IN THE NEW MEXICO COURT OF APPEALS

WILLIS S. MUNCEY,

Plaintiff-Appellee

vs.

EYEGLASS WORLD, L.L.C.,

Defendant-Appellant.

Ct. App. No. 29,813
Second Judicial District Court
No. CV-2005-07697
Honorable William F. Lang

PLAINTIFF/APPELLEE'S ANSWER BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), counsel for Plaintiff/Appellee certifies that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Word 2007, the body of the Answer Brief, as defined by Rule 12-213(F)(1), contains 10,704 words.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Plaintiff/Appellee does not request oral argument.

INTRODUCTION

EGW's incomplete summary of proceedings yields a skewed rendering of the "question of law" purportedly raised on appeal. (BIC 1) The entire record requires that EGW's "question of law" be revised as follows: May a jury award conversion damages when, **(1) defendant first offers to purchase patient files from plaintiff and determines that the fair market value of the files is $300,000, (2) defendant's contract and corporate officers acknowledge that the patient files are the exclusive property of the plaintiff, (3) defendant decides not to buy the files, but instead, surreptitiously copies the patient files for the direct financial benefit of defendant, (4) immediately after copying the patient files, defendant demands that the plaintiff retrieve his original files, but intentionally fails to inform the plaintiff that it has retained the copies, and, (5) after hearing rumors that his files were copied, plaintiff refrains from retrieving his files until the rumors can be ascertained, and subsequently brings the matter to the attention of the court.**

Because EGW's appeal rests on a deficient record, it must fail. Much like a house built on sand, EGW's attempt to persuade this Court that the jury's judgment must be reversed because there "is no evidence that the defendant used the files without permission" collapses from the sheer weight

of the evidence. (BIC 1, 10-11, 22-26, 33). Persuasion prevails in the end, not through artifice, but through the truth; not by an argument fabricated by cleverness or insinuated by chicanery, but rather by one grounded on the solid rock of evidence.

EGW's argument on appeal merely represents the latest "shift" in EGW's continuously evolving defense of Dr Muncey's claim for conversion. As the record reflects, EGW's response to Dr Muncey has migrated wildly from a flat denial that it copied his patient files, to the incredible assertion that it only copied its own patient files, to a claim that Dr Muncey abandoned his files, and finally to its latest post-trial effort to revise history to its liking by asserting that it never used the patient files that it expended thousands of dollars to copy. EGW's newest argument, which was not raised at trial but for the first time here, is essentially this--that EGW took a month and spent $6,000 to copy 20,000 patient files for the sole purpose of creating a "storage problem" for itself. (Tr. 6/09/09 150:12-16).

SUMMARY OF PROCEEDINGS

Plaintiff/Appellee Willis Muncey began working as an Optometrist at Eyeglass World (hereinafter "EGW") in 1998. (Tr. 6/8/09 98:5-12). The arrangement was very simple. Dr. Muncey leased office space next to the EGW retail store. (Tr. 6/8/09 98:13-99:11). Dr. Muncey would examine his patients and provide them with a prescription. Dr. Muncey's patients would then be escorted to the directly adjacent EGW store, where they would purchase eyeglasses, contacts and other vision products. *Id.* If Dr. Muncey's patients purchased products from EGW, the fee for Dr. Muncey's eye exam would be waived. (Tr. 6/8/09 98:16-24). In exchange for Dr. Muncey's services, EGW paid him a per diem rate. (Tr. 6/8/09 99:24-25).

