclusions of law, and judgment. [R.369–75, 480–504, 432–34.] The trial court found that Wasatch improperly seized Aris's property without judicial process, using it as a “bargaining chip”

to force Aris to pay future rents. With Aris in financial trouble, the trial court found, Wasatch believed that seizing Aris's personal property would ensure payment. Moreover, the trial court found, by providing to Skalka and the Doctors a substantially more favorable lease, Wasatch made it unlikely that Skalka and the Doctors would ever assume Aris's lease. [Findings of Fact ¶¶ 43–44, 88–89.]

Based on detailed findings, the trial court entered judgment against Wasatch on Aris's wrongful eviction, forcible detainer, and conversion claims. [R.505–07.] The trial court awarded \$118,568.81 for the depreciation of Aris's property, \$16,118.82 for the value of Aris's missing property, and \$53,000 for the damage to Aris's lasers, and trebled damages under the forcible detainer statute. [Conclusions of Law ¶¶ 14–15.] The trial court also awarded Aris's security deposit of \$13,393.89 (less unpaid January rent of \$9556.38), along with costs and attorney fees. [Conclusions of Law ¶¶ 17–18; R.505–07.]

Wasatch appealed. The court of appeals affirmed in all respects. See Aris Vision Institute, Inc. v. Wasatch Property Mgmt., Inc., 2005 UT App 326, 121 P.3d 24. Wasatch petitioned for a writ of certiorari, which this Court issued on the following limited issue: “Whether damages awarded for loss, damage, and depreciation to personal property may be trebled pursuant to Utah Code Ann. § 78-36-10(3).” Order Granting Certiorari (Nov. 3, 2005).

SUMMARY OF ARGUMENT

This Court should affirm the court of appeals' decision to uphold the trebling of the damages caused by Wasatch's forcible detainer. Utah's forcible detainer statute and the Utah cases construing it permit the trial court to award any and all damages caused by the forcible detainer. Wasatch completely ignores the statute itself, and fails even to cite—much less distinguish—a single Utah forcible detainer case. Based on the statute and case law, the ruling of the court of appeals was correct and must be upheld. As an alternate basis, this Court can affirm since the issue of whether treble damages can be awarded for damage to personal property by a landlord's forcible detainer was not preserved before the trial court and should not have been considered for the first time on appeal.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S TREBLING OF THE DAMAGES CAUSED BY WASATCH'S FORCIBLE DETAINER.

The court of appeals' ruling, like the trial court's, was correct. By finding that Wasatch committed a forcible detainer—a ruling that is not in question on this appeal—the trial court was obligated under Utah Code Ann. § 78-36-10(2) to award those damages caused by the forcible detainer. Those damages consisted of the loss, damage, and depreciation of Aris's personal property, which Wasatch locked away within the Premises for five months before finally releasing it. Indeed, case authority shows that such damages should be appropriately awarded to a tenant under the statute. Any

damages assessed for forcible detainer must be trebled. The court of appeals was correct to affirm.

A. Based on Wasatch’s Marshaling and Preservation Failures, and This Court’s Writ of Certiorari, the Trial Court’s Findings Relating to the Forcible Detainer Are Not in Question on This Appeal.

Wasatch plays fast and loose with the trial court’s findings—and this Court’s own writ of certiorari—in rearguing the evidence before the trial court. Wasatch reiterates throughout its brief that Aris had “vacated” or “turned over possession” of the Premises, as if to suggest that there was no forcible detainer. See Petitioners’ Brief at 16, 18, 19, 20, 21, 22. On multiple grounds, these arguments are not properly before the Court and should be rejected.

1. Wasatch Reargues Evidence Without Addressing the Trial Court’s Findings or Marshaling Evidence Supporting Them.

Wasatch’s current spin on the evidence contradicts the trial court’s own findings, and Wasatch has completely failed to marshal the evidence supporting those findings.³ The trial court expressly found that by the time the forcible detainer occurred, Aris had not vacated the Premises, or intended or offered to surrender the Lease to Wasatch:

90. There is no credible evidence that Aris ever vacated the Premises prior to January 22, 2002. Likewise, there is no credible evidence that Aris intended or offered to surrender the Lease, much less any evidence that Wasatch or JDJ intended to accept such surrender. Since Peacock refused to release Aris’s personal property—thus preventing Aris from selling it and reaching a settlement with Wasatch—Aris was unable to surrender the Lease.

³ Wasatch also failed to marshal any evidence in its briefs to the court of appeals, even conceding at oral argument before the court of appeals that it was accepting as true the trial court’s factual findings.

Findings of Fact at ¶ 90 (Add. B, attached). Wasatch's argument that Aris vacated the Premises before the forcible detainer occurred was rejected by the trial court below, and Wasatch has failed to marshal the record evidence supporting the trial court's findings. See Utah R. Civ. P. 24(a)(9) ("A party challenging a fact finding must first marshal all record evidence that supports the challenged finding."). As a result, the trial court's findings must be taken as true, and Wasatch's argument about Aris vacating the Premises must be rejected. See Water & Energy Sys. Tech., Inc. v. Keil, 2002 UT 32, ¶ 15, 48 P.3d 888 (holding that when appellant fails to meet its marshaling duty, relevant findings are taken as true).

2. Wasatch Failed to Preserve Below the Argument That Aris Vacated on January 4, 2002.

Even if Wasatch had properly marshaled evidence, it failed to preserve before the trial court the argument, raised for the first time on appeal, that Aris vacated on January 4, 2002. Wasatch argued in their brief to the trial court that "Aris did not 'vacate' until July 2002" when it removed its property from the Premises. [R.229.] Then, contradicting itself but without clearly enunciating a date, Wasatch argued: "In the context of abandonment, Ms. Soto testified that she told Mr. Peacock on January 22nd that Aris was surrendering the lease." [R.304.] Finally, Wasatch changed course again by stating that "Aris is hard-pressed to deny it abandoned the premises once the doctors moved out," which occurred on February 9, 2002. [R.348.] For all this waffling, Wasatch never specifically argued below that Aris vacated on January 4, 2002—the date Wasatch now picks as the official date on which Aris turned over possession of the

Premises. See Wasatch Brief at 17, 19. By failing to give the trial court an adequate opportunity to consider this argument, Appellants waived that issue. See 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801.

3. This Court’s Writ of Certiorari Limits Review to Whether Damages to Personal Property Should Be Trebled Under Section 78-36-10(3).

Wasatch’s current argument that Aris vacated the Premises is not properly before the Court based on the narrow scope of the issue on which this Court granted certiorari: “Whether damages awarded for loss, damage, and depreciation to personal property may be trebled pursuant to Utah Code Ann. § 78-36-10(3).” Order Granting Certiorari (Nov. 3, 2005). In addition to this issue, Wasatch petitioned for certiorari as to the court of appeals’ rulings that (1) Aris never abandoned the Premises, (2) Wasatch committed a forcible detainer, (3) Aris was wrongfully evicted, (3) Wasatch converted Aris’s property, and (4) Wasatch’s wrongful acts caused Aris’s property to depreciate. However, this Court has declined to address any of these issues. As a result, Wasatch’s present arguments—which include assertions that Aris abandoned the Premises or transferred possession and attack the trial court and court of appeals’ rulings that a forcible detainer occurred—are not properly before the Court and should be rejected.

In sum, the trial court held that Wasatch’s actions constituted forcible detainer and the court of appeals affirmed. The only issue now before this Court is whether the damages awarded against Wasatch should be trebled under Section 78-36-10(3). Implicit in that issue is whether Aris was entitled, under Section 78-36-10(2)(b), to damages to its

personal property resulting from Wasatch's forcible detainer of the Premises. As addressed in detail below, the court of appeals properly affirmed on this issue.

B. The Forcible Detainer Statute Requires the Trial Court to Award Those Damages Caused by the Forcible Detainer.

The interpretation of Utah Code Ann. § 78-36-10 is at the heart of this appeal and is central to this Court's order granting certiorari. Wasatch completely ignores the statute in its brief, however, and fails even to quote it in argument or include it in its brief, perhaps supposing that the statute's interpretation is not "determinative of the appeal or of central importance to the appeal." Utah R. App. P. 24(a)(6). It is difficult to see, however, how Section 78-3-10(3), is not determinative since it is identified in this Court's order granting certiorari. Ultimately, Wasatch cannot refute the plain language of the statute, which required the trial court, on finding that Wasatch committed a forcible detainer, to award to Aris all damages caused by the forcible detainer and to treble those damages. Not even a strict construction of the statute prevents this result because there is no language whatsoever in the statute that so limits the scope of permissible damages. Indeed, reading such a limitation into the statute would require a complete rewriting of the statute—a task for the legislature, not this Court.

"[W]hen interpreting a legislative enactment, [the Court's] primary role is to give effect to the legislature's intent as set forth in the statute's plain language." State v. McCoy, 2000 UT 39, ¶ 9, 999 P.2d 572. The Court is not to "look beyond a statute's plain language unless it is ambiguous." Coleman v. Thomas, 2000 UT 53, ¶ 9, 4 P.3d 783. "[W]here there is no ambiguity the plain language of the statute must be taken as

the expression of the Legislature’s intent.” P.I.E. Employees Federal Credit Union v. Bass, 759 P.2d 1144, 1151 (Utah 1988). This is because “[t]he best evidence of the true intent and purpose of the Legislature in enacting the Act is the plain language of the Act.” Id. (quoting Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984)); see also Johnson v. Utah State Retirement Bd., 770 P.2d 93, 95 (Utah 1988) (stating that “[a] fundamental principle of statutory construction is that unambiguous language in a statute itself may not be interpreted so as to contradict its plain meaning”); State v. Paul, 860 P.2d 992, 993 (Utah Ct. App. 1993) (holding that “courts cannot look beyond” plain and unambiguous language “to divine legislative intent” and that “[e]ach term in a statute should be interpreted according to its usual and commonly accepted meaning” and that “[w]e presume that words are used in their ordinary sense”).

Section 78-36-10 covers the remedies available under chapter 36 of title 78, which deals with disputes between landlords and tenants. The treble damages provision identified by this Court in its order granting certiorari, Section 78-36-10(3), requires that “[t]he judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c).” The remedies specified under those subsections apply to claims brought by both landlords and tenants. Section 78-36-10(2)(a) through (c) provides:

The jury or the court, if the proceeding is tried without a jury or upon the defendant’s default, *shall also assess the damages resulting to the plaintiff from any of the following:*

(a) forcible entry;

(b) *forcible* or unlawful *detainer*;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial

Utah Code Ann. § 78-36-10(2) (2002) (emphasis supplied).

