

2005

Wasatch Property Management and JDJ Properties, INC v. Aris Vision Institute, INC : Brief of Petitioner

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

v.

ARIS VISION INSTITUTE, INC., a
California corporation, dba ARIS
VISION, INC.,

Respondent/Appellee.

PETITIONERS' BRIEF

No. 20050693-SC

WRIT OF CERTIORARI FROM THE UTAH COURT OF APPEALS

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I.

JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Ann., §78-2-2(3) and (5) and Rule 45 of the Utah Rules of Appellate Procedure.

II.

STATEMENT OF THE ISSUE FOR REVIEW

1. The issue presented for review is whether the court of appeals erred in affirming an award of treble damages for loss, damage and depreciation to personal property under Utah's forcible detainer statute, Utah Code Ann., §78-36-10(3). The court of appeals' decision on the law is reviewed for correctness. *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1277 (Utah 1998).

This issue was preserved below. [See, e.g., R. 103-112; 169-176; 217-226; 230-231; 346-356; 529 at 558-579; 304-307 and the court of appeals' decision, *Aris Vision Institute, Inc. v. Wasatch Prop. Management, Inc.*, 2005 UT App. 326, ¶¶31-33.]

III.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW.

Aris leased premises from JDJ in Salt Lake County for the operation of a laser eye surgery clinic (the "Premises"). Wasatch managed the Premises for JDJ. Aris ceased all

business operations and vacated the Premises on January 4, 2002 without paying rent. Without JDJ's knowledge or consent, Aris turned over possession of the Premises to the independent contractor doctors who performed surgeries at the Premises to conduct their own business on the Premises while Aris and the doctors attempted to negotiate an agreement for the doctors to purchase Aris's equipment and other personal property (collectively, the "Personal Property") on the Premises and assume Aris's Lease with JDJ.

When Aris and the doctors had been unable to come to an agreement, Aris sent a representative to the Premises on January 22, 2002 to remove the Personal Property that the doctors were then utilizing in their business. When Aris was not permitted to remove the Personal Property, Aris filed (but did not serve) a Complaint in this action alleging forcible detainer, wrongful eviction and conversion of its Personal Property, as well as a claim for declaratory relief. Aris sought damages for not being permitted to remove its Personal Property. Aris also sought replevin of its Personal Property. [R. 1-26]

On or about February 15, 2002, Aris filed and served an Amended Complaint [R. 27-48] and a motion for a writ of replevin and supporting memorandum and affidavits. [R. 49-86] The hearing on the replevin motion was later postponed and then cancelled and the parties worked together for several months to attempt to re-let the Premises and sell the Personal Property. When these efforts were unsuccessful, Wasatch and JDJ permitted Aris to remove the Personal Property from the Premises on July 2, 2002. On

October 28, 2002, JDJ filed a Counterclaim seeking lost rental damages for Aris's breach of the Lease. [R. 103-112]

A bench trial was held before the Honorable Leslie A. Lewis on October 14 through 16, 2003. [R. 526-528] Thereafter, closing arguments were heard by Judge Lewis on November 14, 2003. [R. 529]

On January 27, 2004, Judge Lewis entered a Memorandum Decision finding in favor of Aris on the Complaint and dismissing JDJ's Counterclaim. Judge Lewis allowed Aris recovery on its forcible detainer, wrongful eviction and conversion claims in the amount of \$187,687.60 for depreciation and damage to the Personal Property, and for the value of missing equipment. Judge Lewis then trebled those damages, relying on Utah Code Ann., §78-36-10(3). Judge Lewis also awarded Aris its attorney's fees under the Lease. Judge Lewis refused to award punitive damages, ruling that the actions of Wasatch and JDJ did not amount to a knowing and reckless indifference or disregard of Aris's rights. [R. 369-375]

Judge Lewis entered judgment in favor of Aris on March 12, 2004. [R. 474] Wasatch and JDJ filed a Notice of Appeal from that judgment on March 22, 2004. [R. 477]

On July 21, 2005, the Utah Court of Appeals issued its Opinion affirming the Judgment. The Honorable Gregory K. Orme dissented on the issues of the award of treble damages and the award of depreciation damages. [*See App. A*]

On November 3, 2005, this Court granted the Petition for Writ of Certiorari with respect to the issue of whether treble damages were properly awarded for damages to personal property. [App. B]

B. STATEMENT OF FACTS

In accordance with Wasatch's and JDJ's obligation to marshal the evidence, the following facts are set forth in a light most favorable to Aris and are based almost wholly upon the testimony of Aris's own witnesses:

1. Aris is a California company that owned and operated a laser eye surgery center (the "Center") located in Suites 100 and 120 of the Woodlands Business Park Tower I in Murray, Utah (the "Premises"), that Aris leased from JDJ. [R. 409-410, Findings Nos. 1 & 6] The term of the Lease ran through July 31, 2006. [R. 528 at 381-382; Pl's Exs. 9 & 11]
2. Wasatch was a sister company of JDJ, and managed the Woodlands Towers building as JDJ's agent. [R. 410, Finding No. 8]
3. Aris employed David Skalka ("Skalka") as the manager of the Center and contracted with four physicians (the "Doctors") on an independent contractor basis to perform eye surgeries at the Center. [R. 409, Finding No. 2]
4. Aris owned all the equipment and furniture (collectively the "Personal Property") located at the Center. [R. 527 at 234]

Aris Vacated the Premises

5. According to the evidence presented by Aris, the laser eye surgery market collapsed and on January 3, 2002 Aris decided to close all of its centers the next day, January 4, 2002, and file bankruptcy. All Aris employees, including Skalka, were terminated on January 4, 2002 and Aris ceased doing business in Utah on that date. [R. 526 at 38-39; R. 527 at 234-235 & 263-264]

6. Aris presented the testimony of its employees that over the weekend after January 4, 2002, Aris decided not to file bankruptcy. By January 7, 2002, Aris had decided to allow the independent contractor Doctors to operate their own business on the Premises while Aris attempted to come to terms with the Doctors on the purchase of the Personal Property and assumption of the Lease. On or about January 7, Aris initiated negotiation with the Doctors and agreed that they could use the Personal Property and Premises while they negotiated. [R. 527 at 235-237]

7. Aris did not notify Wasatch or JDJ in advance that it was terminating its business or that it was turning over the Premises to the Doctors. [R. 212, ¶18]

8. 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. [R. 526 at 9-10] When Aris failed to pay rent, Wasatch sent out two notices that the rent was past due. Aris did not respond to the notices. [R. 528 at 384; Pl's Ex. 1, ¶16]

The Personal Property

9. Sometime after Aris terminated its operations, Wasatch's property manager, Dennis Peacock ("Peacock"), asked Skalka what was going on, Aris had not made the January rent payment. Skalka told him that he had been terminated by Aris and of Aris's financial trouble and provided copies of the notices he had received from Aris, which indicated that Aris had terminated Skalka's employment, was ceasing all operations and would likely file for bankruptcy protection. Peacock responded to Skalka that Aris's Personal Property could not be removed from the Premises until Wasatch "found out what was going on with Aris." [R. 527 at 299-301; R. 411, Finding Nos. 15-18]

10. Paragraph 20.1 of the Lease provided in part:

All moveable personal property of Tenant not removed from the premises upon the abandonment thereof (as defined at Title 78, Chapter 36 of the Utah Code Ann. or similar replacement provisions) or upon the termination of this Lease for any cause whatsoever shall conclusively be deemed to have been abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without notice to Tenant or any other person and without any obligation to account therefore.