Over the years, Dr. Muncey developed a very successful longstanding practice with many repeat, loyal patients. (Tr. 6/8/09 99:12-16). By 2005, he had accumulated over 20,000 patient files. (Tr. 6/8/09 102:20-21). EGW regarded Dr. Muncey as a "legacy doctor" (RP 0955:2-3) and he was able to attract and retain a "loyal following" of patients. (Tr. 6/10/09 21:16-20). Dr. Muncey was so important to EGW that the President of EGW "preferred to deal with Dr. Muncey directly." (RP 0959:13-14). Dr. Muncey's practice had a direct impact on EGW's volume of sales and profitability. (Tr. 6/10/09 19:6-13; 23:7-21). Without a doctor providing eye examinations,

EGW would not have customers, and would be unable to make sales and be profitable. (Tr. 6/9/09 49:13-24). EGW "very much wanted" Dr. Muncey to stay at its premises (RP 1001:17-1002:2), but if he did not stay, EGW did not want him opening up a competing business. (Tr. 6/9/09 76:6-77:3)

Dr. Muncey decided to leave EGW in May 2005. His choices were to sell his existing practice or continue his practice by opening up an office across the street. (Tr. 6/08/09 102:16-21; 104:24-105:7). Dr. Muncey approached EGW about buying his practice for his replacement. (Tr. 6/8/09 102:8-18), and EGW offered to buy his practice by purchasing his patient files for $300,000. (Plaintiff's Exhibit 2; RP 0926; TR 6/9/09 25:19-22). As Dr. Muncey testified, and as EGW's offer confirms, the assets or value of an optometrist's practice are the patient files. (Tr. 6/8/09 105:19-22; 178:6-24). EGW determined that Dr Muncey's files had a fair market value of $300,000. (Tr. 6/9/09 29:9-30:3; 71:4-16). Dr. Muncey accepted EGW's offer, and EGW drafted an Agreement to Terminate and Purchase Customer Lists ("Agreement to Purchase Customer Lists"), that specifically provided: "[t]he parties recognize that Muncey was able to operate and grow a prosperous optometrist practice at the Premise. The parties further recognize that it will be easier for EGW to enter into a relationship with another

optometrist at the premises if EGW had possession of Muncey's customer/patient lists...." (Plaintiff's Exh. 3, pg. 1, ¶ 2).

David Hernandez, the EGW representative responsible for negotiating the purchase, confirmed that the purchase of "patient lists" was intended to include Dr. Muncey's patient files. (RP 0962:3-8; 0969:2-7). Dr Muncey also understood that "patient list" meant "patient file." (Tr. 6/8/09 106:3-15; 107:3-5; 176:6-13). The sale of an optometric practice constitutes the purchase of the patient files, (Tr. 6/8/09 102:19-21; 178:6-24), and EGW's offer of $300,000 was essentially for Dr. Muncey to leave his practice behind for EGW's replacement. (Tr. 6/8/09 105: 19-22; 166:16-21).

EGW's motive to have Muncey leave his patient files behind was three-fold. First, it is difficult in New Mexico to find optometrists, and having a ready-made practice with existing patients would make it easier to attract a replacement for Dr. Muncey. (RP 0965:12-24, Tr. 6/9/09 142:1-8). Second, the patient files would allow Dr. Muncey's replacement to continue to quickly and seamlessly service as many patients as possible, thus maximizing revenue for EGW. (Tr. 6/10/09 19:6-13; 23:7-21; Plaintiff's Exh. 3, pg. 1, ¶ 2). Third, EGW did not want Dr. Muncey to take his patient files with him and open up a competing practice. (Tr. 6/8/09 104:19-23; 176:25-177:1-7; Tr. 6/9/09 76:6-77:3).

After agreeing to the essential terms of the Agreement to Purchase Customer Lists, EGW ultimately refused to execute the final draft. (Plaintiff's Exh. 3). By this time, the new practice that Dr. Muncey would have pursued had evaporated, forcing Dr. Muncey with little choice but to continue his practice at EGW. (Tr. 6/8/09 111:18-22; 112:4-7). At the same time, because Dr. Muncey was convinced that he had accepted EGW's binding offer to purchase his practice, he filed suit on October 7, 2005 in district court for breach of contract, seeking to enforce EGW's offer to purchase his patient files for $300,000.[1] (RP 0001).