Because Section 78-36-10(2)(a) through (c) covers damages for both *landlords'* actions (for unlawful detainer and waste) and *tenants'* actions (for forcible entry and forcible detainer), some confusion has arisen about the types of damages that are awardable in these different actions. This Court now has the opportunity to resolve any such confusion. A landlord, on the one hand, is entitled to damages for *rent, unlawful detainer, and waste* under Section 78-36-10(2)(b), (c), and (d).⁴

A tenant, on the other hand, is entitled to damages for *forcible entry and forcible detainer* under Section 78-36-10(2)(a) and (b). As between a landlord and a tenant, these claims belong to the tenant, not the landlord, as demonstrated by the definitions of “forcible entry” and “forcible detainer” in Utah Code Ann. §§ 78-36-1, -2. In broad language, Section 78-36-10(2)(b) requires that the trial court “shall also assess the damages resulting to the plaintiff from . . . forcible . . . detainer.” This language is clear, plain, and unambiguous. It contains no exceptions and no limitations, but instead mandates an assessment of “damages” caused to the tenant. *Id.* § 78-36-10(2)(b). The only limitation in the statute is the requirement of causation—the damages awarded must result from the forcible detainer. *See id.* Any such damages must be trebled. *See id.* §

⁴ According to the definitions of unlawful detainer and waste in the statute only a landlord can sue on such claims, not a tenant. *See* Utah Code Ann. § 78-36-3 (stating that a “*tenant* of real property, for a term less than life, is guilty of an unlawful detainer”) (emphasis supplied); Utah Code Ann. § 78-36-10(2)(c) (stating that damages are to be assessed for “waste of the premises during the defendant’s *tenancy*”) (emphasis supplied).

78-36-10(3) (stating that the judgment “*shall* be entered against the defendant . . . for three times the amount of the damages assessed” for forcible detainer) (emphasis supplied).

Since there is no ambiguity in the statute, the court should interpret the term “damages” according to its usual and commonly accepted meaning. This Court has previously recognized that “damages” can be defined simply as ““compensation in money imposed by law for loss or injury.”” Fuller v. Finance, 694 P.2d 1045, 1047 (Utah 1985) (quoting Webster’s New Collegiate Dictionary 323 (9th ed. 1984)). Similarly, Black’s defines “damages” as “pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.” Black’s Law Dictionary 270 (6th ed. 1991); see also Black’s Law Dictionary 393 (7th ed. 1999) (defining “damages” as “money claimed by, or ordered to be paid to, a person as compensation for loss or injury”). Likewise, in Acculog, Inc. v. Peterson, 692 P.2d 728 (Utah 1984), this Court noted the distinction between “injury” and “damage,” as follows: “[I]njury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury.” Id. at 730 (quoting Clark v. Cassetty, 376 P.2d 37 (N.M. 1962)).

These definitions of “damages” encompass the damages awarded to Aris below, which fell into three basic categories: (1) \$53,000 in physical damage to Aris’s personal property, (2) \$16,118.82 for lost property, and (3) \$118,568.81 for depreciation to the laser equipment. [Conclusions of Law at ¶ 14.] Wasatch has completely failed to show

how these three categories of damages are anything other than “harm, detriment, or loss sustained by reason of the injury” caused by Wasatch—namely the forcible detainer of Aris’s leasehold premises.⁵ Wasatch’s plea for a strict construction of the statute is to no avail because there is no possible reading of the statute that would exclude the types of damages awarded by the trial court in this case.

Absent any restriction on what the “damages” provided for by the statute are to include, the trial court has wide latitude in assessing damages, whatever they might be. And, absent any ambiguity in the statute, this Court cannot and should not craft judicial limitations on the types of damages awardable for forcible detainer. Here, the trial court was well within its discretion to award damages for the injury Wasatch caused to Aris’s personal property.

This view of damages is supported by the definition of “forcible detainer” in Utah Code Ann. § 78-36-2(1), which provides that a person is guilty of a forcible detainer who either “by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise.” The stated policy of the legislature in allowing for treble damages for this kind of reprehensible conduct would not be promoted by preventing a tenant from recovering harm to personal property locked in the detained premises, particularly in this case. Here,

⁵ The issue of whether Wasatch’s forcible detainer of the premises proximately caused the harm to Aris’s personal property is outside the scope of the writ of certiorari, and thus not before the Court on this appeal. In any event, causation is a question of fact, Mahmood v. Ross, 1999 UT 104, ¶ 22, 990 P.2d 933; Harline v. Barker, 912 P.2d 433, 439 (Utah 1986), which the trial court already found in Aris’s favor. See Conclusions of Law at ¶ 1. Wasatch did not attack the finding of causation on appeal and has not attempted to marshal the evidence for and against the finding in its brief.

the trial court found that Wasatch improperly seized Aris's property without judicial process to use it as a "bargaining chip" to force Aris to pay future rents, believing that seizing Aris's personal property would ensure payment, and that Wasatch provided to Skalka and the Doctors a substantially more favorable lease, making it unlikely that Skalka and the Doctors would ever assume Aris's lease. [Findings of Fact ¶¶ 43–44, 88–89.] Wasatch's forcible detainer thus precluded Aris from obtaining valuable and rapidly depreciating personal property. The legislature has not imposed any limitation on the trial court's award of these types of damages for forcible detainer, and this Court should not judicially create any such limitations.

The trebling of these damages was mandatory. See Utah Code Ann. § 78-36-10(3) (the judgment "*shall* be entered against the defendant . . . for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c)" (emphasis supplied). Forrester v. Cook, 77 Utah 137, 156, 292 P. 206, 214 (1930) (holding that the statute "makes it mandatory upon the court to render judgment for three times the amount of damages thus assessed"); Fowler v. Seiter, 838 P.2d 675, 679 (Utah Ct. App. 1992); Grant v. Utah State Land Bd., 26 Utah 2d 100, 102, 485 P.2d 1035, 1036 (1971) (holding that rules of statutory construction "require that we assume that each term of a statute was used advisedly; and that each should be given an interpretation and application in accord with their usually accepted meaning" and holding that the word "may" cannot be interpreted to mean the same thing as "shall" or "must"). The court of appeals was correct to affirm.

C. Utah Case Law Supports the Trial Court’s Award of Damages for Harm Wasatch Caused to Aris’s Personal Property.

While forcible detainer cases in Utah are scarce relative to unlawful detainer cases, this Court has established a clear rule governing the calculation of damages under the forcible detainer statute, and the trial court’s award of damages was proper under that case law. The Court held in the forcible detainer case of King v. Firm, 3 Utah 2d 419, 426, 285 P.2d 1114, 1118 (1955), that if the tenant “had proved any substantial damages which were the natural and proximate result of respondents’ wrongful act [forcible entry and detainer] he should have been granted a judgment for such damages,” and that “the only damages [plaintiff] would be entitled to would be those which would naturally result from the wrongful taking of possession.” (Overruled on other grounds in Richard Barton Enters. v. Tsern, 928 P.2d 368, 377 (Utah 1996).) See also Pentecost v. Harward, 699 P.2d 696, 700 (Utah 1985) (in action for conversion and wrongful eviction, holding that “[o]ne who resorts to self-help is liable to the evicted tenant for *all damages* proximately caused by the eviction”) (emphasis supplied); Lambert v. Sine, 123 Utah 145, 256 P.2d 241 (1953) (awarding damages for wrongful eviction that were the “natural and proximate consequence of the wrong”).

In Buchanan v. Crites, 106 Utah 428, 438, 150 P.2d 100, 104 (1944), this Court upheld an award of damages in a forcible detainer case, which appear to have been based mainly on harassment and mental anguish. The Court found these damages to be the direct and proximate result of the landlord’s removal, during the winter, of the exterior doors to the residence that the tenants were occupying. See 150 P.2d at 430. The Court

reached this decision over a dissent arguing that such damages should not be awarded in forcible detainer cases. See id. at 438–40.

This Court reached the same result in Peterson v. Platt, 16 Utah 2d 330, 331, 400 P.2d 507, 508 (1965), in which the tenants obtained a judgment for forcible detainer after the landlord changed the locks on the tenants’ Arctic Circle restaurant. The landlord changed the locks while the tenants were away, and when one of the tenants returned, “he was refused permission to remove perishable goods, or the books and records,” which remained in the locked premises. Id. Notwithstanding an attempt by the parties to settle the dispute, the Court held that the tenants “retained their right to maintain this action for *conversion of their property under our forcible entry and detainer statute*,” and affirmed the judgment for damages relating to the value of personal property in the premises. 16 Utah 2d at 331–32, 400 P.2d at 508 (emphasis supplied). The facts of the instant case are virtually identical to Peterson, and the same rule should apply. While the Court in Peterson never addressed the trebling of damages, this may be due to the fact that punitive damages were awarded, see id. at 331, id. at 508, and trebling of course would have been duplicative.

In addition to the instant case, the court of appeals has previously upheld an award of treble damages for loss of and damage to personal property under the forcible detainer statute. In Fowler v. Seiter, 838 P.2d 675 (Utah 1992), this issue was addressed by a panel of the court of appeals comprised of Judge Billings, then-Judge Russon, and Judge Orme (the author of the dissent from the court of appeals’ decision in the instant case, upon which Wasatch relies heavily in its brief). The plaintiffs in Fowler, who had rented

a storage unit, “discovered that the lock to the storage unit had been broken and their property removed and disposed of.” Id. at 676. Plaintiffs brought suit under the forcible detainer statute and recovered damages of \$7000 for the loss of their personal property.⁶ See id. at 676–77. The court of appeals upheld the damages award and held that trebling of the award was mandatory under Utah Code Ann. § 78-36-10(3). Id. at 679.

Therefore, in spite of being “baffled” by an award of treble damages for loss, damage and depreciation of personal property in the instant case, see Aris Vision, 2005 UT App 326 at ¶ 35 (Orme, J., dissenting), Judge Orme concurred in an opinion in 1992 doing that very thing. That was the correct result in Fowler, and the trial court likewise reached the correct result in the instant case.

As in Peterson and Fowler, the trial court found that the harm to Aris’s personal property was proximately caused by the forcible detainer, and thus properly awarded under Utah Code Ann. § 78-36-10(2). Absent any contrary Utah authority—there is none—the trial court’s award, as affirmed by the court of appeals, should be upheld.