11. When the negotiations between Aris and Skalka and the Doctors proved unsuccessful, Aris directed that Richard Enright ("Enright"), its Director of Operations, come to Utah to determine if Skalka and the Doctors had any interest in purchasing the Personal Property and, if not, to remove the Personal Property. [R. 526 at 36 & 39] Enright came to Utah without prior notice on January 22, 2002. [*Id.* at 39 & 89]

12. When Enright arrived at the Premises, he walked through the space with Skalka. [*Id.* at 41-42] There were certain rooms Skalka would not let him enter. [*Id.* at 83] The Doctors were preparing for surgeries that day. It was business as usual. Enright did not have a key to the Premises. Enright asked to do an inventory. Skalka said it would be pointless to do an inventory because Wasatch had seized the assets. Skalka did not give Enright permission to take the Personal Property, but told him he would have to speak with Peacock, Wasatch's property manager at the building. [*Id.* at 41-42]

13. Skalka took Enright downstairs to meet Peacock, introduced him to Peacock as Richard Enright from Aris Vision and told Peacock that Enright was there to remove the Personal Property. Peacock said that the Personal Property could not be removed because Aris had abandoned the Premises and had defaulted under the Lease by failing to pay the January rent and that as a result, Wasatch had seized the Personal Property. [R. 526 at 41-43; R. 413, Finding No. 26]

14. Enright tendered a check for the rent, but Peacock refused to accept it. Peacock stated that it was too late, that Aris had abandoned the premises and that Wasatch was not taking Aris's money. Enright denied there had been an abandonment. [*Id.* at 44-45; R. 415, Finding No. 27]

15. Enright called Kathleen Soto ("Soto"), Aris's CFO, and told her what had occurred. Soto then spoke with Skalka and Peacock. Peacock told Soto that Aris had abandoned the Premises and had defaulted under the Lease by failing to pay its January

rent. Peacock told Soto that Wasatch was therefore entitled to seize Aris's Personal Property under paragraph 20.1 of the Lease. [R. 413, Finding Nos. 28 & 29] Soto testified that she responded that Aris was pursuing its right under paragraph 20.1 of the Lease to remove its Personal Property *before surrendering the Premises*. [R. 413, Finding No. 30] Soto offered to pay the January rent immediately by wire transfer, but Peacock indicated it was too late and the payment would not be accepted. [*Id.*, Finding No. 31]

16. Peacock told Enright that he needed to leave the Premises and threatened to have the police remove Enright if he did not leave. [R. 526 at 44-45] Enright testified that he and Peacock did not have a confrontation on January 22, but "basically a discussion". [R. 526 at 76-77] Enright left the Premises without removing any Personal Property. [R. 414, Finding No. 35]

17. Aris did not have any keys to the Premises which were occupied by the Doctors. During his visit, Enright requested a key from Skalka and then requested a key from Peacock. They both refused to give Enright a key. [*Id.* at 47]

18. Aris then retained Erik Olson ("Olson") with the law firm of Durham, Jones & Pinegar, who filed (but did not serve) a Complaint on behalf of Aris on January 23, 2002, seeking replevin of the Personal Property and damages for the refusal to give Aris the Personal Property. [R. 414, Finding No. 37]

19. On January 24, 2002, Olson talked with John A. Dahlstrom, Jr. ("Dahlstrom"), the Executive Vice President and General Counsel of Wasatch. Olson told Dahlstrom

that Aris wanted to remove the Personal Property and wanted access to the Premises to do so. Dahlstrom responded, “let’s see if we can work out a deal”. Olsen testified that Dahlstrom was extremely professional. Dahlstrom proposed that Aris consider a “business solution” under which Aris would sell its Personal Property to Skalka and the Doctors and they would assume the Lease. Aris agreed to pursue such an arrangement. [R. 526 at 153-155; R. 528 at 441-442; R. 415, Finding No. 40] Aris recognized that it was on the hook for some sort of ongoing monthly rent obligation. [R. 526 at 154-156]

20. Olson acknowledged that between January 24 and February 15, 2002, the parties were mutually cooperating in an effort to move Skalka and the Doctors into the Premises. [R. 527 at 219-220]

21. The Doctors moved out of the Premises on February 9, 2002 and moved into a smaller space in the Building. Wasatch did not supervise the move or retrieve the keys to the Premises. [R. 527 at 249-251 & Pl’s Ex. 12; R. 416, Finding No. 46] Aris and the Doctors did not work out an arrangement for the Doctors to purchase the Personal Property. Soto never asked Skalka to remove the Personal Property after Enright left on January 22. [R. 527 at 330]

22. When the Doctors vacated the Premises, Peacock changed the locks in part to safeguard the Personal Property so that Skalka and the Doctors who had previous keys would no longer be able to have access to the Premises. Aris and Olson did not ask for a

key and Peacock did not give Aris or Olson a key. [R. 527 at 189; 338 & 345] Wasatch did not advise Aris that the locks had been changed. [Finding No. 47 at R. 488]

23. When Olson heard nothing further from Dahlstrom by mid-February (this was during the Olympics), Olson filed and served an Amended Complaint and also a motion for a writ of replevin for possession of the Personal Property. [R. 526 at 157-159; Pl's Exs. 1 & 2]

24. Olson discussed the motion for writ of replevin with Dahlstrom a few times. Dahlstrom said that Wasatch would fight the motion and that Aris could not win, but even if it did, Aris would have to post an undertaking in the amount of hundreds of thousands of dollars. Dahlstrom said that Olson could not expect Wasatch to let all security just walk out the door leaving Wasatch holding the bag. [R. 526 at 160-161]

25. The writ of replevin hearing was originally scheduled for February 26, 2002. At Dahlstrom's request, the hearing was rescheduled for March 5, 2002. [R. 526 at 161-162]

26. Olson then cancelled the March 5 hearing. Olson testified he did so based upon Dahlstrom's statements that he would oppose the motion and there would be a large undertaking, but there was no evidence he told Dahlstrom his reason. Aris left the Personal Property on the Premises. Olson and Dahlstrom agreed to work together to try to find a new tenant to reduce the damage claim against Aris. It was Olson's intent to try to reduce Aris's exposure and at the same time avoid the necessity for Aris to file a large

undertaking. Olson was aware that Aris had four and a half years remaining on a seven-year lease at approximately \$20 a square foot. [R. 527 at 199; R. 528 at 470-471]

27. The parties also agreed to put the litigation on hold while they worked together to find a new tenant. [R. 527 at 164-166; R. 528 at 470-471] In the seven months following February 15, Olson took no further action in court to prosecute the claims until after JDJ's Counterclaim was filed in October 2002. [R. 527 at 197]

28. After January 22, 2002, there was never any occasion when Aris was denied access to the Premises or attempted to remove any Personal Property from the Premises where Aris was restrained from doing so. [R. 526 at 13; R. 527 at 200-201] After March 5, 2002, Peacock opened the Premises on several occasions so that Aris could inventory the Personal Property and show the Premises to prospective tenants. [R. 526 at 12]

29. After March 5, Olson and Dahlstrom had subsequent conversations where they would catch up with each other about leads for replacement tenants. [R. 527 at 168]

30. Within a week or two after March 5, Olson told Dahlstrom that Aris wanted access to the Premises for the purpose of inventorying the Personal Property to make sure that nothing was damaged or missing. Dahlstrom agreed and had Olson make arrangements directly with Peacock. [R. 527 at 166-167] Dahlstrom told Peacock to let Aris in any time they asked and to be courteous and help in any way and cooperate. [R. 528 at 361-362]

31. One of the visits Olson arranged to the Premises was on April 29, 2002 for the purpose of showing Ed Barber the space. Mr. Barber was interested in perhaps leasing the space and perhaps purchasing some of the Personal Property. A week later Aris had another visit with Barber at the Premises. [R. 527 at 168-169; R. 526 at 54-55 & 57] Peacock was also present during, and supervised, these visits. [*Id.* at 58] On the April 25 visit, Enright requested that Aris be allowed to remove one item of equipment, a microkeratome, and Peacock agreed. [*Id.* at 62]

32. Olson understood that the Personal Property would have greater value in place if they could find a new tenant and that is why Aris was working with Barber in April and May to get him to not only buy the equipment, but to move into the Premises. [R. 527 at 223]

33. Sometime before May 20, 2002, Aris reached an agreement with Barber to purchase some of the equipment for \$35,000. [*Id.* at 171, 173 & 266]

34. Aris worked with Barber for quite a while on taking over the Premises, but was unsuccessful. [*Id.* at 171-172]

35. In late May or early June, 2002, Olson told Dahlstrom that Aris was not making much progress with getting Barber into the space. Olson turned Barber over to Dahlstrom and Wasatch in the hope that they could work something out with Barber to lease the Premises. [*Id.* at 172-173]