In May 2006, EGW and Dr. Muncey began settlement negotiations. (Plaintiff's Exh. 10). Those settlement negotiations culminated in a new Lease Agreement with EGW executed on July 31, 2006 that purported to provide greater revenue to Dr. Muncey by implementing a revenue sharing arrangement (the "New Lease"). (Plaintiff's Exh. 11). In consideration for the New Lease, Dr. Muncey agreed to dismiss his lawsuit against EGW.

However, EGW refused and/or failed to implement the terms of the New Lease, in particular the revenue sharing provisions. On October 18, 2006, Dr. Muncey emailed EGW's director of compliance, David Hernandez, to inform him that due to the non-implementation of the New

[1] This claim was dismissed before trial by the District Court on a summary judgment motion.

Lease that Dr. Muncey considered the New Lease to be "void." (RP 983:13-23). In response, Mr. Hernandez denied that the New Lease was "void," just "not yet fully implemented," and offered to continue to pay Dr. Muncey pursuant to the terms of his prior contract until the terms of the New Lease could be revised. (RP 0983:24-0984:2).

Despite Mr. Hernandez' promise to re-negotiate the terms of the New Lease, Dr. Muncey heard nothing further from EGW. On January 23, 2007, EGW's attorney abruptly demanded that Dr. Muncey dismiss his lawsuit. (Plaintiff's Exh. 13). Dr. Muncey refused to dismiss the lawsuit because EGW had failed to honor the New Lease, which was the consideration underlying his agreement to dismiss his suit. (Tr. 6/8/09 112:22-113:1; Plaintiff's Exh. 14). Although EGW's attorney indicated that he would file a motion to dismiss the lawsuit if Muncey refused to do so voluntarily, (Plaintiff's Exh. 13), EGW did not file a motion and abandoned its demand that Dr. Muncey dismiss his suit.

Given EGW's continued failures to honor its agreements with Dr. Muncey, and Dr. Muncey's refusal to dismiss his suit, it is not surprising that the parties' relationship deteriorated beyond repair. (Tr. 6/8/09 121:5-13). Dr. Muncey began looking for work elsewhere and began to drop doctor coverage at EGW. This precipitated letters from EGW's attorney

demanding that Dr. Muncey provide uninterrupted doctor coverage at the EGW location. (Plaintiff's Exhs. 16 and 17). In response, Dr. Muncey informed EGW that he was terminating his relationship with EGW and vacating the premises effective April 25, 2007. (Plaintiff's Exh. 18). At the same time, Dr. Muncey offered to contract with other optometrists to provide doctor coverage at EGW until the end of May, in order to give EGW time to find and hire a replacement doctor. *Id.*

EGW accepted Dr. Muncey's offer to provide doctor coverage through the end of May 2007 ("the Coverage Period"). Consequently, Dr. Muncey left his patient files at the EGW location, so that the doctors he had procured and who were under contract with him could access his patient records. (Tr. 6/8/09 130:4-7). At this time, and unbeknownst to Dr. Muncey, EGW concocted a plan to copy all of his patient files. (Tr. 6/8/09 128:18-19). Within a few days after the end of the Coverage Period, EGW ordered that the files be copied after business hours and under cover of darkness. (Tr. 6/9/09 9:5-9). EGW's copying of Dr. Muncey's files took over a month, beginning with the most recently seen patients, at an approximate cost of $6,000. (Tr. 6/9/09 36:23-25).

