

2005

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

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'
REPLY BRIEF

No. 20050693-SC

WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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FILED
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I.

INTRODUCTION

Aris's own employees testified without contradiction or dispute that Aris ceased all business operations on January 4, 2002, fired all of its employees, closed its doors and then on January 7, 2002, turned over possession of the Premises to the independent contractor doctors to run their own business on the Premises. Aris never again sought to occupy the Premises and, of course, had no reason to do so. Aris simply wanted to remove its equipment from the Premises. In fact, when Aris's Richard Enright ("Enright") came to Salt Lake City on January 22, 2002 to remove Aris's personal property, the Doctors were still operating their business on the Premises and continued to do so for a few weeks thereafter. Aris never contended that it suffered damages because of its inability to occupy the Premises and no such damages were awarded. Instead, the only damages sought and awarded were for depreciation of the personal property, physical damage to the personal property and missing personal property. It is respectfully submitted that the court of appeals erred in affirming the award of treble damages for this personal property damage.

II.

ARGUMENT

A. WASATCH AND JDJ HAVE MARSHALED THE EVIDENCE AND PROPERLY PRESERVED BELOW THEIR ARGUMENT CONCERNING VACATING OF THE PREMISES.

Aris repeats in its brief the unsuccessful arguments it made to the court of appeals that Wasatch and JDJ have failed to marshal the evidence and to preserve below their argument concerning Aris's vacating of the Premises.¹ The record, however, demonstrates that Wasatch and JDJ have indeed marshaled the evidence and did preserve their argument below.

1. Wasatch and JDJ Marshaled the Evidence.

As it did before the court of appeals, Aris incorrectly argues that Wasatch and JDJ have failed to marshal the evidence. Aris wholly fails, however, to recite a single piece of evidence that was supposedly not marshaled or dispute with citations to the record any of the evidence recited in Petitioners' Brief. This failure is not surprising because all of the evidence recited in Petitioners' Brief comes from the testimony of Aris's own witnesses

¹ Ironically, as discussed later in this brief [pp. 8-10], Aris also raises for the very first time an argument not raised before the court of appeals, i.e., that Wasatch and JDJ failed to raise before the court of appeals or the trial court their contention that treble damages cannot be awarded for damage to personal property.

upon which Aris relied at trial or upon the stipulation of facts executed by the parties.

[See R. 210-216] Indeed, all of the facts which Aris sets forth in its brief are contained in Petitioners' Brief, but are stated in Petitioner's Brief in even more detail most favorably to Aris.

For example, Aris argues that Wasatch and JDJ have failed to marshal the evidence supporting the trial court's finding that Aris did not vacate the Premises prior to January 22, 2002. Aris has been unable, however, to point to one piece of evidence not contained in Petitioners' Brief. As stated above, Aris's own witnesses, Enright and his boss, Kathleen Soto ("Soto"), testified without contradiction that Aris ceased all business operations and terminated all its employees on January 4, did not pay rent and then turned over possession to the independent contractor Doctors to operate their own business on January 7. [R. 526 at 38-39; 527 at 234-237] Enright further testified that when he came to Salt Lake City on January 22, he wanted to remove **the equipment** from the Premises. [R. 526 at 41-43] Aris did not demand that the Doctors who were then in possession of the Premises vacate the Premises and Aris made no effort to reoccupy the Premises. Soto likewise testified that she told Wasatch's Dennis Peacock ("Peacock") that Aris was entitled to **remove its equipment** before surrendering the Premises. [R. 527 at 246-248]

The failure to marshal argument raised by Aris is bereft of merit and should be rejected.