36. On June 4, 2002, Olson wrote a letter to Dahlstrom in which he stated:

As we have discussed over the phone on several occasions, it remains Aris's intention at the present time to postpone indefinitely the litigation of the lawsuit Aris has filed against Wasatch including the motion for writ of replevin in hopes that either Aris or Wasatch can work together in good faith to find a new tenant to occupy the premises. ***In the meantime, Aris will leave its valuable equipment in the space. Aris's efforts to find a tenant should not be construed in any way to negate Wasatch's duty, if any, to mitigate the damages.*** [*Id.* at 173 & Pl's Ex. 24]¹ [Emphasis added]

37. Olson and Enright went to the Premises with Barber on June 10, 2002 to close the equipment sale. Olson talked with Dahlstrom who said he did not have authorization for Aris to remove the equipment yet, but anticipated he could get it, but not in time to close the deal on that day. Olson then told Aris and Barber they were not able to proceed with the sale that day. [R. 527 at 175-177]

38. The next day Olson talked with Dahlstrom who said Wasatch would only agree to the transaction if the \$35,000 was paid to Wasatch. Olson said there was no way Aris would agree to that. Dahlstrom then said he would see if his client would be willing to take \$10,000. [*Id.* at 177-178]

39. Approximately ten days later when Olson had not heard from Dahlstrom, he told Dahlstrom that Aris was going to go forward with the lawsuit and proceed with the motion for writ of replevin to get possession of the Personal Property. Dahlstrom responded on approximately June 25 that Aris could go ahead and remove the Personal

¹ Olson testified that he included in his letter the language about the equipment staying on the Premises based upon the fact that the writ hearing had been cancelled so Aris was unable to remove the equipment and that he did not intend to waive any claims. [*Id.* at 173-174]

Property. [*Id.* at 178-179] Judge Lewis found that Dahlstrom's instructions were a change from Wasatch's previous instructions not to allow Aris to remove the Personal Property and that Wasatch refused to allow Aris to take the Personal Property as a "bargaining chip" in Wasatch's negotiations with Aris over the payment of rent. [R. 421, Finding No. 76; R. 424, Finding No. 89]

40. The equipment sale to Barber was consummated on July 2, 2002. He did not ask for a discount because of the delay. [*Id.* at 264 & 266-267]

41. On July 2, 2002, Aris removed all of the Personal Property from the Premises. [R. 527 at 240] Two of the lasers were inoperable. [*Id.* at 251-252]²

Aris's Claimed Damages

42. Soto testified that two of the lasers were damaged so when Aris settled with VISX the amount of the credit which VISX gave for those lasers was reduced by \$53,000 and Judge Lewis awarded this amount. [*Id.* at 252-253]³

43. There were missing items of equipment. [*Id.* at 243] Enright did not know who took the missing Personal Property or if Skalka or the Doctors took any of the equipment

² JDJ subsequently relet the Premises at a substantially reduced rent because of market conditions. The undisputed evidence was that JDJ lost \$174,561.17. [R. 528 at 395, 397-398, 515-516 and Ex. 65]

³ Soto speculated that the damage to the lasers had to occur sometime after February 9, 2002 when the Doctors vacated the Premises because the Doctors were performing surgeries using those lasers. [*Id.* at 251-252] Soto did not know whether any of the Aris employees who were fired or any of the Doctors damaged the lasers as they moved out. [*Id.* at 288] Skalka did not know one way or another whether any of the lasers were broken when the Doctors moved out of the Center. [*Id.* at 329]

when they moved out. [R. 526 at 108] Judge Lewis awarded Aris \$16,118.82 for the missing equipment. [R. 494, Finding No. 80]

44. Richard Holdren (“Holdren”) testified on behalf of Aris as its damage expert. Mr. Holdren appraises and sells medical practices and equipment. [R. 526 at 112] Holdren was asked to value the Personal Property as of January 22, 2002 and as of a date approximately five months later to determine the difference in value. Holdren testified that the Personal Property depreciated in value by \$118,568.81 during the five months it remained on the Premises and Judge Lewis awarded damages in that amount. [Id. at 121-122]

IV.

SUMMARY OF ARGUMENT

Aris vacated the Premises on January 4, 2002 without notice and without paying rent. At that time, Aris terminated all of its Utah employees and all of its business operations in Utah, as well as throughout the country. On January 7, in breach of the Lease, Aris turned over possession of the Premises to the independent contractor Doctors to operate their own independent business on the Premises while Aris and the Doctors attempted to work out an arrangement for Aris to take over the Lease and purchase Aris’s

Personal Property. After January 4, 2002, Aris had no desire or ability to occupy the Premises.

The court of appeals affirmed Judge Lewis's ruling that Wasatch and JDJ wrongfully withheld Aris's Personal Property by only allowing access to the Personal Property to Aris when Aris requested for the purpose of inventorying it and showing it to third parties. The only damages sought by Aris or awarded to Aris were damages for depreciation in the value of the Personal Property; damage to the Personal Property and missing items of Personal Property. No damages were sought or awarded to Aris relating to its inability to occupy the Premises because Aris had no desire or ability to occupy the Premises. The court of appeals erred in affirming the trial court's decision awarding Aris treble damages under Utah's real estate forcible detainer statute where the only damages suffered were with respect to conversion of the Personal Property and Aris did not seek to reoccupy the Premises and had no desire or ability to do so.

V.

ARGUMENT

The testimony of Aris's own employees at trial established that Aris vacated the Premises on January 4, 2002 without notice and without paying rent, terminated all business operations in Utah as well as throughout the country on that date and, in breach

of the Lease, turned over possession of the Premises to the independent contractor Doctors to conduct their own independent business on January 7.

Nevertheless, the court of appeals affirmed Judge Lewis's rulings that (1) Aris had not abandoned the Premises because it had turned the Premises over to the independent contractor Doctors and did not intend to abandon⁴; and (2) when two and a half weeks later, on January 22, 2002, Wasatch and JDJ refused to allow Aris to remove its Personal Property from the Premises because JDJ had seized that property under paragraph 20.1 of the Lease, Wasatch and JDJ were guilty of forcible detainer, wrongful eviction and conversion of the Personal Property.

Moreover, the court of appeals affirmed - - over Judge Orme's dissent - - Judge Lewis's ruling trebling the Personal Property conversion damages under Utah's real estate treble damage statute, Utah Code Ann., §78-36-10(3). This incredible result was reached even though Aris was voluntarily cooperating with Wasatch and JDJ for months to relet the Premises and sell the Personal Property to a new tenant in order to mitigate *Aris's* liability for damages. It is respectfully submitted that the court of appeals erred in awarding treble damages under the *real estate* forcible detainer statute for conversion of *personal property*.

⁴ The court of appeals ruled that Aris had not abandoned the Premises because it had no intent to do so even though subjective intent is irrelevant to statutory abandonment under Utah Code Ann., §78-36-12.3 and the three elements required for statutory abandonment were clearly met.

There was no claim or evidence that Aris suffered any damage by virtue of the alleged detainer of the real estate. Aris had ceased all business operations in Utah and had vacated the Premises on January 4, 2002. Aris had no employees in Utah; Aris had no business in Utah; and Aris had no use for the Premises or any ability to occupy the Premises. In fact, when Aris's Enright came to Utah on January 22, 2002, the independent contractor Doctors to whom Aris had transferred possession of the Premises were occupying the Premises and continued to do so until February 9, 2002. Aris made no demand that the Doctors vacate. Enright only sought access to the Premises to remove the Personal Property; he did not seek possession of the Premises. Similarly, his boss, Soto, told Wasatch's Peacock at that time when Peacock told her that JDJ had seized the Personal Property under paragraph 20.1 of the Lease that Aris was entitled to remove the Personal Property *before surrendering the Premises to JDJ*.

In short, at most, all the evidence demonstrated was that Aris wanted to remove its *Personal Property* from the Premises. That is not a legal basis for an award of treble damages under Utah's *real property* forcible detainer statute.

Wasatch and JDJ have been unable to find any Utah cases dealing with the issue of whether treble damages can be awarded for conversion of a tenant's personal property.⁵

⁵ The only cases that Wasatch and JDJ have been able to locate from other jurisdictions on this issue are cases decided many years ago in New York and Michigan in which the courts held that in forcible entry or detainer cases treble damages could not be recovered for injuries to personal property. See *Arout v. Azar*, 219 N.Y.S. 431 (1927); *Carman v. Scott*, 137 N.W. 655 (Mich. 1912); *Shaw v. Hoffman*, 1872 WL 3228, *4 (Mich. 1872).