At no time did EGW inform Dr. Muncey that it was copying his files or seek Dr. Muncey's authorization to access his files. (Tr. 6/9/09 34:9-15;

37:1-14; 39:7-14). EGW's corporate officer admitted that Dr. Muncey would have had no knowledge that his patient files had been copied based upon the communications he received from EGW. (Tr. 6/9/09 149:17-150:8). EGW certainly understood that Dr. Muncey considered his files to be a valuable asset, given that Dr. Muncey had just rejected EGW's demand that he dismiss his pending lawsuit seeking enforcement of EGW's offer to purchase Dr. Muncie's patient files. EGW also knew and acknowledged that it was not legally authorized to access Dr. Muncey's files without seeking his authority and permission. The New Lease contained a section entitled "Use and Compliance with Laws" that provided ***"[Dr. Muncey] shall maintain full and independent responsibility and control over all files and records relating to [Dr. Muncey's] patients and the optometric Services provided thereto*** in the manner prescribed by the laws of the State[2] in which the Location is located. (emphasis added) (Exh. 11, Sec 3(c)). EGW's President and CEO Ben Cook, understood that Dr. Muncey had exclusive control and responsibility for his patient files (Tr. 6/9/09 35:11-16), and even instructed his employee to seek the advice of EGW's corporate attorney before copying the files. (Tr. 6/9/09 31:23-32:21). Mr. Hernandez, who was

[2] §16.16.21.9(G) NMAC prohibits the "[b]reach of the confidentiality of information or knowledge about a patient obtained by an optometrist while acting in his or her professional capacity."

in charge of regulatory compliance for EGW, understood that the contractual language was intended to comply with federal and state laws regarding patient confidentiality, and that it was necessary and important for Dr. Muncey to retain complete control over the patient files. (RP 0992:12-25).

Notwithstanding EGW corporate officers' collective understanding that Dr. Muncey was to have complete and exclusive control over his patient files, no one at EGW could explain why the files were nevertheless copied the files without the knowledge, much less the permission or authorization, of Dr. Muncey. (Tr. 6/8/09, 37:1-14; 39:7-14). EGW's corporate attorney unbelievably testified that he "did not find anything in either the lease or New Mexico law that prevented the copying" and that he "was told under HIPAA,[3] there was nothing that prevented the records from being copied." (Tr. 6/9/09 87:14-25, 89:6-18, 92:15-25).

In addition, Dr. Muncey testified that only he and personnel working directly for him in his office had authorization to access his patient files. (Tr. 6/8/09 130:4-7). Dr. Muncey also testified that it was important to

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[3] The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") patient privacy rule defines and limits the circumstances in which an individual's protected heath information may be used or disclosed. According to Abner Weintraub, Dr Muncey's proffered HIPAA expert, the copying of Dr. Muncey's patient records clearly violated multiple HIPAA patient privacy rules. (Tr. 6/8/09 7:17-10:15). The Trial Court refused to allow Mr. Weintraub to testify at trial, ruling that HIPAA was not relevant to Dr Muncey's claims. (Tr. 6/8/09 13:9-14).

maintain the confidentiality of his patient files by limiting the access to those files. (Tr. 130:14-23). Dr. Muncey's testimony was independently corroborated at trial by Nathaniel Roland, D.O., who explained the importance of keeping patient records confidential by limiting access to the files and getting patients' permission to copy files. (Tr. 6/9/09 184:17-185:12).

As soon as the files had been copied, EGW demanded that Dr. Muncey retrieve the original files (but not the copies). Around this time, Dr. Muncey heard rumors that EGW had copied his files and, acting upon the advice of counsel, attempted to authenticate those rumors. (Tr. 6/8/09 129:10-25; 131:2-132:24). In the meantime, Dr. Muncey was unable to comply with EGW's demand that he immediately retrieve his files (but not the copies) due to his being away on vacation. (Tr. 6/8/09 132:21-23). When Dr. Muncey failed to acquiesce to EGW's demand that he immediately pick up his files (but not the copies), EGW informed Dr. Muncey that his files (but not the copies) would be delivered to the New Mexico Board of Optometry ("NMBO"). (Tr. 6/8/09 135:21-23).