2. Wasatch and JDJ Preserved Below Their Argument That Aris Vacated on January 4, 2002.

Aris argues that Wasatch and JDJ failed to preserve at trial the argument that Aris vacated on January 4, 2002 and then misleadingly cites two alternative arguments raised by Wasatch and JDJ below with respect to vacating of the Premises. Once again, this argument is not faithful to the record. Wasatch and JDJ repeatedly argued before the trial court that Aris either vacated the Premises on January 4 or at least by February 9 when the Doctors vacated. For example:

(a) Wasatch and JDJ contended in the Pretrial Order that Aris unilaterally terminated the Lease on January 4 and had vacated the Premises more than five days prior to January 22, 2002, which was the date on which Aris contended the forcible detainer occurred. [R. 169-170 & 176]

(b) Wasatch and JDJ argued in their Trial Brief that Aris shut down its office and terminated all of its employees on January 4, allowed the Doctors to take possession of the Premises and failed to pay the January rent. [R. 219] Wasatch and JDJ argued that Aris's own testimony demonstrated that the Doctors - - not Aris - - were in possession of the Premises on January 22, 2002 and that since Aris had terminated all its employees on January 4, Aris was not in possession after that date. [R. 239-231]

(c) In their closing arguments at trial, Wasatch and JDJ again argued that Aris vacated the Premises on January 4 when it terminated its employees and closed its offices:

“The evidence at trial revealed that January 4, 2002 was the last day Aris was in peaceable possession of the premises Aris was not in peaceable possession on that date [January 22, 2002] - the terminated doctors were in possession at that time.” [R. 305] [See also R. 529 at 558-559 & 577]

Indeed, in his opening statement, Aris’s own counsel told Judge Lewis that Aris shut down its business on the Premises on January 4, 2002 and that thereafter the independent contractor Doctors conducted their own business on the Premises. [R. 526 at 19-20]² Beyond that, the Statement of Stipulated Facts executed by the parties prior to trial indicates the same thing. [R. 212-213, ¶¶17-20]

In fact, the uncontradicted testimony of Aris’s own witnesses at trial was that when Enright attempted to remove the equipment on January 22, Wasatch’s Peacock refused on the basis that Aris had abandoned the Premises. [R. 526 at 44-45; R. 415, Finding No. 27]

Clearly, Wasatch and JDJ raised at trial their argument that Aris vacated the Premises on January 4.

² If Aris is attempting to argue that Aris did not vacate because the Doctors’ occupancy constituted occupancy by Aris, this argument does not assist its case. If such a legally baseless argument were accepted, Aris necessarily continued in occupancy of the Premises on January 22 when Enright attempted to remove the personal property because at that time the Doctors were undeniably still in possession of the Premises using the equipment [see Finding of Fact No. 90]. Thus, there could not have been a forcible detainer of real estate on January 22 when Wasatch and JDJ refused to consent to Enright’s removing the personal property, as found by the trial court and affirmed by the court of appeals.

3. Whether Aris Vacated the Premises on January 4 Is Properly Before This Court.

Aris narrowly construes this Court's order granting certiorari to preclude the argument raised by Wasatch and JDJ that treble damages cannot be awarded because Aris had already vacated the Premises weeks before Wasatch and JDJ refused to allow Aris to remove its personal property. The Order states that the issue to be determined is: "Whether damages awarded for loss, damage, and depreciation to personal property may be trebled pursuant to Utah Code Ann. §78-36-10(3)." The determination of that issue obviously has to be made based upon the facts of this particular case. Wasatch and JDJ have argued that treble damages cannot be awarded for damage to personal property in any circumstance but that at the very least treble damages cannot be awarded for personal property where, as in the present case, the tenant vacated the Premises weeks before the tenant was not allowed to remove the personal property. This issue is properly before the Court.

B. TREBLE DAMAGES FOR CONVERSION OF PERSONAL PROPERTY ARE NOT RECOVERABLE UNDER THE FORCIBLE DETAINER STATUTE.

1. Wasatch and JDJ Preserved This Argument Below.

Aris argues for the very first time that Wasatch and JDJ failed to raise before the court of appeals or the trial court the contention that treble damages under the forcible

detainer statute cannot be awarded for damage to personal property. Aris made no such argument before the court of appeals and this Court should, therefore, refuse to consider the argument. *See, Ellis v. Swensen*, 2000 UT 101, ¶30, 16 P.3d 1233. Moreover, the record disposes of this argument.

First, Wasatch and JDJ clearly raised this argument before the court of appeals both in their opening brief and their reply brief. [See Appellants' Brief at 35-36; Appellants' Reply Brief at 9, excerpts of which are attached hereto as Addenda A&B] For example, Wasatch and JDJ argued in their opening brief before the court of appeals:

Aris did not seek restitution of the Premises at trial and no such relief was granted. Aris did not even seek any damages on the basis it had not been able to occupy and use the Premises for the obvious reason that Aris had no use for the Premises. Aris only sought damages it claimed to have suffered because it had not been permitted to take its Equipment from the Premises.