⁶ Although the court of appeals’ opinion does not discuss in depth the award of damages for the disposal of plaintiffs’ personal property, an examination of the briefs lodged with the court of appeals in Fowler leaves no doubt that the issue of the nature of and basis for the damages award was squarely before the court. The plaintiffs’ appellate brief included the following statements regarding the damages award: “The jury in a special verdict determined that Plaintiffs’ damage from the unlawful entry was in the amount of \$7,000 based upon the value of the items taken by Defendant.” Appellants’ Brief at 8. “The damages resulting from forcible entry include the value of household goods and personal effects removed.” Id. at 9. “Damages resulting from forcible entry include the value of household goods and personal effects removed from the premises.” Id. at 13. “The natural and proximate consequences of the forcible entry were the disposal by Defendant of the contents of the storage unit.” Id. at 14.

D. There Is No Authority for Awarding Fair Rental Value to a Tenant in a Forcible Detainer Case.

Wasatch argues that damages for forcible detainer are those “relating to [Aris’s] inability to occupy the Premises.” Petitioners’ Brief at 17. By implication, Wasatch also argues that what Wasatch characterizes as “the *real estate* forcible detainer statute” or “Utah’s *real property* forcible detainer statute,” Petitioners’ Brief at 18, 19 (emphasis in original), somehow requires a court to exclude recovery of damage to Aris’s personal property resulting from the forcible detainer. The Court should reject Wasatch’s argument—backed by not a single Utah forcible detainer case—that damages for forcible detainer consist only of the fair rental value of the premises, rather than damage to personal property. There is no authority for this. Merely calling the forcible detainer statute a “real estate” or “real property” statute does not create a legal interpretive basis for excluding whole categories of damages that a tenant might suffer.

Wasatch appears to have adopted its misguided view from the dissenting opinion of Judge Orme, who relies exclusively on two unlawful detainer cases for the position that fair rental value of the premises is the measure of damages for forcible detainer. See 2005 UT App 326 at ¶ 37 (Orme, J., dissenting). (The majority opinion even seems confused by this, conceding that the fair rental value is the minimum of damages awardable for forcible detainer. See 2005 UT App 326 at ¶ 31 n.5.)

The first case relied on by Judge Orme regarding fair rental value (in paragraphs 36 and 37 of the opinion) is Forrester v. Cook, an unlawful detainer case in which this Court addressed whether a landlord’s right to recover rents under what is now subsection

2(d) of the statute (addressed in Point I(A), above) precludes an award of treble damages for the rental value of the premises during the unlawful detainer period. See 77 Utah 137, 155–57, 292 P. 206, 214 (1930).⁷ The Court held that “rents,” “which may not be trebled, are such as accrue before termination of the tenancy” and before commencement of the unlawful detainer period. Id. at 157, id. at 214. In contrast, the landlord’s “loss of the value of the use and occupation of the premises, or the rental value thereof” during the unlawful detainer constitutes damages to be trebled under the statute. Id. at 156, id. at 214.

This remedy of the fair rental value has no place in a forcible detainer action because a tenant is never entitled to collect rents *from the landlord*, but instead pays rent *to the landlord* to occupy the premises. A tenant can argue (as Aris did below) under Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 374–78 (Utah 1998), that the forcible detainer results in abatement of rent, but there is no legal basis for awarding the rental value to the tenant. As noted above, Section 78-36-10(2) includes remedies for both landlords and tenants. The remedy of rent, under Subsection (2)(d), could only refer to a remedy available to a landlord, not to a tenant.

The second case relied on by Judge Orme that relates to fair rental value (at paragraph 37 of the opinion) does not change this. That case, Monroc, Inc. v. Sidwell, 770 P.2d 1022 (Utah Ct. App. 1989), was an unlawful detainer case in which the landlord was awarded \$300 as the “reasonable rental value” of the premises during the unlawful

⁷ Forrester was overruled on other, unrelated grounds by P.H. Inv. v. Oliver, 818 P.2d 1018, 1020 (Utah 1991)).

detainer. Id. at 1025–26. Again, neither Monroc nor Forrester was a forcible detainer case, and it makes no sense to apply the unlawful detainer damages theory of fair rental value in this forcible detainer action. The Court should reject the view that fair rental value is a remedy available to tenants in a forcible detainer case.

The key language in Forrester that Wasatch fails to address is that “[t]he plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer.” See 77 Utah at 156, 292 P. at 214. That principle has never been overruled. This language is based on the general damages provision in the statute that applies to both forcible detainer and unlawful detainer actions—that the trial court “shall also assess the damages resulting to the plaintiff from . . . forcible or unlawful detainer.” Utah Code Ann. § 78-36-10(2)(b). The trial court and court of appeals properly applied this rule here, where the damage to Aris’s personal property was the natural and proximate consequence of the forcible detainer. This Court should affirm the award.

E. There Is No Authority for Wasatch’s Claim That Aris’s Damages Are “Consequential” and Not Awardable.

The Court should also reject Wasatch’s argument that Aris’s recovery constitutes “consequential” damages, and that consequential damages cannot be recovered unless general damages are awarded. See Petitioners’ Brief at 21. Not only is this argument not within the scope of the writ of certiorari, it was not argued before the trial court or the court of appeals. It is based on the fallacy that the “general” damages awarded for forcible detainer constitute “reasonable rental value of the Premises,” Petitioners’ Brief at 21, and that such “general” damages must first be awarded before any consequential

damages. To the contrary, the statute does not authorize an award to a tenant of rent or of damages equal to fair rental value. Since fair rental value is not awardable to tenants, *any* recovery in a forcible detainer case will constitute consequential damages under Wasatch's interpretation. The fact remains that the statute does not limit damages for harm to personal property.

The forcible detainer statute gives no protection to tenants at all if it cannot be used to punish landlords like Wasatch who lock out tenants without judicial process for the sole purpose of seizing the tenant's personal property to use as a bargaining chip to pay future rents. Since the damages awarded to Aris were "the natural and proximate consequences" of the forcible detainer, the trial court was within its discretion to award them, and the court of appeals correctly affirmed.

F. The Court Should Disregard the Case Law Cited by Wasatch.

Wasatch's three archaic cases from other jurisdictions, see Petitioners' Brief at 19 n.5, provide no guidance in this appeal. First, Arout v. Azar, 219 A.D. 260, 219 N.Y.S. 431 (Sup. Ct. App. Div. 1927), offers no support for Wasatch's position because the New York court held that the case did not involve a forcible detainer at all. See id. Instead, in that case "defendants were guilty of a trespass." Id. Moreover, that court offered no rationale for the statement quoted by Wasatch, so the reader is left to wonder whether the preclusion of such damages is based upon the statute itself or upon case law interpreting the statute or based upon nothing at all.

Second, Carman v. Scott, 137 N.W. 655 (Mich. 1912), like Arou, offered no rationale for its statement that certain damages were not recoverable under the forcible detainer statute then in effect.

Third, Shaw v. Hoffman, 1872 Mich. LEXIS 91 (1872), provides no helpful analysis of this issue. Shaw was the primary case relied upon by the Carman court in holding that damages to personal property were not recoverable under the forcible detainer statute. However, the court in Shaw offered no more analysis of this issue than any of the other two cases cited by Wasatch.

Given the complete absence of any analysis of the key issue in any of these cases, and the contrasting authority of this Court and the court of appeals, the Utah authority must prevail. The Court should affirm and uphold the trial court's award of damages for loss, damage and depreciation of Aris's personal property.

II. THIS COURT SHOULD AFFIRM BASED ON WASATCH'S FAILURE TO PRESERVE THE ISSUE OF TREBLING DAMAGES RESULTING FROM INJURY TO PERSONAL PROPERTY.

Notwithstanding the Court's writ of certiorari to the court of appeals, the issue of whether damage to Aris's personal property should be trebled is not properly before the Court because Wasatch failed to preserve it before the trial court. In fact, Wasatch failed even to preserve before the court of appeals the narrow issue now before this Court on certiorari. Rather, the issue now before this Court was raised for the very first time by Judge Orme in his dissenting opinion. See 2005 UT App 326 at ¶¶ 36–37 (Orme, J., dissenting). The lead opinion of the court of appeals only referenced this issue in a footnote at the end of its opinion as a response to the dissent. See id. at ¶ 31 n.5. Thus,

while the court of appeals affirmed the trial court on the merits, it was equally entitled to affirm the trial court's trebling of damages based on Wasatch's failure ever to preserve this issue. This Court may affirm the court of appeals on the same alternative basis.

A. Preservation Must Occur at the Trial Court.

An appellant cannot raise for the first time on appeal arguments that it never gave the trial court the opportunity to consider. See 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (citing Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968). It is axiomatic that preservation occur before the trial court, and not at an intermediate appellate court. See id. (“In order to preserve and issue for appeal, the issue must be presented to *the trial court* in such a way that *the trial court* has an opportunity to rule on the issue.”) (quoting Brookside, 2002 UT 48 at ¶ 14) (emphasis supplied).⁸ “For a trial court to be afforded an opportunity to correct the error, ‘(1) the issue must be raised in a timely fashion[,], (2) the issue must be specifically raised[,], and (3) the challenging party must introduce supporting evidence or relevant legal authority.’” Id. (quoting Brookside, 2002 UT 48 at ¶ 14). As the court of appeals has observed, “[m]ere mention” of an issue in trial pleadings, without supporting evidence or

⁸ The instant case presents the unusual circumstance where the issue on which this Court grants certiorari was never preserved by the petitioner. A similar scenario arose in the recent case of B.A.M. Development, L.L.C. v. Salt Lake County, 2006 UT 2, ___ P.3d ___, where the respondent made a lack of preservation argument after issuance of a writ of certiorari, but the Court in its discretion determined to address the merits anyway. See id. at ¶ 24 (“While it may be possible to imagine circumstances under which we might reconsider a grant of certiorari on an issue we later conclude was not properly preserved, that is not the case here, and we take up the issue on its merits.”). Here, there is little reason for this Court to review an issue that, as discussed below, was never raised at the trial court but was raised for the first time in a dissenting opinion from a court of appeals judge.

legal authority, is insufficient. LeBaron & Assocs. v. Rebel Enters., 823 P.2d 479, 482–83 (Utah Ct. App. 1991).

B. Wasatch Failed to Preserve at the Trial Court Whether Damages to Personal Property Are Recoverable Under Utah Code Ann. § 78-36-10.

At the trial court, Wasatch never even hinted that Aris could not recover under the forcible detainer statute for injury to its personal property. However, the trial court provided to the parties “an adequate opportunity to speak to all the issues” [R.529 at 569]—and thus preserve arguments—through trial briefs [R.189–208, 217–36], opening statements [R.526 at 18–35], both written and oral closing arguments [R.265–86, 287–311; 529:544–81], and then even written replies [R.346–68]. After all this, Wasatch hired new counsel and has attempted to raise new arguments on appeal, without setting forth any ground for reviewing unpreserved issues. See Utah R. App. P. 24(a)(5)(B) (“The brief of the appellant shall contain . . . a statement of grounds for seeking review of an issue not preserved in the trial court.”).