However, instead of delivering the patient files to the NMBO, EGW filed a disciplinary complaint with the Optometry Board, alleging that Dr. Muncey "refused to retrieve" his files. (Tr. 6/8/09 136:16-137:3). EGW did

not inform the NMBO that it had copied Dr. Muncey's files. *Id.* Dr. Muncey filed a response and asserted that the complaint was nothing more than an attempt at "influencing ongoing litigation between Dr. Muncey and [EGW], as well as an attempt to deflect attention away from [EGW's] own apparent violation of state and federal laws." (RP 0366-0367). Dr. Muncey's response further described the receipt of "credible evidence indicating that patient files may have been surreptitiously copied by [EGW] without patient authorization," and his decision to take "no further action to retrieve the files until the matter could be fully investigated and if verified, brought to the attention of the New Mexico District Court." *Id.* Ultimately, the NMBO dismissed the EGW complaint, finding "no cause for disciplinary action." (Plaintiff's Exh. 34; Tr. 6/8/09 138:25-139:7). Unfortunately, during the five-month pendency of EGW's disciplinary complaint, Dr. Muncey suffered, emotionally, physically, and professionally. (Tr. 6/8/09 137:9-19; 139: 8-15; 172:12-173:7).

After Dr. Muncey verified that EGW copied his files, he filed an amended complaint with the district court to include a claim for conversion. (RP 0156-0220). EGW answered, denying that it had copied the patient files and alleged that Dr. Muncey had abandoned his files. (RP 0221-0226). During discovery, EGW continued to deny that it had copied Dr. Muncey's

patient files, and instead asserted that it had only copied its own patient files (RP 0353).

No EGW representative could provide any explanation as to why EGW did not seek Dr. Muncey's permission to copy his patient files or why EGW needed to copy Dr. Muncey's patient files if, as EGW claimed, he had abandoned them. (Tr. 6/9/09 34:9-35:1-16; 38:15-20; 74:22-75:13; 142:1-8). At trial, the only explanation, repeated from EGW's opening argument all the way through to closing argument, was that EGW copied the files so that they could be used by the replacement optometrist. (Tr. 5/21/09 4:23-3-5; 6/8/09 85:11-17; 6/9/09 38:15-20; 62:15-19; 77:22-78:4; 80:15-23; 120:15-21; 142:1-23; 6/10/09 51:15-17).

At no time during closing argument or subsequently during the many hours of the jury's deliberations did EGW's counsel make any objection to Dr. Muncey's counsel's closing argument. The Jury returned a verdict in favor of Dr. Muncey, awarding $1 in nominal damages for his breach of contract claim and $300,000 in compensatory damages for his conversion claim. (RP 0603-0604). The Jury also awarded $2,000,001 on the punitive damages claim, $1 more than requested by Dr. Muncey. *Id.*

ARGUMENT

I. THERE WAS SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL FROM WHICH A REASONABLE JURY COULD FIND IN FAVOR OF DR. MUNCEY FOR CONVERSION

A. Standard of Review on Appeal

A key requirement in every appeal is that the factual recitation contained in any pleading filed be specific, accurate, and complete.[4] Where an appellant fails to include the substance of all the evidence bearing upon a proposition, the Court of Appeals shall not consider a challenge to the sufficiency of the evidence. *Martinez v. S.W. Landfills, Inc.*, 115 N.M. 181, 186, 848 P.2d 1108, 1113 (Ct. App. 1993); *Wachocki v. Bernalillo County Sheriff's Department*, 2010-NMCA-21, ¶ 17 (Appellate Court shall not consider an appellant's substantial evidence argument if appellant fails to present the evidence as a whole or only discusses those facts which tend to support the appellant's argument).