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. The statute should be strictly construed. [Citations omitted] A landlord's act in withholding a tenant's personal property is distinct from the act of forcibly detaining real property a tenant is occupying. A tenant is relegated to an action for conversion and replevin with respect to personal property. The forcible detainer statute simply does not apply to a landlord's claimed wrongful withholding of personal property, especially after a tenant has vacated and abandoned the premises. The imposition of the treble damages penalty would be even more incongruous in the case at bar where the parties cooperated for months in attempting to find a replacement tenant and Aris had no desire or ability to occupy the Premises. [Appellants' Brief at 35-36]

In addition, in Appellants' Reply Brief before the court of appeals, Wasatch and JDJ argued:

Wasatch and JDJ did not unlawfully hold and keep the Premises, or do so by force. At most, Aris only wanted to remove its Equipment. The forcible detainer statute applies to the forcible detainer of real property, not to the withholding of personal property. [Citations omitted]

Wasatch and JDJ then went on in their reply brief to distinguish the two cases that Aris cited in its brief before the court of appeals to attempt to support the imposition of treble damages. [Appellants' Reply Brief at 9]

Clearly, the treble damage issue was raised by Wasatch and JDJ before the court of appeals.

Aris also raises for the first time its argument that the treble damage argument was not preserved in the trial court. Even if Aris could raise this new argument, Wasatch and JDJ clearly did preserve the treble damages issue before the trial court. [*See, e.g.*, R. 401-402, ¶¶c and e; R. 403, ¶5]

For example, in its objections to the proposed Findings of Fact and Conclusions of Law and Judgment, Wasatch and JDJ argued that §78-36-10 only applied to the forcible detainer of real property, not personal property. [R. 401, ¶c] They further argued that “[s]ince the elements of the forcible detainer statute were not met the trebling of damages is not appropriate Only the damages set forth in §78-36-10(2)(a) are eligible for trebling, which does not include personal property or equipment. [R. 401-402, ¶e] [*See*

also R. 403, ¶5; R. 304 (the facts of the case do not qualify as a forcible detainer action and treble damages are not appropriate.))³

An issue is adequately preserved for appellate review if it is raised in time to give the trial court an opportunity to rule on the issue. *Searle v. Searle*, 2001 UT App. 367, ¶17, 38 P.3d 307. In *James v. Preston*, 746 P.2d 799, 801 (Utah App. 1987), the court stated that “[a] matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law.” In *Peirce v. Peirce*, 2000 UT 7, ¶16, 994 P.2d 193, this Court held that the appellant adequately preserved issues in the trial court by raising them in a memorandum submitted to the trial court before it issued its findings of fact and conclusions of law. In the case at bar, Wasatch and JDJ plainly raise the issue of treble damages with respect to personal property before the trial court issued its findings of fact and conclusions of law. Thus, the issue was preserved for appeal.

³ In this connection, it should be noted that Aris’s contention that it was entitled to recover treble damages with respect to the personal property damage was not raised until late in the game. In its Amended Complaint, Aris only claimed generally that it had “suffered damages, and continues to suffer damages” as a result of the forcible detainer of the Premises and then sought treble damages with respect to those unspecified damages. [R. 33, ¶¶29 & 30] Aris did not allege personal property damage by virtue of the forcible detainer. The only personal property damage alleged was in the Fourth Claim for Relief for conversion. [R. 34, ¶¶37 thru 39] Aris did not seek treble damages with respect to the personal property damages alleged in its conversion claim. Nor in its trial brief did Aris expressly contend that it was entitled to treble damages for damage to personal property based on violation of the forcible detainer statute. [R. 199-200] Instead, Aris argued that it was entitled to recover the personal property damages based upon its conversion claim and sought to recover punitive damages. [R. 201-202] It was not until the last seconds of its counsel’s closing argument that Aris claimed briefly in passing and without discussion or citation of authority that it was entitled to either treble damages or punitive damages with respect to the personal property damage. [R. 529 at 556]

2. §78-36-10(2) and (3) Do Not Provide for Trebling of Personal Property

Damage.