Wasatch fails to concede this mistake. In the preservation section on page 2 of Wasatch’s brief, it cites voluminous pages of various trial briefs and transcripts that have absolutely nothing to do with the issue now before this Court:

1. R.103–12: This is Wasatch’s answer and counterclaim, which is silent on this issue.
2. R.169–76: This is Wasatch’s portion of the pretrial order, none of which addresses the issue raised by this appeal, but instead addresses other, unrelated defenses to the forcible detainer claim. [R.176–77.]

3. R.217–26: This is the fact section of Wasatch’s trial brief. The legal issue of trebling of damages cannot be preserved by merely alleging facts.

4. R.230–31: This is the section of Wasatch’s trial brief that relates to forcible detainer, not a single sentence of which suggests that trebling of damages to personal property is inappropriate.

5. R.346–56: This is Wasatch’s supplemental, post-closing-argument brief, which only addressed Wasatch’s view of the evidence, but still includes no argument nor authority regarding whether Aris’s damages could be trebled.

6. R.529 at 558–79: These are the transcript pages of closing argument, which is wholly devoid even of the word “trebling.”

7. R.304–07: This is the forcible detainer argument from Wasatch’s written closing argument brief, which raises other, unrelated defenses to trebling.

In sum, not one portion of the trial record cited by Wasatch—which included numerous pretrial and post-trial briefs—contains any argument or authority regarding whether damages to personal property can be awarded and trebled under the forcible detainer statute. As a result, the court of appeals was not obligated to address this issue on the merits, but was entitled to affirm the trial court on preservation grounds. While the court of appeals nevertheless affirmed on the merits, this Court is entitled to affirm—and should affirm—on the alternative basis of Wasatch’s failure to preserve the treble damages issue. See American Fork City v. Pena-Flores, 2002 UT 131, ¶ 7, 63 P.3d 675 (holding that this Court “‘may affirm the court of appeals’ decision on any ground supported in the record.’”) (quoting Collins v. Sandy City Bd. of Adjustment, 2002 UT

77, ¶ 11, 52 P.3d 1267); see also, e.g., State v. Stubbs, 2005 UT 65, ¶ 3, 123 P.3d 407 (affirming judgment on “alternate grounds” to those expressed by court of appeals); Anderson v. Wilshire Invs., L.L.C., 2005 UT 59, ¶ 6, 123 P.3d 393 (same).

C. Wasatch Failed to Raise Before the Court of Appeals Whether Damage to Personal Property Is Recoverable Under Section 78-36-10.

Not only did Wasatch fail to preserve before the trial court the issue now before this Court, but it also failed to raise the issue before the court of appeals. Indeed, Judge Orme in his dissenting opinion was the first in the course of this litigation to suggest that injury to personal property should not be compensated under the forcible detainer statute. See 2005 UT App 326 at ¶¶ 36–37 (Orme, J., dissenting). While the majority address this issue, it does so only as a counterargument to the dissent in a footnote at the end of the lead opinion. See id. at ¶ 31 n.5.

Wasatch nevertheless suggests in the preservation section of its brief that it preserved the issue (of awarding damages under the forcible detainer statute for harm to personal property) before the court of appeals, but Wasatch cites only the court of appeals opinion itself, see Petitioners’ Brief at 2, rather than Wasatch’s own briefs to the court of appeals, which were devoid of any meaningful discussion of this issue or relevant authority. Wasatch seems to suggest that the court of appeals satisfied Wasatch’s preservation burden for it, but Wasatch ignores that the preservation duty is met at the trial level—not on appeal. See Point II(A), above. Moreover, even if its burden to preserve could be met before the court of appeals, Wasatch still failed to meet this burden because its briefs and argument to the court of appeals lack any specific argument or

relevant legal authority. Again, this Court may affirm the court of appeals based on Wasatch's failure to preserve the limited issue now before this Court on certiorari.

CONCLUSION

For the above reasons, Respondent Aris Vision Institute, Inc., respectfully requests that this Court affirm the ruling of the court of appeals, which upheld the trebling of damages caused by Wasatch's forcible detainer. Pursuant to Utah Code Ann. § 78-36-10(3) and the lease between the parties, Aris respectfully requests an award of the attorney fees and costs that Aris has incurred in connection with Wasatch's appeals, and such additional and further relief as the Court deems appropriate.

DATED this 17th day of January, 2006.

DURHAM JONES & PINEGAR, P.C.

By: _____

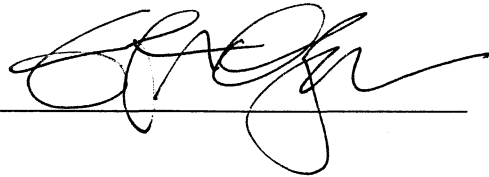
R. Stephen Marshall
Erik A. Olson

Attorneys for Respondent/Appellee Aris
Vision Institute, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2006, I caused two copies of the foregoing **BRIEF OF RESPONDENT** to be hand-delivered to the following:

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
215 South State Street, Suite 920
Salt Lake City, Utah 84111



A handwritten signature in black ink, appearing to read "R. D. Burbidge", is written over a horizontal line.

INDEX OF ADDENDA

- ADDENDUM A: Amended Judgment (March 25, 2004)
- ADDENDUM B: Findings of Fact and Conclusions of Law (March 25, 2004)
- ADDENDUM C: Forcible Entry and Detainer Statute, Utah Code Ann. § 78-36-1 to -12.6 (2002)

Tab A

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FILED DISTRICT COURT
Third Judicial District

MAR 25 2004

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

ARIS VISION INSTITUTE, INC., a
California corporation, d/b/a ARIS VISION,
INC.,

Plaintiff,

vs.

WASATCH PROPERTY MANAGEMENT,
INC., a Utah corporation, JDJ PROPERTIES,
INC., a Utah corporation, DAVID SKALKA,
an individual, BRIAN SKALKA, an
individual, and DENNIS PEACOCK, an
individual,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 020900624

Judge Leslie A. Lewis

This matter came before the Court at a bench trial on October 14, 15, and 16, 2003. Closing argument was held on November 14, 2003. The parties submitted written closing argument briefs and submitted written responses to the written closing argument briefs. Plaintiff Aris Vision Institute, Inc., was represented at trial by R. Stephen Marshall of the law firm of

Durham Jones & Pinegar and defendants Wasatch Property Management, Inc., and JDJ Properties, Inc., were represented by Todd D. Weiler of the law firm of Parry Anderson & Gardiner. Defendants David Skalka, Brian Skalka, and Dennis Peacock have not been served with process in this matter and have not entered appearances. Claims against the three unserved defendants were not litigated at trial.

Having considered the evidence and arguments of counsel, the Court entered its memorandum decision in this matter on January 22, 2004, in which the Court directed counsel for plaintiff to prepare written findings of fact and conclusions of law. Based on the arguments of the parties, the testimony and credibility of witnesses at trial, the exhibits and other evidence presented at trial, subsequent oral and written submissions to the Court, the Court's memorandum decision, and good cause appearing, the Court hereby enters its findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Aris Vision Institute, Inc., ("Aris"), a California company, owned and operated a laser eye surgery center (the "Center") located in Suites 100 and 120 (the "Premises") within the Woodlands Business Park Tower I in Murray, Utah (the "Building").
2. Aris employed David Skalka ("Skalka") as Center manager and contracted with four physicians who agreed to perform eye surgeries at the Center (the "Doctors").
3. Aris handled the bills for the Center, including all rental payments to the landlord.

4. Aris placed in the Premises furniture and multiple pieces of surgical equipment, including three VISX model S-2 lasers, which were needed to operate the Center.

5. Aris owned all of the equipment and furniture that it placed on the Premises, including the three lasers.

6. Pursuant to a written lease agreement (the "Lease"), Aris leased the Premises from defendant JDJ Properties, Inc., ("JDJ").

7. Aris deposited with JDJ the sum of \$13,393.89 as a security deposit to secure the Lease.

8. JDJ had an agreement with its sister company, Wasatch Property Management, Inc., ("Wasatch"), under which Wasatch agreed to manage the Building and collect rents from tenants. All of Wasatch's actions in this matter were within the scope of its agency and responsibilities delegated to it by JDJ.

9. From its Logan, Utah headquarters, Wasatch directed all invoices relating to the Premises to Aris's Los Angeles, California headquarters, and Aris mailed all payments, including rents, from Aris's headquarters to Wasatch's headquarters.

10. Long before Aris hired Skalka and the Doctors and opened the Center, Skalka and the Doctors had been tenants within the Building and had enjoyed a long-standing relationship with Wasatch. Francis Wapner, one of the Doctors, had even performed vision correction surgery for Dennis Peacock ("Peacock"), Wasatch's property manager for the Building, and Dell Loy Hansen, the owner of JDJ and Wasatch.

11. After a severe downturn in the laser eye surgery business, Aris determined to close the Center, along with other centers across the United States.

12. On January 4, 2002, Aris terminated several employees, including Skalka, and provided various notices to Skalka and vendors that Aris was “in the unfortunate position of having to wind down it[s] current operations and liquidate its business prior to dissolution.”

13. At the time, Aris sought to sell to Skalka and the Doctors all of Aris’s property located on the Premises, and to have Skalka and the Doctors assume Aris’s obligations under the Lease.

14. Through February 9, 2002, while those negotiations moved forward, Skalka and the Doctors continued to occupy the Premises and performed surgeries on the Premises using Aris’s equipment.

15. Aris did not pay its January rent in the amount of \$9,556.38 by January 1, 2002, when it was due pursuant to the Lease.

16. Sometime after the 1st of January, Peacock and Anita Lockhart (“Lockhart”), Wasatch’s property managers, confronted Skalka regarding the missed January rent payment.

17. Skalka told them about his termination and Aris’s financial trouble, and provided copies of the notices he had received from Aris, which indicated that Aris (1) had terminated Skalka’s employment; (2) was ceasing all operations; and (3) would likely file for bankruptcy protection.

18. Peacock responded to Skalka that Aris's equipment and furniture could not be removed from the Premises under any circumstances.

19. Skalka had already informed Lockhart in late 2001 that Aris would file for bankruptcy and that Skalka and the doctors were going to separate from Aris.

20. By about mid-January 2002, Aris's negotiations with Skalka and the Doctors proved unsuccessful, and Aris elected to inventory, remove, and sell its furniture and equipment to pay escalating debts.