B. Substantial Evidence Standard

EGW challenges the jury verdict for conversion for lack of substantial evidence. In reviewing a claim that the jury's decision was not supported by substantial evidence, the appellate court views the evidence in the light most

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[4] "The Court's calendaring system depends on a thorough and accurate statement of the facts." Paper on Docketing & Calendaring, Honorable Judge Lynn Pickard, 1982, (Rev. 8/2006), pg. 8. http://coa.nmcourts.gove/courtinfo/sumryart.pdf

favorable to the decision below, resolving all conflicts in the evidence in favor of that decision. *Insure New Mexico, LLC, v. McGonigle*, 2000-NMCA-018, ¶ 8, 128 N.M. 611, 995 P.2d 1053. In addition, a reviewing court does not lightly overturn a judgment of the trial court, and will search the record on appeal for substantial evidence to support the trial court verdict. *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991). An appellate court will reverse only when the evidence, or reasonable inferences from the evidence, cannot support the decision of the trial court. *Id. See also Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 561 P.2d 493 (Ct. App. 1977) (In reviewing the trial court decision, the Court disregards all evidence inferences unfavorable to the trial court's result).

C. New Mexico Law on Conversion

New Mexico's definition of conversion is broad. Conversion is defined as the unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property, or a wrongful detention after demand has been made. *Nosker v. Trinity Land Co.*, 107 N.M. 333, 337-38, 757 P.2d 803, 807-08 (Ct. App. 1988) (emphasis added). Thus, a claimant has at least three independent ways of proving conversion and need only establish one of them in order to assert a

valid claim. *See Case Credit Corp. v. Portales Nat. Bank*, 1998-NMSC-035, ¶ 13, 126 N.M. 89, 92, 966 P.2d 1172, 1175 (J. Minzner, dissenting) (There are at least three different ways to find conversion in New Mexico and up to seven ways recognized in the Restatement (Second) Torts § 223 (1965)). At trial, the jury was instructed on the definition of conversion. The jury need only to have found one of these three bases for conversion to be proven.

i. EGW Exercised Dominion and Control over Dr. Muncey's Property in Exclusion or Defiance of Dr. Muncey's Rights

There is no question that by copying Dr. Muncey's files, EGW exercised dominion and control over his property. EGW did not dispute this at any time during the trial and does not do so now. As Judge Lang commented "I don't think there is much doubt they did." (Tr. 6/9/09 162:20-22). Thus, it is undisputed that Dr. Muncey met this element of conversion.

The trial record wholly contradicts EGW's contention that there was no evidence that it acted in defiance or exclusion of Dr. Muncey's rights. Substantial evidence was presented to the jury that established that Dr. Muncey had exclusive control over and ownership of his patient files. The substantial evidence included the terms of the New Lease that established that the patient files were exclusively owned and controlled by Dr. Muncey,

and the testimony of several witnesses. (Tr. 6/08/2009 130: 1-7; Tr. 6/08/2009; 183:2-8; RP 0992:16-25).

EGW makes no attempt to argue that the act of copying the files was not in "defiance" of Dr. Muncey's rights. Rather, it argues that it is "undisputed" that it rightfully came into possession of Dr. Muncey's property, ignoring all of the substantial testimony to the contrary. *See id.* The act of copying Dr. Muncey's files, without authorization from Dr. Muncey, is in itself exercising dominion and control over Dr. Muncey's property in defiance of his right of exclusive control over the files. This alone supports the jury's verdict in favor of Dr. Muncey for conversion.

ii. EGW Committed Acts Constituting an Unauthorized and Injurious Use of Dr. Muncey's Property

Mr. Cook's testimony, and the terms of the New Lease, established that EGW did not have the authority to access, much less copy Dr. Muncey's files. *See infra.* Mr. Cook testified:

> Q: Now, ... at the time you copied Dr. Muncey's patient files, that there was an ongoing lawsuit that had been filed by Dr. Muncey in which he claims that you owe him $300,000 for those patient files pursuant to your offer?...
> A: Evidently, yes.
> Q: So you decided, then, to copy his files and not ask for permission because you knew that if you had asked for his permission, he'd say, wait a second, you owe me $300,000 for these files because that's what you offered me, and that's what I have sued you for, correct?

A: I don't know what he would say.