However, the treble damages penalty provided by the forcible detainer statute is a drastic remedy to discourage landlords from forcibly dispossessing tenants of their possession of real property. Consequently, the statute should be strictly construed. *Van Zyverden v. Farrar*, 393 P.2d 468, 470 (Utah 1964); *Forrester v. Cook*, 292 P. 206, 214 (Utah 1930) (“The provision for damages in three times the amount of damages is highly penal and therefore subject to strict construction”). Cf. *Keller v. Southwood North Medical Pavilion*, 959 P.2d 102, 108 (Utah 1998) (forcible entry statute only applies to types of property people can occupy). See also *Gibby’s Inc. v. Aylett*, 615 P.2d 949, 951 (Nev. 1980). A landlord’s act in converting a tenant’s personal property is distinct from the act of forcibly detaining real property a tenant is occupying. A tenant should be relegated to an action for conversion and replevin with respect to personal property. The forcible detainer statute should not be applied to a landlord’s alleged wrongful withholding of personal property, especially after the tenant has vacated the premises.

In his dissenting opinion, Judge Orme stated that he was “baffled” by the affirmance of the award of treble damages for conversion of personal property based upon the real estate forcible detainer statute that permits the “extraordinary remedy of tripling the amount of actual damages”. Judge Orme correctly recognized that the “severe remedy of treble damages is available because of the special status of real estate, and it is a remedy that is pretty well limited to real property contexts.” [2005 UT App. 325 at ¶36] Judge Orme concluded that “[i]t subverts the purpose of that long-standing policy

favoring real estate to treble *all* damages in an action between a tenant and landlord just because forcible detainer of the leasehold is one aspect of that litigation.” [*Id.*]

Although Aris has never contended that the Personal Property damage constituted consequential damage resulting from the forcible detainer of the Premises, Judge Orme reasoned that even if the Personal Property damage could be viewed as constituting consequential damages, the Personal Property damage was not recoverable as consequential damage because no general damages constituting reasonable rental value of the Premises were sought or awarded. *See, Forrester v. Cook*, 292 P. 207, 211 and 214 (Utah 1930) overruled in part on other grounds, *P. H. Inv. v. Oliver*, 818 P.2d 108 (Utah 1991); *Monroc, Inc. v. Sidwell*, 770 P.2d 1022, 1025-1026 (Utah App. 1989). Judge Orme correctly observed that consequential damages cannot be recovered unless general damages are awarded. *See, Martineau v. Anderson*, 636 P.2d 1039, 1041-1043 (Utah 1981); *Cohn v. J. C. Penney Co.*, 537 P.2d 306, 307 (Utah 1975).

The award of treble damages in this case is especially ironic given the fact that Aris had turned over possession of the Premises to the independent contractor doctors weeks before the conversion of the Personal Property found by the court of appeals occurred. Aris had no desire or ability to reoccupy the Premises; Aris was working with Wasatch and JDJ for months to attempt to relet the Premises and sell the Personal Property to mitigate *Aris's* liability for future rent; and the trial court refused to award punitive damages against Wasatch and JDJ with respect to conversion of the Personal

Property because the trial court determined they did not act with knowing and reckless indifference or disregard of Aris's rights. [R. 369-375]

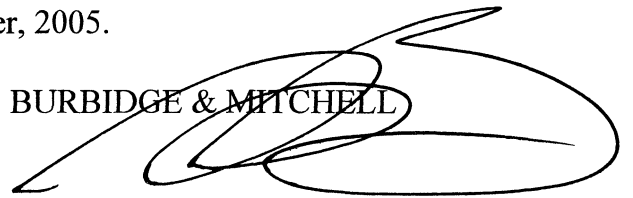
In summary, the real estate forcible detainer statute should not be applied to sanction the drastic penalty of treble damages for conversion of personal property. Moreover, even if such a treble damage award could be given as consequential damages where a landlord deprives a tenant of possession of the real estate, the treble damages awarded in the present case could not be justified. Aris had turned over possession of the Premises to the independent contractor doctors weeks before the Personal Property was withheld and Aris did not seek to reoccupy the Premises and had no reason or ability to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court of appeals affirming the award of treble damages should be reversed and the Judgment modified to eliminate the award of treble damages.

DATED this 15th day of December, 2005.

BURBIDGE & MITCHELL

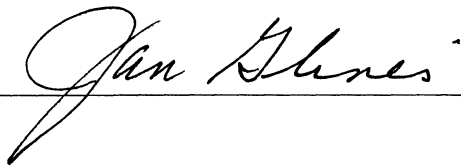
A large, stylized handwritten signature in black ink, appearing to read 'R. Burbidge', is written over the firm name and extends across the line above the name.

RICHARD D. BURBIDGE
Attorneys for Petitioners

MAILING CERTIFICATE

I HEREBY CERTIFY that two copies of the foregoing PETITIONERS' BRIEF
was mailed to the following on the 15 day of December, 2005:

R. Stephen Marshall, Esq.
DURHAM, JONES & PINEGAR
111 East Broadway, Suite 900
Salt Lake City, Utah 84111



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APPENDIX A

COURT OF APPEALS OPINION

C

Court of Appeals of Utah
 ARIS VISION INSTITUTE, INC , a California
 corporation dba Aris Vision,
 Inc , Plaintiff and Appellee,

v

WASATCH PROPERTY MANAGEMENT, INC ,
 a Utah corporation, JDJ Properties, a Utah
 corporation, David Skalka, an individual, Brian
 Skalka, an individual, and
 Dennis Peacock, an individual, Defendants and
 Appellants

No. 20040304-CA.

July 21, 2005

Background: Tenant sued landlord alleging forcible detainer, wrongful eviction, and conversion. Landlord counterclaimed that tenant abandoned the premises. The Third District Court, Salt Lake Department, Leslie A. Lewis, J., entered judgment for tenant and awarded **treble damages** on the **forcible detainer** claim. Landlord appealed.

Holdings: The Court of Appeals, Bench, Associate Presiding Judge, held that

- (1) tenant's actions were insufficient to constitute statutory abandonment,
 - (2) tenant's actions were insufficient to constitute common-law abandonment,
 - (3) landlord used force and threats to unlawfully hold and keep possession of leased premises,
 - (4) tenant was not required to seek restitution under the forcible detainer statute,
 - (5) landlord wrongfully evicted tenant,
 - (6) tenant did not waive its conversion claim,
 - (7) tenant was entitled to trebled damages for conversion damages resulting from forcible detainer.
- Affirmed

Orme, J., dissented and filed opinion

West Headnotes

[1] Appeal and Error ⚡946

30k946 Most Cited Cases

The district court's application of the law to the facts of a case is reviewed for abuse of discretion.

[2] Appeal and Error ⚡1008.1(14)

30k1008 1(14) Most Cited Cases

[2] Landlord and Tenant ⚡110(1)

233k110(1) Most Cited Cases

Common-law abandonment of a leased premises depends on the intent of the party accused of the act, and the determination of that intent is a question of fact, which will only be reversed if the district court's finding is clearly erroneous.

[3] Appeal and Error ⚡842(1)

30k842(1) Most Cited Cases

Matters of statutory construction are questions of law that are reviewed for correctness.

[4] Appeal and Error ⚡1008.1(5)

30k1008 1(5) Most Cited Cases

Questions of fact are reviewed under the clearly erroneous standard, with deference given to the trial court.

[5] Appeal and Error ⚡1008.1(8.1)

30k1008 1(8.1) Most Cited Cases

The determination of intent to waive a claim is a question of fact, and thus, will only be reversed if the district court's finding is clearly erroneous.

[6] Appeal and Error ⚡1013

30k1013 Most Cited Cases

Because the adequacy of damages is a question of fact, the reviewing court cannot overturn the trial court's findings unless they are clearly erroneous.