21. Aris arranged for the sale of its equipment and furniture, and sent its regional manager, Richard Enright, from California to the Premises for this purpose, and arranged in advance for a moving company to remove and store all of Aris's property pending its sale.

22. On January 22, 2002, before the moving company was scheduled to arrive on the Premises, Enright arrived at the Building and proceeded directly to the Premises, where he met Skalka.

23. Enright informed Skalka that he had come to remove all of Aris's furniture and equipment.

24. Based on Peacock's directive that no property could be removed, Skalka refused to permit Enright to remove the equipment and furniture, and advised Enright to speak directly to Peacock.

25. Skalka escorted Enright to Peacock's office within the Building, and introduced Enright to Peacock. Enright identified himself to Peacock as an Aris employee, and expressed his intention of removing Aris's equipment and furniture from the Premises.

26. Peacock refused to release any equipment or furniture to Enright, and informed Enright that Aris had abandoned the Premises and had defaulted under the Lease by failing to pay its January rent. As a result, according to Peacock, Wasatch was entitled to seize Aris's personal property.

27. Enright tendered a check to Peacock for the January rent, but Peacock responded that Wasatch would not accept it.

28. While Enright was in Peacock's office, Peacock was contacted via telephone by Kathleen Soto ("Soto"), Aris's CFO, who informed him that Enright was an authorized representative of Aris, and requested that Peacock release all of Aris's property to Enright.

29. Peacock repeated to Soto that Aris had abandoned the Premises under paragraph 20.1 of the Lease, and had defaulted under the Lease by failing to pay its January rent. As a result, according to Peacock, Wasatch was entitled to seize Aris's personal property.

30. Soto responded to Peacock that Aris was pursuing its right under paragraph 20.1 of the Lease to remove its personal property before surrendering the premises.

31. Like Enright, Soto offered to pay the January rent payment immediately via wire transfer, but Peacock indicated that such payment was too late and would not be accepted.

32. After Peacock completed his telephone conversation with Soto, Enright again insisted that he be permitted to remove Aris's property.

33. Instead of releasing Aris' property, however, Peacock directed Enright to leave the Premises immediately and threatened to have the police forcefully remove Enright if he ever returned again.

34. Peacock did not contact any other representatives of Aris at that time, nor did he ever seek to obtain any contact information for Aris from Wasatch's Logan, Utah, headquarters to verify the statements made by Enright and Soto.

35. Pursuant to Peacock's demand, Enright left the Premises without removing any equipment or furniture.

36. The Court is not persuaded by Peacock's testimony that he turned Enright away because he did not know who he was. Peacock conceded that Wasatch's main office would have had Aris's California contact information. Yet, Peacock never even sought this information before turning Enright away, instead favoring Skalka, whom Peacock knew had been terminated.

37. On January 23, 2004, the day after Enright's visit to the Premises, Aris filed this action seeking replevin of its property and damages.

38. Shortly after Enright's encounter with Peacock, Erik Olson ("Olson"), counsel for Aris, contacted Dahlstrom and requested that Wasatch permit Aris to remove its property from the Premises. Olson also tendered in a letter to Dahlstrom Aris's January rent payment.

39. Dahlstrom refused to release the equipment and furniture to Aris, and did not accept the tender of January rent.

40. Dahlstrom proposed that Aris consider a "business solution" under which Aris would sell its equipment and furniture to Skalka and the Doctors, and Skalka and the Doctors would assume the Lease obligations to Wasatch. Aris agreed to pursue such an arrangement.

41. However, no one from JDJ or Wasatch disclosed to any representative of Aris that Lockhart had been working with Skalka and the Doctors since mid-2001 to set up a competing laser eye surgery center in another space within the Building at a more advantageous rent. No one disclosed to Aris that Skalka and the Doctors indeed consummated a new lease with Wasatch dated January 1, 2002, for another space within the Building that had been vacant for some time. Wasatch had a tremendous amount of vacant space in 2001 and 2002.

42. There is no credible evidence that Wasatch had attempted at any time prior to January 22, 2002, to negotiate with Skalka and the Doctors to remain in the Premises, rather than relocate to another suite within the Building.

43. By relocating Skalka and the Doctors within the Building, Wasatch intended to eliminate that vacancy and then look to Aris for payment of the full rent for the Premises.

44. With Skalka and the Doctors relocated and Aris in financial trouble, Wasatch believed that holding Aris's personal property was a way to insure that JDJ would be paid under the Lease. Moreover, by providing to Skalka and the Doctors a substantially more

favorable lease in the same building, Wasatch made it unlikely that the Doctors would assume Aris's lease.

45. No agreement was reached among Aris, Wasatch, Skalka, and the Doctors with respect to re-leasing the Premises to Skalka and the Doctors.

46. On or shortly after February 9, 2002, Skalka and the Doctors vacated the Premises and relocated within the Building pursuant to their new lease. Wasatch never supervised Skalka and the Doctors' move or retrieved their key to the Premises.

47. Sometime after Skalka and the Doctors vacated the Premises, Wasatch changed the locks to the Premises, but never provided a key to Aris and never advised Aris that the locks had been changed.

48. On February 15, 2002, Aris served on Dahlstrom a motion for a writ of replevin in which Aris sought a Court order restoring to Aris all of its personal property located on the Premises. The Court scheduled a hearing on the motion for February 26, 2002, and Dahlstrom received notice of the hearing on the 21st of February.

49. After receiving the motion for writ of replevin and the notice of hearing, Dahlstrom did not relent. He informed Olson that he would oppose the motion for writ of replevin.

50. Dahlstrom asked for more time to prepare for the hearing, and Olson agreed to postpone the hearing until March 5, 2002.

51. In the days leading up to the hearing, Dahlstrom never conceded that Aris was entitled to replevin of its personal property. Rather, he indicated his intention to oppose the

motion for writ of replevin, and warned that Aris would have to post a bond of hundreds of thousands of dollars to secure the writ.

52. Based on Dahlstrom's opposition to the replevin and insistence on a sizeable bond, Aris agreed to postpone indefinitely the March 5, 2002, hearing and work with Wasatch to locate a new tenant for the Premises.

53. By agreeing to postpone the writ of replevin hearing and by working with Wasatch to find a new tenant for the Premises, neither Olson nor Aris ever intended to waive, settle, or release any claims set forth in this action, including its claims for replevin, conversion, wrongful eviction, and forcible detainer.

54. In fact, there was no settlement at all between Aris and Wasatch. Olson and Aris's agreement with Wasatch was nothing more than an agreement to postpone the litigation to find any tenant who could use the space, as a means of reducing JDJ's claimed damages, avoiding the expense to Aris of posting a bond to secure the release of its property, and determining whether a settlement between Aris and Wasatch could be reached.

55. Aris did not postpone the replevin hearing for the narrow purpose of attempting to re-let the premises to another laser surgery center tenant. While Aris attempted to make the best of the situation (such as locating Ed Barber and attempting to place Barber's group in the space), it was a remote possibility that a laser eye surgery tenant would relocate to the space when Skalka and the doctors conducted the same business downstairs.

56. After the writ of replevin hearing was stricken from the Court's calendar, Dahlstrom and Olson worked together for a few months to resolve this matter in a manner that was

equitable for both sides. However, Mr. Peacock and other agents of Wasatch did not share this spirit of negotiation or understanding of an appropriate resolution.

57. On various occasions between March and June 2002, Aris representatives were provided very limited, supervised access to the Premises. Access was granted only if Aris first obtained Wasatch's permission and was accompanied by Peacock, who was the only individual with a key to the Premises.

58. Each visit was coordinated with and supervised by Peacock, who would unlock the door and stand guard on the Premises. As Peacock conceded, it was his job to supervise visitation to the Premises and "safeguard" Aris's property. According to Peacock, "safeguard" meant that he was not to allow anyone—including Aris—to take any equipment or furniture out of the Building.

59. During these visits to the Premises, Aris inventoried its personal property. Enright discovered that three pieces of equipment had been removed from the Premises between his January 22, 2002, visit and his March 2002 inventory:

- a. Statim autoclave (item 230 on Pl. Ex. 21);
- b. Compaq laptop (item 601 on Pl. Ex. 21); and
- c. Hansatome microkeratome (item 1137 on Pl. Ex. 21).

60. Additionally, Enright discovered that several pairs of high-end sunglasses were removed from the premises between January 22, 2002, and March 2002.

61. Aris's inventories also discovered that two of Aris's lasers had sustained damage after Aris was excluded from the Premises. According to credible testimony by Soto,

which was uncontroverted, one laser's microscope was broken off, rendering the laser inoperable, and the assembly head covers on two lasers (including the laser with the damaged scope) were also damaged, rendering the lasers inoperable.

62. Credible testimony from Soto established that these two damaged lasers had been operable immediately prior to Skalka and the Doctors vacating the Premises because VISX, the laser manufacturer, had issued "key cards" to Skalka and the Doctors enabling them to use the lasers up until they vacated on or about February 9, 2002. Thus, the damage sustained by the lasers occurred at the time—or after—Skalka and the Doctors vacated.

63. During one supervised visit to the Premises, Aris and Olson convinced Peacock to release one small piece of equipment, but Peacock confirmed that no other articles were to be removed.

64. On May 20, 2002, Aris memorialized an asset purchase agreement, under which Aris agreed to sell a few pieces of its equipment to Ed Barber, who operated a laser eye surgery center, for \$35,000 cash. Aris and Wasatch also attempted to persuade Barber to negotiate a new lease for the Premises. Barber ultimately was interested only in purchasing the equipment, and not leasing the Premises.

65. Olson sought Dahlstrom's consent to the sale based on Wasatch's prior edict that no equipment or furniture be removed, and sent to Dahlstrom for his review a copy of an asset purchase agreement between Aris and Barber. Dahlstrom indicated that he would check with Wasatch, but did not anticipate any problem.

66. Olson arranged with Peacock and Barber a meeting on the Premises—supervised by Peacock—to close the equipment sale on June 10, 2002. Olson, Enright, and Soto attended the meeting for Aris. Barber attended the meeting. Glen McKay represented Wasatch at the meeting, along with Peacock. At the meeting, Aris and Barber signed the asset purchase agreement for the \$35,000 of Aris's equipment.

67. During the meeting, Olson telephoned Dahlstrom from the Premises to confirm that the sale could proceed, but Dahlstrom forbade it, indicating that Wasatch had not yet approved the transaction. Aris then left the meeting without the \$35,000, and Barber left the meeting without the equipment.

68. A few days later, Dahlstrom telephoned Olson and indicated that Wasatch would only permit Aris to sell the equipment to Barber if Aris paid the entire \$35,000 proceeds to Wasatch.