Aris argues that under the plain language of Utah Code Ann. §78-36-10(2), damages to personal property are recoverable where the landlord has forcibly detained the real estate and, therefore, such damages must be trebled under §78-36-10(3). To the contrary, §78-36-10(2) says nothing about damage to personal property. That section 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.

Each of these subsections relates to real estate. There is no such thing as the forcible detainer of personal property. A landlord's refusal to turn over possession of personal property is a conversion and is a distinct act from the landlord's forcible detainer of the real estate.

Section 78-36-10(3) only provides that: "The judgment shall be entered against the defendant for the rent, [and] for three times the amount of damages assessed under Subsections (2) (a) through (2) (c). . . ." As demonstrated in Petitioners' Brief [p. 20], this treble damages penalty provision should be strictly construed. Because there is no express provision in §78-36-10(2) for recovery of personal property damages, §78-36-

10(3) should be strictly construed to prohibit treble damages for damages to personal property.

Such a statutory interpretation would not, of course, leave a tenant without a remedy where a landlord refuses to surrender possession of personal property. The tenant can recover compensatory damages for conversion and can also recover punitive damages in an appropriate case where the landlord has acted willfully and maliciously or in knowing or reckless disregard of a tenant's rights. Utah Code Ann. §78-18-19. In the case at bar, the trial court refused to award punitive damages because Wasatch and JDJ did not act with a knowing or reckless indifference or disregard of Aris's rights. [R. 369-375] The trial court's refusal to award punitive damages is not surprising given the fact that JDJ in good faith claimed it had a right to retain the personal property based upon Aris's claimed abandonment of the Premises and the provisions of paragraph 20.1 of the Lease [Ex. 9, ¶20.1; R. 526 at 41-43; R. 413; Finding No. 26] and the further fact that the parties were cooperating for months to attempt to lease the Premises and sell the personal property to a third party. [R. 527 at 164-166 & 199; R. 528 at 470-471 & Ex. 24]

3. The Personal Property Damage Did Not Constitute Consequential Damages or General Damages Resulting From the Forcible Detainer.

Judge Orme stated in his dissenting opinion that even if the personal property damages could be viewed as consequential damages from the forcible detainer, the

personal property damages could not be recovered because no general damages were recovered for the forcible detainer. Aris's response is telling.

First, Aris argues that the personal property damages were not consequential damages resulting from the forcible detainer and that Wasatch and JDJ never made such an argument. [Aris Brief at 23-24] Wasatch and JDJ agree. Although Judge Orme was correct that even if the personal property damages were viewed as consequential damages they could not be recovered, the parties never argued the personal property damages were consequential damages and they clearly were not. In other words, the personal property damages were not suffered as a consequence of a forcible detainer of the real estate. The personal property damages found by the trial court were suffered as a result of the refusal by Wasatch and JDJ to surrender possession of the personal property to Aris, but, this fact augers in favor of Wasatch and JDJ.⁴

Second, Aris argues that it suffered "harm, detriment, or loss sustained by reason of the injury" resulting from the forcible detainer of the Premises, that the personal property damages were the natural and proximate cause of the forcible detainer found by

⁴ Furthermore, Aris has never argued that the personal property damage constituted special damages resulting from the forcible detainer of the Premises. Even had Aris made such a contention, and even if the personal property damages were incorrectly deemed to be special damages, Aris did not plead special damages in the forcible detainer cause of action of its Amended Complaint. [R. 33] A party is required to specifically plead special damages in order to recover them. *See, Hodges v. Gibson Products Co.*, 811 P.2d 151, 162 (Utah 1991); *Graham v. Street*, 270 P.2d 456, 459 (Utah 1954).

the trial court so that these damages constituted general damages and that is all Aris was required to prove.