[7] Landlord and Tenant ⚡110(1)

233k110(1) Most Cited Cases

Commercial tenant's actions were insufficient to constitute statutory abandonment of leased

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premises, which were used as a laser eye surgery center, even though tenant did not inform landlord of any possible absence from the premises and tenant failed to pay monthly rent when due, where doctors, who were independent contractors of tenant, continued to perform laser eye surgery using tenant's equipment on the premises West's U C A § 78-36-12 3(3)

[8] Landlord and Tenant ⚡110(1)

233k110(1) Most Cited Cases

Commercial tenant's conduct in terminating its office manager, informing various vendors that it was closing its business, and failing to pay rent was insufficient to constitute common law abandonment of leased premises that were used as a laser eye surgery center, even though doctors, who were independent contractors, continued to perform surgery on premises, where tenant did not turn over contractual rights to possession to the doctors, but merely allowed the doctors to continue to use its equipment while negotiations for sale of the business took place

[9] Landlord and Tenant ⚡110(1)

233k110(1) Most Cited Cases

Under the common-law definition of "abandonment," a lease may be abandoned when a tenant voluntarily relinquishes or vacates the leased premises with the intention to terminate contractual rights to possession and control of the premises, which requisite intent can be shown by words or conduct

[10] Landlord and Tenant ⚡112.5

233k112 5 Most Cited Cases

Whether a common law abandonment or surrender occurred is for the trial court to determine from the conduct and expressions of the parties with respect thereto

[11] Landlord and Tenant ⚡278.17(1)

233k278 17(1) Most Cited Cases

[11] Landlord and Tenant ⚡288

233k288 Most Cited Cases

In order to comply with forcible detainer statute, unless a tenant plainly abandons the premises, a

landlord must resort to judicial process if he wishes to be rid of a tenant in peaceable possession, a landlord who resorts to self-help is liable to the evicted tenant West's U C A § 78-36-2

[12] Landlord and Tenant ⚡278.17(1)

233k278 17(1) Most Cited Cases

Landlord used force or threats to unlawfully hold and keep possession of the leased premises, as required for liability to tenant under the forcible detainer statute, even though landlord claimed the tenant abandoned the premises, landlord refused to allow tenant to remove its equipment from the premises, landlord threatened to call the police if tenant did not leave the premises, landlord changed the locks on two occasions and only allowed tenant access to premises under supervision, and tenant's actions were insufficient to constitute abandonment West's U C A § 78-36-2

[13] Landlord and Tenant ⚡278.17(3)

233k278 17(3) Most Cited Cases

Restitution of the premises was a permissive remedy under forcible detainer statutes, and thus tenant's claim for damages, without an additional claim for restitution of the premises, did not invalidate its claim under the statutes West's U C A §§ 78-36-2, 78-36-10

[14] Appeal and Error ⚡173(2)

30k173(2) Most Cited Cases

Landlord waived for appellate review issue of whether forcible detainer statute did not apply in tenant's action after landlord held tenant's equipment due to statutory lessor's lien, where issue was raised for the first time on appeal West's U C A § 38-3-1

[15] Landlord and Tenant ⚡278.17(1)

233k278 17(1) Most Cited Cases

Landlord wrongfully evicted tenant by not permitting tenant complete access to the premises, tenant was in legal possession and had not abandoned the premises, and tenant's representative was denied access to the premises to remove tenant's equipment and was threatened with police action if he did not leave immediately West's U C A § 78-36-10

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[16] Stipulations ⚡14(11)

363k14(11) Most Cited Cases

Tenant's agreement to postpone a hearing in its replevin action against landlord to recover its equipment was not a waiver of its conversion claim, postponement was sought while tenant and landlord attempted to find new tenants for the premises, there was no settlement between the parties, and tenant did not expressly agree to waive its claim

[17] Landlord and Tenant ⚡278.17(4)

233k278 17(4) Most Cited Cases

Tenant was entitled to trebling of damages for landlord's conversion of personal property as a result of a forcible detainer, given that forcible detainer statute did not limit damages to rental value of premises during the period of the detainer, tenant's damages totaled \$187,687.63 for damage to, and depreciation of equipment and for missing equipment, which were trebled under the statute West's U C A § 78-36-10

[18] Landlord and Tenant ⚡278.17(4)

233k278 17(4) Most Cited Cases

A landlord who resorts to self-help is liable to the evicted tenant for all damages proximately caused by the eviction West's U C A § 78-36-10

[19] Appeal and Error ⚡842(1)

30k842(1) Most Cited Cases

Whether the district court applied the correct rule for measuring damages is a question of law that is reviewed for correctness

[20] Trover and Conversion ⚡46

389k46 Most Cited Cases

The measure of damages in a conversion action is generally the value of the converted property at the time of conversion, plus interest

[21] Damages ⚡95

115k95 Most Cited Cases

[21] Damages ⚡103

115k103 Most Cited Cases

To the extent possible, the fundamental purpose of compensatory damages is to place the plaintiff in the same position he would have occupied had the

tort not been committed

*26 Richard D Burbidge and Stephen B Mitchell, Burbidge & Mitchell, Salt Lake City, for Appellants

R Stephen Marshall and Erik A Olson, Durham Jones & Pinegar, Salt Lake City, for Appellee

Before Judges BENCH, DAVIS, and ORME

OPINION

BENCH, Associate Presiding Judge

**1 Defendants appeal a judgment in favor of Aris Vision Institute, Inc (Aris) for forcible detainer, wrongful eviction, and conversion of personal property We affirm

BACKGROUND

**2 Aris, a California corporation, owned and operated a laser eye surgery center (the premises) located at the Woodlands Business Park in Murray, Utah Aris owned all the equipment and furniture (collectively, "equipment") located at the premises Aris contracted with four doctors to perform eye surgeries on the premises using Aris's equipment and hired a manager, David Skalka Aris leased the premises from Defendant JDJ Properties, Inc (JDJ), pursuant to a 1995 lease agreement Defendant Wasatch Property Management, Inc (Wasatch), a sister company and an agent of JDJ, managed the premises and collected rents from Aris

**3 After an industry downturn, Aris made the decision to close the business and contemplated filing for bankruptcy On January 4, 2002, Aris terminated Skalka and provided various notices to him and various vendors that it "was in the unfortunate position of having to wind down it[s] current operations and liquidate its business prior to dissolution" In early January, Aris began negotiations with the doctors and Skalka to sell the equipment and transfer the lease During the negotiations, Skalka and the doctors continued to occupy the premises and perform surgeries using Aris's equipment

**4 Aris failed to pay the January rent of

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\$9,556.38 Skalka notified Wasatch's building manager, Dennis Peacock, and property manager, Anita Lockhart, about Aris's intention to terminate the business and file for bankruptcy. Peacock instructed Skalka to not let anyone remove the equipment from the premises.

****5** The negotiations between Aris and the doctors proved unsuccessful. On January 22, 2002, Richard Enright, an Aris manager, came to the premises to remove Aris's equipment. Upon Enright's arrival, Skalka recited Peacock's instructions that Aris was not allowed to remove the equipment and told Enright that he should speak with Peacock directly. Peacock told Enright that, by Aris's failure to pay the January rent, it had abandoned the premises and that Defendants had seized Aris's equipment. Enright tendered a check for the January rent, but Peacock refused to accept the check or to release the equipment.

****6** While still in the presence of Skalka and Peacock, Enright phoned Kathleen Soto, Aris's CFO. Soto spoke with Peacock and requested that Wasatch release the equipment to Aris, offering again to pay the January rent. Peacock again refused to accept the rent or to release the equipment. Enright made one more request for the equipment. Peacock responded by instructing Enright to leave the premises and threatened ****7** to have the police forcefully remove Enright if he ever returned again. Sometime during this visit, Enright requested a key from Skalka and Peacock, but both refused the request.

****7** The next day, Aris's attorney, Erik Olson, filed this action. He also requested from John Dahlstrom, Defendants' attorney, permission to enter the premises and remove the equipment, and also tendered the January rent payment. Dahlstrom refused to release the equipment or to accept the tender of rent. Dahlstrom suggested that a "business solution" be considered by Aris and the doctors, basically suggesting that they resume their negotiations. Based on this suggestion, Aris again negotiated with the doctors and Skalka in hopes that they would assume the lease and purchase the equipment. Again the negotiations proved

unsuccessful. Unknown to Aris, Wasatch and the doctors were negotiating a separate lease, where the doctors would occupy other space in Woodlands Business Park.