69. On or about June 19, 2002, Salt Lake County posted a notice of seizure on the Premises setting forth an indebtedness from Aris in the amount of \$14,210 for property taxes and related fees.

70. Shortly after the notice of seizure was posted on the Premises, Peacock changed the locks on the Premises a second time. Again, he failed to notify Aris that he had changed the locks, and failed to provide a key to any representative of Aris.

71. At or about the time Peacock changed the locks a second time, Soto traveled from California to the Premises with the intention of breaking the locks on the Premises

doors and removing all of Aris's property. She had contacted a locksmith and moving company for these purposes.

72. However, discovering the notice of seizure posted on the Premises, Soto went to the Salt Lake County Assessor's office and paid the entire indebtedness. She then decided not to proceed with the locksmith and moving company that day because it appeared that Wasatch employees were guarding the Premises.

73. Shortly after Soto's visit to the Premises, Olson contacted Dahlstrom and informed him that Aris had no intention of paying any proceeds from the Barber sale to Wasatch, and intended instead to proceed with the lawsuit, including the writ for replevin of Aris's equipment and furniture.

74. On or about June 25, 2002, Dahlstrom informed Olson for the first time that Wasatch never intended to withhold any of Aris's personal property and that Aris was entitled to remove it all.

75. Peacock received an e-mail from Lockhart on June 26, 2002, directing him to release Aris's property. Peacock responded to Lockhart, "Is this correct?" Lockhart then replied to Peacock that Aris was now allowed to take all of its personal property from the Premises.

76. The Court finds that the directive Peacock received from Lockhart on June 26 and 28, 2002, to release Aris's equipment and furniture was a change from previous instructions. Based on Peacock and Lockhart's e-mail exchange, the Court finds that Peacock previously had been instructed not to allow Aris to remove its equipment and furniture.

77. On July 2, 2002, Soto removed all of Aris's personal property from the Premises, and sold a portion of the equipment to Barber for \$35,000 as previously agreed.

78. As both Soto and Aris's expert, Richard Holdren ("Holdren"), testified, laser surgery equipment depreciates extremely rapidly and becomes obsolete because new models are released every 12 to 18 months. As Soto's credible testimony indicated, Aris could have obtained \$200,000 for the lasers in January 2002 and only \$55,000 to \$60,000 for the lasers in July 2002.

79. As detailed in Holdren's report, the total amount by which Aris's personal property depreciated while it was within Wasatch's custody is \$118,568.81. Wasatch did not call any rebuttal expert or otherwise offer any rebuttal testimony relating to the depreciation of Aris's property.

80. As Holdren's uncontroverted expert testimony established, the value of the three items of equipment that became missing from the Premises between January 22, 2002, and Enright's inventory in March and April 2002 was as follows at the time Aris was permitted to remove its property from the Premises:

- a. Statim autoclave (item 230 on Pl. Ex. 21): \$393.60;
- b. Compaq laptop (item 601 on Pl. Ex. 21): \$574.98; and
- c. Hansatome microkeratome (item 1137 on Pl. Ex. 21): \$14,164.68.

81. As credible, uncontroverted testimony from Enright established, the value of the missing sunglasses was \$985.56.

82. After removing its personal property from the Premises, Aris sold the two damaged lasers to VISX, which credited the value of the lasers against Aris's debt to VISX. As Soto's credible, uncontroverted testimony established, based on the damage that the lasers had sustained, VISX deducted \$53,000 from the credit Aris received. The third laser was sold to VISX at a loss.

83. While the three lasers had been secured by collateralized loans to Newcourt Financial and Imperial Bank, Aris paid off both of those loans sometime after Aris was enabled to remove the lasers from the Premises.

84. Wasatch produced no credible evidence at trial to controvert Soto's credible testimony that Aris owned all of the personal property on the Premises, including the three lasers.

85. Neither Wasatch nor JDJ has ever had a property interest in any of the furniture or equipment that was located on the Premises. Nor was any credible evidence received at trial of other potential claimants to Aris's personal property, much less claimants who had authorized Wasatch to seize the property.

86. Wasatch knew as early as January 22, 2002, that Aris wanted access to the Premises to remove its belongings. From this date up until the date Soto removed Aris's property, Wasatch refused repeated requests by Aris representatives for permission to remove Aris's property. On multiple occasions, Wasatch prevented Aris from entering into the Premises with intent to deprive Aris of such entry.

87. During this period, Aris did not have free and unfettered access to the Premises nor could it remove its personal property from the Premises. From the time Wasatch changed the locks, Aris had no keys to the Premises. As a result, Aris could have removed its equipment and furniture only by breaking into the Premises, obtaining a Court order, or receiving Wasatch's permission.

88. Wasatch never sought the assistance of the Court in evicting Aris, taking possession of the Premises, or taking possession of Aris's personal property.

89. While Aris's personal property was in Wasatch's custody, Wasatch was not merely safeguarding the property for Aris or for potential claimants to the property, nor did Wasatch consider Aris's property to be merely "stored" at the Premises. To the contrary, because Wasatch knew that Aris was in financial trouble, Wasatch refused to allow Aris's personal property to be released, and instead used it as a bargaining chip in negotiations with Aris with respect to the payment of rent.

90. There is no credible evidence that Aris ever vacated the Premises prior to January 22, 2002. Likewise, there is no credible evidence that Aris intended or offered to surrender the Lease, much less any evidence that Wasatch or JDJ intended to accept such surrender. Rather, Aris's personal property remained on the Premises, and Skalka and the Doctors continued to occupy the Premises until February 9, 2002.

91. Since Peacock refused to release Aris's personal property—thus preventing Aris from selling it and reaching a settlement with Wasatch—Aris was unable to surrender the lease.

92. On or about July 24, 2002, JDJ entered into a new lease for the Premises with Utah Financial. Utah Financial took occupancy of the Premises on September 1, 2002.

93. Since relocating within the Building, Skalka and the Doctors have negotiated with Wasatch to build out a new, larger surgery center for them in an expensive, main-floor-level space in an adjacent building owned by JDJ.

94. As of January 4, 2002, Aris did not conduct any further business in Utah, apart from the isolated transaction of selling \$35,000 of equipment to Barber. Aris negotiated to sell equipment in Utah to Barber and no one else. The asset purchase agreement with Barber was negotiated on May 20, 2002, and the sale would have closed on June 10, 2002, had not Wasatch refused to allow the equipment to be released.

95. On May 23, 2002, Aris's registration to do business in Utah expired for failure to file a renewal.

96. In the answer that Wasatch and JDJ filed in this action, Wasatch and JDJ never raised insufficiency of process as an affirmative defense, nor did they allege any failure to comply with indorsement provisions or other requirements of Utah Code Ann. § 78-36-8 (2002).

97. Based on the affidavit of attorney fees of R. Stephen Marshall, the Court finds that Aris has incurred attorney fees in connection with this action in the amount of \$_____.

98. Based on the affidavit of attorney fees of R. Stephen Marshall, the Court finds that Aris has incurred costs and necessary disbursements in connection with this action in

the amount of \$ _____. The Court finds that these items are correct and have been incurred necessarily and in good faith in this action.

CONCLUSIONS OF LAW

1. Inherent in the Lease is the right of Aris to free, unfettered access to the Premises. The limited, supervised inspection opportunities that Wasatch offered to Aris were not an adequate substitute for the type of free access that accompany leasehold rights and privileges. Inherent in the Lease is the right of the tenant to have a key to the Premises. Aris did not need to ask for a key to access its own property.

2. Wasatch had no authority under Utah law to exclude Aris from the Premises without judicial process and thereby exclude Aris from removing its personal property.

3. By agreeing to postpone the writ of replevin hearing and working with Wasatch to find a new tenant for the Premises, Aris did not waive, settle, or release any claims set forth in this action, including its claims for replevin, conversion, wrongful eviction, and forcible detainer. There was no settlement between Aris and Wasatch.

4. At all relevant times, Peacock, Lockhart, and Dahlstrom were acting within the scope of their employment by Wasatch.

5. At all relevant times, Wasatch and its employees were acting as authorized agents of JDJ. All of Wasatch's actions in this matter were within the scope of its agency.

6. JDJ is the "owner" of the Premises as that term is defined in Utah Code Ann. § 78-36-12.3(2) (2002).

7. By the acts of Wasatch, JDJ's duly authorized agent, JDJ willfully and unlawfully excluded Aris from the Premises without judicial process in violation of Utah Code Ann. § 78-36-12 (2002).

8. Wasatch and JDJ's exclusion of Aris from the Premises and denial of access to Aris's personal property (including removal of the same) constituted a wrongful eviction and conversion.

9. Wasatch and JDJ's forceful, unlawful possession of the Premises during Aris's tenancy constituted a forcible detainer as that term is defined in Utah Code Ann. § 78-36-2 (2002).

10. Wasatch and JDJ were not acting as—and had no authority to act as—agents of Salt Lake County, Imperial Bank, Newcourt Financial, or any other creditor of Aris when Wasatch and JDJ seized Aris's equipment and furniture.

11. Likewise, the facts of Aris's collateralized loans or the June 19, 2002, tax lien notice provide no excuse for Wasatch and JDJ's conversion of Aris's personal property.

12. As Wasatch and JDJ conceded at trial, the Lease did not provide a security interest to JDJ or Wasatch. Absent such a security interest, JDJ and Wasatch had no right to self-help seizure of the equipment and furniture on the Premises.

13. Aris is entitled to an award of damages against Wasatch and JDJ, jointly and severally, in the amount of all damages proximately caused by Wasatch and JDJ's wrongful eviction, conversion, and forcible detainer.

14. The wrongful eviction, conversion, and forcible detainer each proximately caused the following damages to Aris:

- a. \$118,568.81, representing the depreciation of Aris's equipment and furniture for the time period in which Wasatch and JDJ deprived Aris of the property located on the Premises;
- b. \$16,118.82, representing the aggregate value of the statim autoclave, Compaq laptop, and hansatome microkeratome, and sunglasses that were missing from the Premises;
- c. \$53,000.00, representing the damage that Aris's lasers sustained while in Wasatch and JDJ's possession.

15. Pursuant to the forcible detainer statute, Utah Code Ann. § 78-36-10(3) (2002), Aris is entitled to a mandatory trebling of its damages against Wasatch and JDJ, jointly and severally, which totals \$563,062.90 (three times the total damages in the amount of \$187,687.63).

16. The Court does not conclude that Aris is entitled to punitive damages against Wasatch or JDJ because Aris has not met its burden of showing that Wasatch or JDJ's actions demonstrate a knowing and reckless indifference toward, or disregard of, Aris's rights. Utah Code Ann. § 78-18-1 (2002).