This argument fails to appreciate the distinction between detainer of the real estate and the separate act of refusing to permit removal of the personal property. As Judge Orme stated in his dissenting opinion, “[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.” [*Aris Vision Institute, Inc. v. Wasatch Property Management, Inc.*, 2005 UT App. 326, ¶36, 121 P.3d 24] The natural and proximate result of a landlord’s forcible detainer of real estate is the tenant’s loss of occupancy of the real estate. It was not the detainer of the real estate that caused the damages awarded Aris. It was the separate act of refusing to turn over the personal property. As stated earlier, Aris suffered no damage because of any loss of occupancy of the real estate.

Aris argues in this regard that Judge Orme was wrong in stating that the general damages recoverable by a tenant for forcible detainer of real estate consist of the reasonable rental value of the Premises during the time they were forcibly detained. Without any authority, Aris argues that reasonable rental value is not the measure of damages because a tenant is not entitled to recover rent from the landlord. However, if a tenant is entitled to possession of real estate, the general measure of damages that a tenant suffers by being deprived of possession is the value of the possession. In turn, the value

of the possession of leased premises would (absent proof otherwise) presumably be the reasonable rental value of the real estate. That amount is what it would cost the tenant to lease other comparable space.⁵ In any event, the general damages recoverable for forcible detainer of real estate would not be damage to personal property.

4. There Are No Utah Cases Holding That Treble Damages Can Be Recovered For Conversion of Personal Property.

Aris incorrectly argues that Utah case law supports its position that treble damages under the forcible detainer statute can be awarded for conversion of personal property. [Aris Brief at 18-20] The cases cited by Aris do not in fact support this position.

Aris miscites *Pentecost v. Harward*, 699 P.2d 696, 699-700 (Utah 1985) and *Peterson v. Platt*, 400 P.2d 507, 508 (Utah 1965). These cases are not on point because they both involved the forcible detainer of real property where the landlord not only refused to allow the tenant to occupy the premises, but at the same time refused to permit the tenant to remove personal property. This Court simply recognized that the tenants had causes of action for conversion of the personal property. The Court did not hold or imply

⁵ Aris challenges Judge Orme's reliance upon *Forrester v. Cook*, 292 P. 206 (Utah 1930) for his general damage analysis on the basis that it was an unlawful detainer case and argues that Wasatch and JDJ fail to address the *Forrester* court's language that "[t]he plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer." Aris's distinction is one without a difference. And, once again, the natural and proximate cause of an unlawful detainer or a forcible detainer of real estate is not damage to personal property.

in either case that treble damages can be awarded against a landlord for conversion of the tenant's personal property.

Aris cites for the first time *King v. Firm*, 285 P.2d 1114 (Utah 1955). *King* does not assist Aris. In *King*, the landlords padlocked the premises and refused to allow the tenant to enter to remove its personal property after the tenant had failed to pay rent. The tenant sued for wrongful eviction ***and for conversion of its personal property***. The Court held that the tenant had failed to prove any damages resulting from the landlords' forcible entry onto the Premises. No treble damages were awarded and no issue of treble damages was discussed. In fact, the tenant sought to separately recover on his conversion claim damages for the landlords' refusal to turn over the tenant's personal property. The Court separately discussed this issue and held that the landlords had a lien on the personal property for unpaid rent and therefore had not converted the personal property. Further, there was no conversion because there was no evidence that the landlords used the personal property for their own purposes.

Similarly, *Buchanan v. Crites*, 150 P.2d 100 (Utah 1944), relied upon by Aris, is unhelpful. That case did not involve any damage to personal property. While the tenant was away from the premises in the middle of the winter, the landlord removed all of the doors. The tenant continued in possession. The Court only concluded that the landlord had a legal duty not to enter the premises by force, that the landlord had violated that duty and the tenant had suffered damages. The majority opinion did not even discuss the type or amount of damages involved. The Court only held the trial court had not erred in

awarding damages for mental anguish and humiliation without assessing other nominal or compensatory damages. There was no discussion as to whether these damages were special damages, consequential damages or general damages.