****8** In early February, Skalka and the doctors relocated within Woodlands Business Park, without supervision from Wasatch. Peacock changed the locks on the premises and did not provide notice or a key to Aris. A few days later, Aris served a writ of replevin for the equipment. Dahlstrom informed Olson that Wasatch would protest the writ of replevin and seek a large bond. Based on Wasatch's assertions, Aris agreed to postpone the hearing on its writ of replevin and to help Wasatch locate a new tenant.

****9** From March to June 2002, Wasatch provided Aris limited, supervised access to the premises. Peacock would unlock the premises and then supervise the visit in order to ensure that Aris did not remove any equipment. In March, during a supervised visit, Enright inventoried the equipment and discovered that sometime after his January 22 visit, two lasers had been damaged and other equipment had been removed. The missing equipment included a Statim autoclave worth \$393.60, a Compaq laptop worth \$574.98, a Hansatome microkeratome worth \$14,164.68, and several sunglasses worth \$985.56. During another supervised visit, Peacock gave Aris permission to remove one piece of equipment but insisted that Aris was not allowed to remove any other equipment.

****10** In April, Aris and Ed Barber were in negotiations for Barber to purchase some of the equipment and assume the lease. By May, the negotiations had ended, with Barber agreeing only to the sale of the equipment. Before finalizing the sale, Olson asked Dahlstrom for his consent. Dahlstrom replied that he did not anticipate a problem but that he would need to check with Wasatch. On June 10, 2002, Olson met with Barber and Peacock at the premises to close the sale. Dahlstrom stopped the transaction because Wasatch had not yet approved the sale. A few days later, Dahlstrom informed Olson that Wasatch would

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approve the sale only if Wasatch received all the proceeds Aris did not agree to Wasatch's condition

****11** Later in June, Sale Lake County posted a notice of seizure on the premises for past due property taxes After the county posted the notice, Peacock changed the locks a second time and again did not provide notice or keys to Aris About that same time, Soto came to Utah with the intention of breaking the locks and removing the equipment She discovered the tax notice and went to the Salt Lake County Assessor's office and paid the past due amount She did not remove the equipment that day because it appeared that Wasatch's employees were guarding the premises

****12** After Soto's visit, Olson informed Dahlstrom that Aris intended to proceed with the lawsuit On June 25, 2002, Dahlstrom told Olson that Aris could remove all of its equipment and represented that Wasatch never intended to withhold the equipment Lockhart, via email, instructed Peacock to allow Aris to remove the equipment Peacock responded with the question, "Is this correct?" Lockhart confirmed that Aris was now entitled to remove all of its equipment On July 2, 2002, Soto removed Aris's equipment and the sale to Barber finally took place

****13** Aris proceeded with its lawsuit, and Defendants counterclaimed for unpaid rent During the three-day bench trial, Aris introduced a written report and expert witness ***28** testimony that the equipment had depreciated in the amount of \$118,568 81 while in Wasatch's custody Wasatch did not offer any depreciation evidence or rebuttal testimony The district court found that Aris did not vacate or surrender the premises, but rather that Wasatch had forcefully prevented Aris from enjoying "free, unfettered access to the Premises" Additionally, the district court determined that Wasatch had seized Aris's equipment without the proper judicial process and used it as a "bargaining chip" for the unpaid rent

****14** The district court held that Defendants were liable for forcible detainer, wrongful eviction, and conversion of the equipment The district court

awarded damages for the following depreciation in the amount of \$118,568 81, missing equipment in the amount of \$16,118 82, and damage to Aris's lasers in the amount of \$53,000 The damages totaled \$187,687 63, which the district court trebled pursuant to the forcible detainer statute The district court additionally awarded Aris its deposit of \$13,393 89, less the January rent of \$9,556 38, plus costs and attorney fees The district court dismissed Defendants' counterclaim based on its holding that Aris did not abandon the premises

ISSUES AND STANDARDS OF REVIEW

[1][2] ****15** First, Defendants argue that the district court erred in ruling that Aris did not abandon the premises Utah Code section 78-36-12 3 provides a statutory presumption for abandonment *See* Utah Code Ann § 78- 36-12 3 (2002) We review the district court's application of the statute to the facts of the case for abuse of discretion *See Platts v Parents Helping Parents*, 947 P 2d 658, 661 (Utah 1997) Common-law abandonment depends on the intent of the party accused of the act *See State v Hawkins*, 967 P 2d 966, 970 (Utah Ct App 1998) The determination of intent is a question of fact, which will only be reversed if the district court's finding is clearly erroneous *See Pennington v Allstate Ins Co*, 973 P 2d 932, 937 (Utah 1998), *see also* 49 Am Jur 2d *Landlord and Tenant* § 250 (1995) ("[A] question of abandonment is a factual one")

[3][4] ****16** Second, Defendants claim that the district court erred in holding Defendants liable for forcible detainer pursuant to Utah Code section 78-36-2 and for wrongful eviction *See* Utah Code Ann § 78-36-2 (2002) This issue is a mixed question of law and fact "Matters of statutory construction are questions of law that are reviewed for correctness" *Platts*, 947 P 2d at 661 "Questions of fact are reviewed under the clearly erroneous standard, with deference given to the trial court" *Id* "The trial court's application of law to the facts is reviewed for abuse of discretion" *Id*

[5] ****17** Third, Defendants argue that the district court erred in holding that they converted Aris's equipment because Aris waived its conversion

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claim. To find a waiver, the court must ascertain whether Aris intended to waive the claim. *See Soter's v. Deseret Fed. Sav. & Loan*, 857 P.2d 935, 942 (Utah 1993). The determination of intent is a question of fact, and thus, will only be reversed if the district court's finding is clearly erroneous. *See Pennington*, 973 P.2d at 937.

[6] ****18** Finally, Defendants contend that the district court erred in its assessment of damages. "Because the adequacy of damages is a question of fact, we cannot overturn the trial court's findings unless they are clearly erroneous." *In re Estate of Knickerbocker*, 912 P.2d 969, 981 (Utah 1996).

ANALYSIS

I. Abandonment

[7] ****19** Defendants argue that Aris abandoned the premises prior to January 22, 2002. Utah Code section 78-36-12.3(3) provides:

"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....

***29** Utah Code Ann. § 78-36-12.3(3). The statute "defines 'abandonment' as vacating the premises without notice by the tenant to the landlord." *Fashion Place Assocs. v. Glad Rags*, 754 P.2d 940, 941 (Utah 1988). Defendants argue that Aris vacated the premises and failed to pay rent within fifteen days and thus, as a matter of law, abandoned the premises. The factual findings show that Aris did not directly notify Defendants of any possible absence and did not pay the January rent. However, the findings also show that the doctors were still performing surgeries on the premises using Aris's equipment, and that Aris and the doctors were in negotiations for the sale of the business. Therefore, there is "reasonable evidence other than the presence of [Aris's] personal property" that Aris was still using the premises, and thus, the district court did not abuse its discretion in ruling that there was no statutory presumption of abandonment. Utah Code Ann. § 78-36-12.3(3).

[8][9][10] ****20** Similarly, there was no abandonment under the common-law definition. "A lease may be abandoned when a tenant 'voluntarily relinquishes or vacates the leased premises with the intention to terminate contractual rights to ... possession and control of the premises. The requisite intent can be shown by words or conduct.'" *State v. Hawkins*, 967 P.2d 966, 970 (Utah Ct.App.1998) (alteration in original) (quoting 49 Am.Jur.2d *Landlord and Tenant* § 250 (1995)). Whether an abandonment or surrender occurred, "was for the trial court to determine from the conduct and expressions of the parties with respect thereto." *Frisco Joes, Inc. v. Peay*, 558 P.2d 1327, 1330 (Utah 1977).