17. Aris is entitled to recover its security deposit in the amount of \$13,393.89.

18. Wasatch did not accept Aris's tender of its January, 2002, rent. Utah Code Ann. § 78-27-1. Nevertheless, as Aris conceded at trial, Aris's damages must be offset by the amount of the January rent due, \$9,556.38.

19. JDJ's obligation under the Lease to provide free, unfettered access to the Premises and any personal property located on the Premises, and Aris's obligation under the Lease to make rental payments, were mutually dependent leasehold covenants.

20. Based on the doctrine of mutually dependent covenants recognized in Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 374-78 (Utah 1996), and other authorities set forth therein, the Court concludes that when JDJ and Wasatch wrongfully evicted Aris and excluded Aris from the entirety of the Premises (including prohibiting Aris from accessing and removing its property), Aris's rental obligations were abated in their entirety.

21. Moreover, based on Wasatch and JDJ's improper conduct, the Lease was terminated and Aris was relieved of any further obligations thereunder.

22. JDJ's counterclaim should therefore be dismissed.

23. Pursuant to Paragraph 26.17 of the Lease and Utah Code Ann. § 78-36-10(3), Aris is entitled to recover from Wasatch and JDJ its attorney's fees and costs.

24. After evaluating a number of factors, including the difficulty of the litigation, the efficiency of Aris's attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case, the result attained, and the expertise and experience of

the lawyers involved, the Court concludes that Aris is entitled to an award of reasonable attorney fees in the amount of \$_____.

25. Aris is also entitled to an award of necessarily incurred costs and disbursements in the amount of \$_____.

26. Aris's sale of \$35,000 of equipment to Barber did not constitute "transacting business" within the meaning of Utah Code Ann. § 16-10a-1501(1) (2001).

27. Additionally and alternatively, the sale to Barber was merely an "isolated transaction" within the meaning of Utah Code Ann. § 16-10a-1501(2)(j) (2001). If not for Wasatch's seizure of Aris's personal property, the sale of equipment would have been consummated within 30 days.

28. Aris did not "transact business" within the meaning of Utah Code Ann. § 16-10a-1501(1) (2001) at any time after it ceased operations in Utah on January 4, 2002.

29. Pursuant to Utah Code Ann. § 16-10a-1501(3) (2001), Aris was authorized to bring and prosecute this action. As a result, JDJ and Wasatch's motion to dismiss should be denied.

30. Pursuant to Rule 12 of the Utah Rules of Civil Procedure, Wasatch and JDJ have waived any defense of insufficiency of process or failure to comply with indorsement requirements or other provisions of Utah Code Ann. § 78-36-8 (2002).

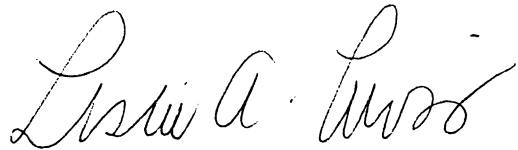
31. There is no evidence or authority to support either a surrender or acceptance. Aris never surrendered its tenancy to JDJ, nor did Aris at any point in time ever

“abandon” the Premises as “abandonment” is defined in Utah Code Ann. § 78-36-12.3 and Fashion Place Assocs. v. Glad Rags, Inc., 754 P.2d 940, 941 (Utah 1988).

32. Service of process on defendants David Skalka, Brian Skalka, and Dennis Peacock has not been made and as a result, claims against these three defendants should be dismissed without prejudice.

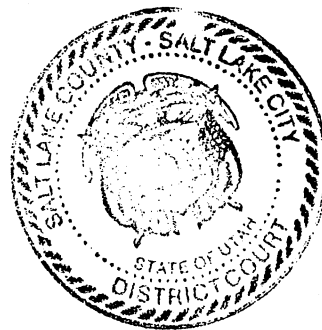
DATED this 18th March day of ~~February~~, 2004.

BY THE COURT



Leslie A. Lewis
Third District Judge

Objections denied



CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of March, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served via hand-delivery to the following:

Todd D. Weiler
Parry Anderson & Gardiner
1270 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

_____

Tab B

R. Stephen Marshall (2097)
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Attorneys for Plaintiff

FILED DISTRICT COURT
 Third Judicial District

MAR 25 2004

SALT LAKE COUNTY
 By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

ARIS VISION INSTITUTE, INC., a
 California corporation, d/b/a ARIS VISION,
 INC.,

Plaintiff,

vs.

WASATCH PROPERTY MANAGEMENT,
 INC., a Utah corporation, JDJ PROPERTIES,
 INC., a Utah corporation, DAVID SKALKA,
 an individual, BRIAN SKALKA, an
 individual, and DENNIS PEACOCK, an
 individual,

Defendants.

Amended
**JUDGMENT AGAINST WASATCH
 PROPERTY MANAGEMENT, INC.,
 AND JDJ PROPERTIES, INC.**

Civil No. 020900624

Judge Leslie A. Lewis

Signed on 3/18/04, Amended Judgment Against Wasat



JD13772312

020900624 WASATCH PROPERTY MANAGEMENT,

This matter came before the Court at a bench trial, which concluded on October 16, 2003. Plaintiff Aris Vision Institute, Inc., ("Aris") was represented at trial by R. Stephen Marshall, and defendants Wasatch Property Management, Inc., ("Wasatch") and JDJ Properties, Inc., ("JDJ") were represented by Todd D. Weiler. Having carefully reviewed all of the evidence

received at trial, along with the written and oral arguments of counsel, and based on the Court's findings of fact and conclusions of law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Judgment is ENTERED against Wasatch and JDJ, jointly and severally, for treble damages in the total amount of \$553,506.51 (three times \$187,687.63 less the rent due in the amount of \$9,556.38), attorney fees in the amount of \$ 69,613.00, and costs in the amount of \$ 3343.87, for a total judgment in the amount of \$ 10210413.38 together with post-judgment interest at the legal rate; LaZ

2. In addition to the foregoing judgment, judgment is also ENTERED against JDJ for the amount of \$13,393.89 (security deposit), together with post-judgment interest at the legal rate;

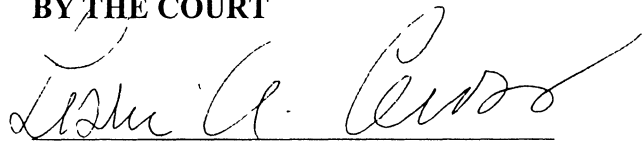
3. JDJ's counterclaim against Aris is DISMISSED with prejudice and on the merits;

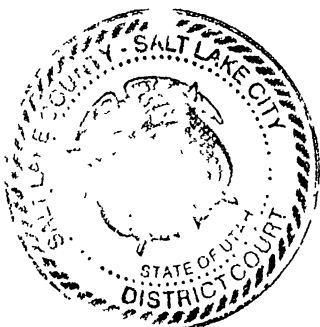
4. JDJ and Wasatch's motion to dismiss is DENIED; and

5. Aris's claims against defendants David Skalka, Brian Skalka, and Dennis Peacock are DISMISSED without prejudice for failure to serve these defendants with process.

DATED this 18th day of March, 2004.

BY THE COURT


Leslie A. Lewis
Third District Judge 3-18-04



JUDGMENT DEBTOR INFORMATION (UTAH CODE ANN. § 78-22-1.5)

1. Judgment debtor Wasatch Property Management, Inc., (“Wasatch”) was served through its Vice President and General Counsel, John A. Dahlstrom, Jr., at 299 South Main Street, Suite 2400, Salt Lake City, Utah 84111.
2. Judgment debtor JDJ Properties, Inc., (“JDJ”) was also served through Mr. Dahlstrom at 299 South Main Street, Suite 2400, Salt Lake City, Utah 84111.
3. The last known business addresses of Wasatch and JDJ are 299 South Main Street, Suite 2400, Salt Lake City, Utah 84111, and 399 North Main, Suite 200, Logan, Utah 84321.
4. The name and address of the judgment creditor is Aris Vision Institute, Inc., dba Aris Vision, Inc., 2730 Armacoast Avenue, Los Angeles, California 90064.
5. The tax ID numbers of Wasatch and JDJ are unknown.
6. The judgment has not been stayed.
7. Any further information required by section 78-22-1.5 but not provided in this statement is unknown and unavailable to the judgment creditor.

Tab C

CHAPTER 36

FORCIBLE ENTRY AND DETAINER

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78-36-1. "Forcible entry" defined.

Every person is guilty of a forcible entry, who either:

- (1) by breaking open doors, windows or other parts of a house, or by fraud, intimidation or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or,
- (2) after entering peaceably upon real property, turns out by force, threats or menacing conduct the party in actual possession.

1953

78-36-2. "Forcible detainer" defined.

Every person is guilty of a forcible detainer who either:

- (1) by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,
- (2) in the nighttime, or during the absence of the occupants of any real property, unlawfully enters thereon, and, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who within five days preceding such unlawful entry was in the peaceable and undisturbed possession of such lands.

1953

78-36-3. Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

- (a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

- (i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

(c) when he continues in possession, in person or by subtenant, after default in the payment of any rent and after a notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, has remained uncomplied with for a period of three days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, including

Section 78-38-9, and remains in possession after service upon him of a three days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three days after service. Within three days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, then no notice need be given.

(2) Unlawful detainer by an owner resident of a mobile home is determined under Title 57, Chapter 16, Mobile Home Park Residency Act.

(3) The notice provisions for nuisance in Subsection 78-36-3(1)(d) are not applicable to nuisance actions provided in Sections 78-38-9 through 78-38-16 only.

1992

78-36-4. Right of tenant of agricultural lands to hold over.

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the owner, his designated agent, or his successor in estate, he shall be deemed to be held by permission of the owner, his designated agent, or his successor in estate, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year; and the holding over for the 60-day period shall be taken and construed as a consent on the part of the tenant to hold for another year.

1981

78-36-5. Remedies available to tenant against undertenant.

A tenant may take proceedings similar to those prescribed in this chapter to obtain possession of the premises let to an undertenant in case of his unlawful detention of the premises underlet to him.

1953

78-36-6. Definitions — Notice to quit — How served.

(1) For purposes of this section:

(a) "Commercial tenant" means any tenant who may be a body politic and corporate, partnership, association, or company.

(b) "Tenant" means any natural person and any individual other than a commercial tenant.