Lastly, Aris places great reliance upon *Fowler v. Seiter*, 838 P.2d 675 (Utah App. 1992), decided by a panel of the court of appeals of which Judge Orme was a member. Aris argues that in *Fowler* the court of appeals “upheld an award of treble damages for loss of and damage to personal property under the forcible detainer statute.” Aris unfairly and inaccurately criticizes Judge Orme’s opinion in the case at bar as being inconsistent with his decision in *Fowler*. [Aris Brief at 19-20]

Aris overstates the holding in *Fowler*. In *Fowler*, the owners of a self-storage facility broke the lock on the tenant’s unit and removed and sold the tenant’s personal property. The single defendant at trial admitted liability and the jury awarded damages of \$7,000. There is no discussion in the opinion of the basis for the \$7,000 award and the award of compensatory damages was not an issue on appeal. After entry of the verdict, the plaintiffs moved for an award of treble damages pursuant to the forcible entry and detainer statute. The only objection raised by the landlord was that the tenant had failed to endorse the summons pursuant to Utah Code Ann. §78-36-8 and that failure allegedly barred an award of treble damages. The only issue on appeal was whether the failure to endorse the summons barred an award of treble damages.⁶ 838 P.2d at 677. There was

⁶ The court of appeals did not even decide the general question of whether the forcible entry statute applied to an uninhabited storage facility because that issue was not before the court. [838 P.2d at 677 n.3]

no issue before the court of appeals as to whether treble damages could be awarded for damage to personal property (even assuming that the \$7,000 verdict was based upon personal property damages) and the court of appeals did not decide such an issue. Consequently, Aris's criticism of Judge Orme's opinion in the present case as being inconsistent with his opinion in *Fowler* is baseless. Simply put, *Fowler* did not consider or decide the issue now before this Court. No Utah case has decided this issue.

**C. EVEN IF TREBLE DAMAGES COULD OTHERWISE BE AWARDED
FOR DAMAGE TO PERSONAL PROPERTY IN CONNECTION WITH A
FORCIBLE DETAINER, TREBLE DAMAGES SHOULD NOT BE AWARDED
WHERE THE TENANT HAS ALREADY VACATED THE PREMISES.**

Even if, contrary to what Wasatch and JDJ argue above and in their opening brief, this Court concludes for some reason that when a landlord forcibly detains real estate and then refuses to turn over possession of the tenant's personal property that the personal property damage can be trebled, treble damages should not have been awarded in this case.

As previously explained, the undisputed evidence from Aris's own employees - - as recited by Aris's counsel in his opening statement and as acknowledged in the stipulated facts - - was that Aris went out of business, terminated its employees and shut its doors on January 4, 2002 and then turned over possession of the Premises to the Doctors to operate their own business on January 7, 2002. Although Aris argues it did

not vacate the Premises at that time, it does not challenge this undisputed evidence or recite any evidence to support the notion that it continued in possession of the Premises. Aris had no use for the Premises, never attempted to reoccupy the Premises and had no ability to do so since it had fired all of its employees.

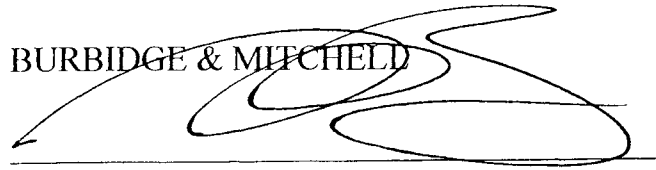
After Aris went out of business on January 4, at most all the evidence demonstrated was that commencing 18 days later, on January 22, Aris wanted to remove its equipment. Because Aris did not want to occupy, and could not use, the Premises, Aris did not suffer any damages because it did not continue to occupy the real estate; Aris did not seek any occupancy damages and Aris was not awarded any such damages. Under these circumstances, Aris was not entitled to an award of treble damages for the conversion of its personal property found by the trial court which occurred weeks after Aris had vacated the Premises.

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 February, 2006.

BURBIDGE & MITCHELL



RICHARD D. BURBIDGE
Attorneys for Petitioners

MAILING CERTIFICATE

I HEREBY CERTIFY that two copies of the foregoing PETITIONERS' REPLY
BRIEF was mailed to the following on the 15 day of February, 2006:

R. Stephen Marshall, Esq.
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ADDENDUM A

EXCERPTS FROM APPELLANTS' BRIEF

IN THE UTAH COURT OF APPEALS

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

Plaintiff/Appellee,

v.

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

Defendants/Appellants.