****21** Defendants assert that Aris abandoned the lease by vacating the premises and turning over possession to the doctors. Whether Aris abandoned the premises depends on whether Aris intended to "terminate contractual rights to ... possession and control of the premises," which is a question of fact. *Hawkins*, 967 P.2d at 970 (alteration in original) (quoting 49 Am.Jur.2d *Landlord and Tenant* § 250 (1995)); *see also Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998) ("We emphasize that intent is a question of fact."). The district court's holding that Aris did not intend to abandon the premises prior to January 22, 2002, is not clearly erroneous. Aris did not turn over contractual rights to possession to the doctors, but merely allowed the doctors to continue to use Aris's equipment while negotiations took place. *See, e.g., Ontel Corp. v. Helasol Realty Corp.*, 130 A.D.2d 639, 515 N.Y.S.2d 567 (1987) (holding that the tenant did not abandon the lease where it "was merely readying the premises in preparation for the occupancy by the proposed assignee"). Where Aris did not intend to abandon the premises prior to January 22, 2002, the district court properly held there was no abandonment. *See Hawkins*, 967 P.2d at 970.

II. Forcible Detainer and Wrongful Eviction

[11] ****22** "Both [the forcible entry and detainer] statutes and the tort action derived from them require that unless a tenant plainly abandons the premises, a landlord must resort to judicial process

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if he wishes to be rid of a tenant in peaceable possession " *Pentecost v Harward*, 699 P 2d 696, 699- 700 (Utah 1985) "One who resorts to self-help is liable to the evicted tenant " *Id*

[12] ****23** Defendants argue that even if the court finds there was no abandonment, the forcible detainer statute still does not apply The statute provides

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

Utah Code Ann § 78-36-2 (2002) The district court held that Defendants unlawfully ***30** held the premises by force creating a forcible detainer under part (1) of the statute The factual findings reflect the following Defendants refused to allow Aris to remove its equipment from the premises, despite several requests from Aris representatives, Defendants directed Aris's representative, Enright, to leave the premises or they would contact the police, Defendants changed the locks on two occasions without notifying Aris or providing it a key, Defendants provided Aris supervised access to the premises, requiring Aris to gain permission to enter, on several occasions Defendants intentionally deprived Aris from entry onto the premises, and, "Aris did not have free and unfettered access to the premises nor could it remove its personal property" Based on these findings of fact, the district court did not abuse its discretion in holding that Defendants used "force" and "unlawfully [held] and [kept] possession of [the] real property " *Id* § 78- 36-2(1)

****24** Defendants, although conceding the findings

of fact, offer several arguments in their brief as to why the forcible detainer statute does not apply First, they argue that their actions against Aris did not constitute force and, therefore, they are not liable under Utah Code section 78-36- 2(1) The district court's findings that Defendants used "force, or menaces and threats of violence," are supported by the evidence *Id* Defendants changed the locks and on one occasion threatened to call the police if an Aris representative did not leave the premises However, even if Defendants' actions did not constitute force, they would still be liable for forcible detainer under part (2) of Utah Code section 78-36-2, where "during the absence of the occupants" Defendants unlawfully entered the premises and refused to surrender the premises to Aris *Id* § 78-36-2(2)

****25** Second, Defendants assert that they legally could not render possession to Aris because the doctors possessed the premises, and Aris did not have the right to take possession by self-help This argument is not sound Aris did not abandon the premises, and therefore, Aris still had rights to possession Though Aris and the doctors discussed the option of the doctors assuming the lease, the negotiations were unsuccessful, and the doctors did not have any rights to the premises superior to those of Aris

****26** Third, Defendants claim that, pursuant to paragraph 20 1 of the lease, they were entitled to enter the premises and dispose of the equipment if Aris abandoned the premises However, because there was no abandonment, this clause in the lease does not apply

[13][14] ****27** Fourth, Defendants assert that the forcible detainer statute does not apply because Aris did not seek restitution of the premises Defendants argue that the statute limits relief to those seeking restitution [FN1] Although "[e]very person" who commits the acts specified in the statute "is guilty of forcible detainer," *id* § 78-36-2, Defendants cite Utah Code section 78-36-10(1), which provides that "[a] judgment entered in favor of the plaintiff shall include an order for the restitution of the premises " Utah Code Ann § 78-36-10(1) (2002) However,

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that same section also provides a plaintiff with the right to be awarded damages incurred as the result of the forcible detainer. See Utah Code Ann § 78-36-10(2). A tenant is therefore entitled to restitution and an award of damages upon showing the landlord's liability. See *id*. A tenant is not required to seek restitution of the premises--but may pursue such relief. See *Fowler v Setter*, 838 P 2d 675, 679 (Utah Ct App 1992) (holding that "pursuant to section 78-36-10(3), the trial court was required to treble the jury's damages award" where the court found forcible entry, even though the plaintiffs did not seek restitution), *Pentecost v Harward*, 699 P 2d 696, 699 (Utah 1985) (holding that if the facts were viewed in the light most favorable to the plaintiff they would support an action against the defendants for forcible entry under the statute and *31 the tort action derived from such statute, where the party was seeking damages), *Peterson v Platt*, 16 Utah 2d 330, 400 P 2d 507, 508 (1965) (affirming an award of damages under the forcible entry and detainer statute, without any mention of the party seeking restitution). The district court therefore properly interpreted the **forcible detainer** statute by awarding **treble damages** to Aris, even though it did not seek restitution [FN2]

FN1 Defendants rely upon *Freeway Park Building, Inc v Western States Wholesale Supply*, 22 Utah 2d 266, 451 P 2d 778 (1969). In *Freeway Park*, unlike in the present case, the parties did not bring an action for forcible detainer. Therefore, the court's dicta as to when the forcible detainer statute applies does not govern this case.

FN2 Defendants also assert that the forcible detainer statute does not apply because Defendants had a lessor's lien on the equipment pursuant to Utah Code section 38-3-1. See Utah Code Ann § 38-3-1 (2001). Defendants did not raise this argument below, and therefore, cannot address it on appeal. See *Carrier v Salt Lake County*, 2004 UT 98, ¶ 43, 104 P 3d 1208.

[15] **28 Additionally, Defendants separately assert that the district court erred in ruling that they were liable for wrongful eviction. As stated above, Aris did not abandon the premises, and therefore, it was in legal possession. Defendants wrongfully evicted Aris by not permitting Aris complete access to the premises on January 22, 2002. See *Freeway Park Bldg, Inc v Western States Wholesale Supply*, 22 Utah 2d 266, 451 P 2d 778, 781 (1969) (stating that a landlord cannot take the law into his own hands and evict a defaulting tenant).

III Conversion

[16] **29 Defendants assert that the district court erred in ruling that they converted Aris's equipment because Aris had abandoned the premises and turned over possession to the doctors. As explained above, Aris did not abandon the premises, and therefore, Defendants' argument fails. Defendants also claim that Aris waived its claim of conversion by leaving the equipment on the premises and working with Defendants to find a new tenant. The Utah Supreme Court has stated "that there is only one legal standard required to establish waiver under Utah law. A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." *Soter's v Deseret Fed Sav & Loan*, 857 P 2d 935, 942 (Utah 1993) (citation and quotations omitted). A waiver "must be distinctly made, although it may be express or implied." *Id* at 940 (quotations and citation omitted).

**30 The district court specifically held that Aris did not waive its conversion claim. Aris agreed to postpone the hearing on its writ of replevin while the parties tried to find a new tenant for the premises. There was not a settlement between the parties, only an agreement to postpone litigation to see if a settlement could be reached. There was no expressed or implied distinctive waiver, therefore, the district court's holding was not clearly erroneous. See *id*, see also *Pennington v Allstate Ins Co* 973 P 2d 932, 937 (Utah 1998) (stating that the determination of intent is a question of fact, and thus, will only be reversed if the district court's

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finding is clearly erroneous).

IV. Damages

[17][18][19][20][21] ****31** "One who resorts to self-help is liable to the evicted tenant for all damages proximately caused by the eviction" *Pentecost*, 699 P.2d at 700. Utah Code section 78-36-10 states that "[t]he jury or the [district] court ... shall also assess the damages resulting to the plaintiff." Utah Code Ann. § 78-36-10. Defendants assert that the district court erred in its assessment of damages. The district court's assessment of damages is not clearly erroneous, and therefore, we do not upset its determination. [FN3] *See In re Estate of Knickerbocker*, 912 P.2d 969, 981 (Utah 1996). The amount of damages totaled \$187,687.63, [FN4] and under the forcible ***32** detainer statute, the judgment shall be "for three times the amount of damages assessed." [FN5] Utah Code Ann. § 78-36-10(3). We therefore affirm the award of \$563,062.90.