(2) The notices required by Title 78, Chapter 36, Forcible Entry and Detainer, may be served:

(a) by delivering a copy to the tenant personally or, if the tenant is a commercial tenant, by delivering a copy to the commercial tenant's usual place of business by leaving a copy of the notice with a person of suitable age and discretion;

(b) by sending a copy through registered or certified mail addressed to the tenant at his place of residence or, if the tenant is a commercial tenant, by sending a copy through registered or certified mail addressed to the commercial tenant's usual place of business;

(c) if he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of

copy to the tenant at the address of his place of residence or place of business;

(d) if a person of suitable age or discretion cannot be found at the place of residence, then by affixing a copy in a conspicuous place on the leased property; or

(e) if an order of abatement by eviction of the nuisance is issued by the court as provided in Section 78-38-11, when issued, the parties present shall be on notice that the abatement by eviction order is issued and immediately effective or as to any absent party, notice shall be given as provided in Subsections (2)(a) through (e).

3) Service upon a subtenant may be made in the same manner as provided in Subsection (2). 1997

36-7. Necessary parties defendant.

(1) No person other than the tenant of the premises, and tenant if there is one in the actual occupation of the premises when the action is commenced, shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be dismissed, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

(2) If a person has become subtenant of the premises in controversy after the service of any notice as provided in this chapter, the fact that such notice was not served on the subtenant is not a defense to the action. All persons who enter under the tenant after the commencement of the action shall be bound by the judgment the same as if they had been made parties to the action.

(3) A landlord, owner, or designated agent is a necessary party defendant only in an abatement by eviction action for an unlawful drug house as provided in Section 78-38-13. 1992

8-36-8. Allegations permitted in complaint — Time for appearance — Service of summons.

The plaintiff in his complaint, in addition to setting forth the facts on which he seeks to recover, may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible or unlawful detainer, and claim damages therefor or compensation for the occupation of the premises, or both. If the unlawful detainer charged is after default in the payment of rent, the complaint shall state the amount of rent due. The court shall indorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than three or more than 20 days from the date of service. The court may authorize service by publication or mail for cause shown. Service by publication is complete one week after publication. Service by mail is complete three days after mailing. The summons shall be changed in form to conform to the time of service as ordered, and shall be served as in other cases. 1987

78-36-8.5. Possession bond of plaintiff — Alternative remedies.

(1) At any time between the filing of his complaint and the entry of final judgment, the plaintiff may execute and file a possession bond. The bond may be in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action. The court shall approve the bond in an amount that is the probable amount of costs of suit and damages which may result to the defendant if the suit has been improperly instituted. The bond shall be payable to the clerk of the court for the benefit of the defendant for all costs and damages actually adjudged against the plaintiff. The plaintiff shall notify the defendant that he has filed a possession

bond. This notice shall be served in the same manner as service of summons and shall inform the defendant of all of the alternative remedies and procedures under Subsection (2).

(2) The following are alternative remedies and procedures applicable to an action if the plaintiff files a possession bond under Subsection (1):

(a) With respect to an unlawful detainer action based solely upon nonpayment of rent or utilities, the existing contract shall remain in force and the complaint shall be dismissed if the defendant, within three days of the service of the notice of the possession bond, pays accrued rent, utility charges, any late fee, and other costs, including attorney's fees, as provided in the rental agreement.

(b) The defendant may remain in possession if he executes and files a counter bond in the form of a corporate bond, a cash bond, certified funds, or a property bond executed by two persons who own real property in the state and who are not parties to the action. The form of the bond is at the defendant's option. The bond shall be payable to the clerk of the court. The defendant shall file the bond prior to the expiration of three days from the date he is served with notice of the filing of plaintiff's possession bond. The court shall approve the bond in an amount that is the probable amount of costs of suit and actual damages that may result to the plaintiff if the defendant has improperly withheld possession. The court shall consider prepaid rent to the owner as a portion of the defendant's total bond.

(c) The defendant, upon demand, shall be granted a hearing to be held prior to the expiration of three days from the date the defendant is served with notice of the filing of plaintiff's possession bond.

(3) If the defendant does not elect and comply with a remedy under Subsection (2) within the required time, the plaintiff, upon ex parte motion, shall be granted an order of restitution. The constable of the precinct or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff promptly.

(4) If the defendant demands a hearing under Subsection (2)(c), and if the court rules after the hearing that the plaintiff is entitled to possession of the property, the constable or sheriff shall promptly return possession of the property to the plaintiff. If at the hearing the court allows the defendant to remain in possession and further issues remain to be adjudicated between the parties, the court shall require the defendant to post a bond as required in Subsection (2)(b). If at the hearing the court rules that all issues between the parties can be adjudicated without further court proceedings, the court shall, upon adjudicating those issues, enter judgment on the merits. 1987

78-36-9. Proof required of plaintiff — Defense.

On the trial of any proceeding for any forcible entry or forcible detainer the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, had been in the quiet possession thereof for the space of one whole year continuously next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings. 1953

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

(1) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided

in Section 78-36-10.5. If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

- (a) forcible entry;
- (b) forcible or unlawful detainer;
- (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
- (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and
- (e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.

1994

78-36-10.5. Order of restitution — Service — Enforcement — Disposition of personal property — Hearing.

(1) Each order of restitution shall:

(a) direct the defendant to vacate the premises, remove his personal property, and restore possession of the premises to the plaintiff, or be forcibly removed by a sheriff or constable;

(b) advise the defendant of the time limit set by the court for the defendant to vacate the premises, which shall be three business days following service of the order, unless the court determines that a longer or shorter period is appropriate under the circumstances; and

(c) advise the defendant of the defendant's right to a hearing to contest the manner of its enforcement.

(2) (a) A copy of the order of restitution and a form for the defendant to request a hearing as listed on the form shall be served in accordance with Section 78-36-6 by a person authorized to serve process pursuant to Subsection 78-12a-2(1). If personal service is impossible or impracticable, service may be made by:

(i) mailing a copy of the order and the form to the defendant's last-known address and posting a copy of the order and the form at a conspicuous place on the premises; or

(ii) mailing a copy of the order and the form to the commercial tenant defendant's last-known place of business and posting a copy of the order and the form at a conspicuous place on the business premises.

(b) A request for hearing by the defendant may not stay enforcement of the restitution order unless:

(i) the defendant furnishes a corporate bond, cash bond, certified funds, or a property bond to the clerk of the court in an amount approved by the court according to the formula set forth in Subsection 78-36-8.5(2)(b); and

(ii) the court orders that the restitution order be stayed.

(c) The date of service, the name, title, signature, and telephone number of the person serving the order and the form shall be legibly endorsed on the copy of the order and

(d) Within ten days of service, the person serving the order and the form shall file proof of service in accordance with Rule 4(e), Utah Rules of Civil Procedure.

(3) (a) If the defendant fails to comply with the order within the time prescribed by the court, a sheriff or constable at the plaintiff's direction may enter the premises by force using the least destructive means possible to remove the defendant.

(b) Any personal property of the defendant may be removed from the premises by the sheriff or constable and transported to a suitable location for safe storage. The sheriff or constable may delegate responsibility for storage to the plaintiff, who shall store the personal property in a suitable place and in a reasonable manner.

(c) The personal property removed and stored shall be inventoried by the sheriff or constable or the plaintiff who shall keep the original inventory and personally deliver or mail the defendant a copy of the inventory immediately after the personal property is removed.

(4) (a) After demand made by the defendant within 30 days of removal of personal property from the premises, the sheriff or constable or the plaintiff shall promptly return all of the defendant's personal property upon payment of the reasonable costs incurred for its removal and storage.

(b) The person storing the personal property may sell the property remaining in storage at a public sale if:

(i) the defendant does not request a hearing or demand return of the personal property within 30 days of its removal from the premises; or

(ii) the defendant fails to pay the reasonable costs incurred for the removal and storage of the personal property.

(c) In advance of the sale, the person storing the personal property shall mail to the defendant's last-known address a written notice of the time and place of the sale.

(d) If the defendant is present at the sale, he may specify the order in which the personal property shall be sold, and only so much personal property shall be sold as to satisfy the costs of removal, storage, advertising, and conducting the sale. The remainder of the personal property, if any, shall be released to the defendant. If the defendant is not present at the sale, the proceeds, after deduction of the costs of removal, storage, advertising, and conducting the sale shall be paid to the plaintiff up to the amount of any judgment the plaintiff obtained against the defendant. Any surplus shall be paid to the defendant, if the defendant's whereabouts are known. If the defendant's whereabouts are not known, any surplus shall be disposed of in accordance with Title 67, Chapter 4a, Unclaimed Property Act.

(e) The plaintiff may donate the property to charity if:

(i) the defendant does not request a hearing or demand return of the personal property within 30 days of its removal from the premises; or

(ii) the defendant fails to pay the reasonable costs incurred for the removal and storage of the personal property; and

(iii) donation is a commercially reasonable alternative.

(f) If the property belonging to a person who is not a defendant is removed and stored in accordance with this section, that person may claim the property by delivering a written demand for its release to the sheriff or constable or the plaintiff. If the claimant provides proper identification and evidence of ownership, the sheriff or constable or the plaintiff shall promptly release the property.

(5) In the event of a dispute concerning the manner of enforcement of the restitution order, the defendant or any person claiming to own stored personal property may file a request for a hearing. The court shall set the matter for hearing within ten days from the filing of the request, or as soon thereafter as practicable, and shall mail notice of the hearing to the parties.

(6) The Judicial Council shall draft the forms necessary to implement this section. 2003

3-36-11. Time for appeal.

(1) Except as provided in Subsection (2), either party may, within ten days, appeal from the judgment rendered.

(2) In a nuisance action under Sections 78-38-9 through 78-38-16, any party may appeal from the judgment rendered within three days. 1992

8-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted.

It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under subsection 78-36-12(6)(2) and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises. 1981

78-36-12.3. Definitions.

(1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises, or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises. 1981

78-36-12.6. Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises.

(1) In the event of abandonment, the owner may retake the premises and attempt to rent them at a fair rental value and the tenant who abandoned the premises shall be liable:

(a) for the entire rent due for the remainder of the term, or

(b) for rent accrued during the period necessary to rerent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection applies, if less than Subsection (a), notwithstanding that the owner did not rerent the premises.

(2) (a) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant.

(b) (i) The owner shall make reasonable efforts to notify the tenant of the location of the personal property.

(ii) If the property has been in storage for over 30 days and the tenant has made no reasonable effort to recover it, the owner may:

(A) sell the property and apply the proceeds toward any amount the tenant owes, or

(B) donate the property to charity if the donation is a commercially reasonable alternative.

(c) Any money left over from the sale of the property shall be handled as specified in Title 67, Chapter 4a, Part 2, Standards for Determining When Property is Abandoned or Unclaimed.

(d) Nothing contained in this act shall be in derogation of or alter the owner's rights under Title 38, Chapter 3, Lessors' Liens. 1997