APPELLANTS' BRIEF

Case No. 20040304-CA

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE LESLIE A LEWIS, PRESIDING

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ORAL ARGUMENT REQUESTED

Sixth, Aris had no right to recover for forcible detainer because it was not seeking restitution of the Premises. Under Utah Code Ann., §78-36-10(1), a judgment for forcible detainer “shall include an order for the restitution of the premises as provided in Section 78-36-10.5.” [Emphasis Added] *See Freeway Park Bldg.*, 451 P.2d at 275 (the case was not for forcible entry or detainer because restitution of the premises was not sought, but was instead for the separate tort of wrongful eviction). Aris did not seek restitution of the Premises at trial and no such relief was granted. Aris did not even seek any damages on the basis it had not been able to occupy and use the Premises for the obvious reason that Aris had no use for the Premises. Aris only sought damages it claimed to have suffered because it had not been permitted to take its Equipment from the Premises.

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. The statute should be strictly construed. *Van Zyverden v. Farrar*, 393 P.2d 468, 470 (Utah 1964). *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 withholding a tenant's personal property is distinct from the act of forcibly detaining real property a tenant is occupying. A tenant is relegated to an action for conversion and replevin with respect to personal property. The forcible detainer statute simply does not apply to a landlord's claimed wrongful withholding of personal property, especially after

a tenant has vacated and abandoned the premises. The imposition of the treble damages penalty would be even more incongruous in the case at bar where the parties cooperated for months in attempting to find a replacement tenant and Aris had no desire or ability to occupy the Premises.

Aris argued below, and the trial court found, that in addition to forcibly detaining the Equipment on January 22, Wasatch and JDJ also forcibly detained the Equipment when Peacock changed the locks after the Doctors vacated on February 9. However, Aris had long before voluntarily vacated and abandoned the Premises and wrongfully turned possession of the Premises over to the Doctors. When the locks were changed on February 9, Aris had not occupied or operated a business on the Premises for over a month. Further, Aris did not have keys to the Premises even before the locks were changed so the changing of the locks did not dispossess Aris and had no effect whatsoever on Aris's ability to occupy the Premises. Finally, after the locks were changed, Aris did not request occupancy of the Premises or keys to the Premises. Aris was given access to the Premises any time it requested for the purpose of inspecting and inventorying the Equipment and showing it to prospective purchasers. [SOF Nos. 29 & 35]

2. Wrongful Eviction.

Similarly, because Aris had vacated and abandoned the Premises on January 4 and then turned over possession of the Premises to the Doctors, thereby breaching the Lease,

ADDENDUM B

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1. Forcible Detainer.

After Aris ceased all business operations, terminated all employees and vacated the Premises on January 4 and voluntarily turned over possession of the Premises to the doctors on January 7, Aris had no reason or desire to occupy the Premises and had no ability to do so. Wasatch and JDJ did not unlawfully hold and keep the Premises, or do so by force. At most, Aris only wanted to remove its Equipment. The forcible detainer statute applies to the forcible detainer of real property, not to the withholding of personal property.⁴ *Utah Code Ann.*, §78-36-2. *See Freeway Park Bldg., Inc. v. Western States Wholesale Supply*, 451 P.2d 778, 781 (Utah 1969).

Aris miscites *Pentecost v. Harward*, 699 P.2d 696, 699-700 (Utah 1985) and *Peterson v. Platt*, 400 P.2d 507, 508 (Utah 1965), for the proposition that a landlord can be held liable under the forcible detainer statute for seizing a tenant's personal property without judicial process. [Appellee's Brief at 31] These cases are not on point because they both involved the forcible detainer of real property where the landlord also refused to permit the tenant to remove personal property. Further, the Supreme Court only recognized that the tenants had causes of action for conversion of the personal property. The Supreme Court did not hold or intimate in either case that treble damages can be awarded against a landlord for conversion of the tenant's personal property.

⁴ Aris does not appear to challenge that Wasatch and JDJ raised below the argument that the forcible detainer statute only applies to the forcible detainer of real property, not personal property. In any event, they clearly did raise this argument. [See, e.g., R. 401-402 ¶¶a, c & e; 175-176; 230-231; 305-306; R. 529 at 560-561; 403 ¶5]