FN3. Defendants argue that the district court erred by awarding lost opportunity damages. Though the district court considered evidence on the issue, it did not in fact award such damages.

FN4. The dissent opposes the award of \$118,000 in depreciation, stating that "depreciation is not a *measure* of recoverable damages at all." "Whether the district court applied the correct rule for measuring damages is a question of law that we review for correctness." *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 25, 96 P.3d 893 (Utah 2004). "Generally, the measure of damages in a conversion action is the value of the converted property at the time of conversion, plus interest." *Id.* at ¶ 26. "To the extent possible, the fundamental purpose of compensatory damages is to place the plaintiff in the same position he would have occupied had the tort not been committed." *Id.* In this case, the district court awarded the value of the property at the time of conversion less the end value of

the property. Where Wasatch eventually returned the property to Aris, the district court, in awarding depreciation or diminishment in value, placed Aris "in the same position [it] would have occupied had the tort not been committed." *Id.*

FN5. The dissent asserts that damages for conversion of personal property as a result of a forcible detainer should not be trebled as required by the forcible detainer statute. Utah Code section 78-36-10 requires that damages "resulting to the plaintiff from ... forcible or unlawful detainer" be trebled. Utah Code Ann. 78-36-10 (2002). As the dissent quotes, "the plaintiff is entitled to recover such damages as are the natural and proximate consequence of the unlawful detainer." *Forrester v. Cook*, 77 Utah 137, 292 P. 206, 214 (1930). The dissent contends, citing *Forrester*, that "general damages for forcible detainer is the reasonable rental value of the premises for the time during which they were unlawfully detained." However, the *Forrester* court merely held that the "rental value during the unlawful withholding of possession is the minimum of damages" and "damages may not be restricted to the rental value and may include more." *Forrester*, 292 P. at 214.

CONCLUSION

****32** Aris did not abandon the premises where it did not intend to vacate prior to January 22, 2002. Given that there was no abandonment, Defendants are liable for forcible detainer, wrongful eviction, and conversion where they took and kept possession of the premises by self-help. Further, Aris did not waive a conversion claim by agreeing to postpone the hearing on its writ of replevin and assist Defendants in locating a new tenant. Finally, the district court properly assessed the amount of damages.

****33** Accordingly, we affirm.

****34** I CONCUR: JAMES Z. DAVIS, Judge.

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ORME, Judge (dissenting):

****35** I am baffled by the trial court's award of damages and by the majority's affirmance of the entire award. I have no problem with the award of some \$16,000 to compensate the tenant for personal property that came up missing while the landlord was wrongfully in possession of the premises. Likewise, I have no qualms about an award of \$53,000 to compensate the tenant for damage to its lasers while in the landlord's "care." I fail to see, however, how damages for conversion and damages for trespass to chattels can be trebled pursuant to a statute that permits the extraordinary remedy of tripling the amount of actual damages for the forcible detainer of a real estate leasehold.

****36** The severe remedy of treble damages is available because of the special status of real estate, and it is a remedy that is pretty well limited to real property contexts. *See* Utah Code Ann. § 78-38-2 (2002) (providing for trebling of damages for waste of real estate); *id.* § 78-38-3 (providing for trebling of damages to owner of land whose trees are cut down without authorization); *id.* § 78-36-10(2)(a)-(d), (3) (providing for trebling of damages for forcible entry, forcible or unlawful detainer, and waste, but not for unpaid rent). It subverts the purpose of that long-standing policy favoring real estate to treble *all* damages in an action between a tenant and landlord just because forcible detainer of the leasehold is one aspect of that litigation. *See Forrester v. Cook*, 77 Utah 137, 292 P. 206, 214 (1930) ("The provision for damages in three times the amount of [actual] damages is highly penal and therefore subject to strict construction. While the statute provides for recovery of rents, damages, and waste, it is damages only that are to be trebled.... The plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer."), *overruled in part on other grounds by P.H. Inv. v. Oliver*, 818 P.2d 1018, 1020-21 (Utah 1991).

****37** The measure of general damages for forcible detainer is the reasonable rental value of the premises for the time during which they were unlawfully detained. *See id.* at 211, 214. *Accord*

Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1025-26 (Utah Ct.App.1989) (relying on *Forrester*, appellate court affirmed ***33** unlawful detainer damages of \$300, representing the "reasonable rental value" of the premises for the period they were unlawfully detained, but directed trebling in accordance with statute because such "rental value" is damages for unlawful detainer rather than rent, as trial court assumed). Such general damages appear not to have been awarded in this case. Insofar as the damages that were awarded might be viewed as consequential damages resulting from forcible detainer, it is settled law that consequential or "special" damages are available, if at all, only if general damages are awarded. [FN1] *See* 22 Am.Jur.2d *Damages* § 43 (2d ed. 2003) ("As a general rule, a verdict for special damages without an allowance for general damages is improper."). *Cf. Martineau v. Anderson*, 636 P.2d 1039, 1041-43 (Utah 1981) (noting that jury assessment of special damages without general damages is irregularity on face of verdict); *Cohn v. J.C. Penney Co.*, 537 P.2d 306, 307 (Utah 1975) (stating that if judge had believed jury's verdict only assessed special damages and not general damages, judge would not have accepted verdict) (Utah 1975); *Baden v. Sunset Fuel Co.*, 225 Or. 116, 357 P.2d 410, 411 (1960) (citing "the well-established rule" that, in order for there to be an award of special damages, there must also be an award of more than nominal damages).

FN1. Which is not to say that I necessarily agree that all consequential damages stemming from forcible detainer must be trebled along with general damages.

****38** More bizarre is the award of over \$118,000 in depreciation. So far as I am aware, depreciation is not a *measure* of recoverable damages at all; rather, it is an offset against what would otherwise be the amount of damages. *See generally* Dan B. Dobbs, *Law of Remedies* § 5.12 at 392 (1973) ("Cost of replacement or repair, with suitable adjustment for the fact that the damaged or destroyed property was old and had depreciated in value, is perhaps the factor most commonly considered in fixing value of property without

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market"), *id* § 5 12 at 394 ("A number of courts have allow[ed] replacement cost less accrued depreciation[]") To award a plaintiff depreciation as damages is bad enough, but to treble that amount on a theory that depreciation was occasioned by the forcible detainer of a real estate leasehold is untenable given the very nature of depreciation *See* Black's Law Dictionary 441 (6th ed 1991) (defining depreciation as the "decline in value of property caused by wear or obsolescence")

****39** I would remand this matter with instructions to comprehensively reassess--and substantially reduce--the amount of damages awarded to the tenant

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APPENDIX B

ORDER GRANTING CERTIORARI

FILED

IN THE SUPREME COURT OF THE STATE OF UTAH APPELLATE COURTS

NOV 03 2005

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Wasatch Property Management, Inc.
and JDJ Properties, Inc.,

NOV 07 2005

Petitioners,

v.

Case No. 20050693-SC

Aris Vision Institute, Inc.,

Respondent.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on August 17, 2005.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issue: ,

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

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

Date

November 3, 2005

Christine M. Durham
Christine M. Durham
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on November 4, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

RICHARD D. BURBIDGE
STEPHEN B MITCHELL
BURBIDGE & MITCHELL
215 S STATE ST STE 920
SALT LAKE CITY UT 84111-1103

R. STEPHEN MARSHALL
ERIK A OLSON
DURHAM JONES & PINEGAR
111 E BROADWAY STE 900
SALT LAKE CITY UT 84111

and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court listed below:

LISA COLLINS
COURT OF APPEALS
450 S STATE ST
PO BOX 140230
SALT LAKE CITY UT 84114-0230

and a true and correct copy of the foregoing ORDER was placed in interdepartmental mail to be delivered to the trial court listed below:

THIRD DISTRICT, SALT LAKE
ATTN: SOPHIE ORVIN / JODI BAILEY
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

Dated this November 4, 2005.

By 
Deputy Clerk

Case No. 20050693
Court of Appeals Case No. 20040304
THIRD DISTRICT, SALT LAKE Case No. 020900624