(Tr. 6/09/2009; 74:22-75:13)

Q: Now, if you look—I believe it's paragraph 3e. Is that the provision of the lease that talks about the patient files being under the exclusive control and responsibility of Dr. Muncey?
A: It says, yes, "Tenant shall maintain full and independent responsibility and control."
Q: So you understood that, according to the lease anyway, Dr. Muncey was required to maintain exclusive control and responsibility for those patient files?
A: Yeah, Dr. Muncey, the doctor, is responsible for the files."
Q: And in spite of the—your knowledge of that provision, you said that the lease makes it okay for Eyeglass World to go in and copy those files without seeking permission from Dr. Muncey?
A: I didn't read through the lease. I let John [Geary] handle that."

(Tr. 6/09/2009; 34:9-35:1-16).

Q: Why didn't Eyeglass World ask Dr. Muncey's permission to copy the files?
A: I don't know.
Q: Does it make rational sense to you that Dr. Muncey should have been asked for permission before his files were copied?
A: I don't know.
Q: Is the reason that Dr. Muncey was not asked for his permission because Eyeglass World knew that if they asked him he'd say no?
A: I don't think so.
Q: Then why not ask him?
A: I don't know. I don't recall the facts and circumstances, at the time, of why or why not.

(Tr. 6/09/2009; 37:1-14).

There was no evidence presented at trial to suggest that Dr. Muncey gave EGW the permission or the authority to copy his files. EGW also ignores

the evidence that the copying of Dr. Muncey's files constituted an injurious use of those files that affected the value of his practice. Dr. Muncey testified:

> A: When I go to buy a practice, I want the records because this is what brings the patients back. When I go—or they go to the dentist or their medical doctor, they're going because those records are there ... [b]ut those records are the value. If I went out to buy a practice and there were no patient files, records, history, I wouldn't give them a nickel for them.

(Tr. 6/08/2009; 178:15-24).

During opening argument, EGW admitted that it used the copied files.[5] "After the copies were made, they were...put on the shelf for the replacement eye doctor to use." (Tr. 6/08/2009; 85:11-17).

Dr. Muncey also explained how his patient files would be used by a replacement optometrist recruited and contracted by Eyeglass World.

> Well, what [EGW] would do is they would pay me for the practice and then they would go out, now, get a doc, because they can't examine patients unless they have an optometrist ... The beauty of them having the practice is that they can have all the numbers, they have all the patients, so they can go get somebody that's a year or two out of school, maybe, and say "Here's what we can do for you ..." They know the kind of volume that it will generate...and it gives them a chance to step into a practice, instead of starting cold,

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[5] *See Baxter v. Gannaway*, 113 N.M. 45, 50, 822 P.2d 1128, 1133 (Ct. App. 1991); *D.R. Horton, Inc. v. Bischof & Coffman Construction, LLC*, 217 P.3d 1262, 1276 (Colo. App. 2009) (A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute).

opening the door and going, "okay. Where's my first patient?"

(Tr. 6/08/2009; 102:23-103:11).

EGW would benefit financially by keeping Dr. Muncey's files. "The parties recognize that Muncey was able to operate and grow a prosperous optometrist practice at the Premises while conducting its business under the 1998 Agreements. The parties further recognize that it will be easier for Eyeglass World to enter into a relationship with another optometrist at the Premises if Eyeglass World had possession of Muncey's customer/patient lists." (Tr. 6/08/2009; 177:16-23). The jury also heard testimony that after the files were copied, they were replaced on active shelves at the EGW location.

Q: [THE COURT:] Okay. Are they kept within—the copy within the file of the copy or are they separate?
A: You have a section which is the active files, and then, you know, which I believe, the photocopies. The originals are sitting in an empty room, that could be an examination room at some point in time.

(Tr. 6/09/2009; 80:15-23 (emphasis added)).

EGW's own personnel testified regarding EGW's intent to use the files. Mr. Cook testified that "[w]e knew that the patients would benefit if there was a copy of those files made to give to the replacement optometrist." (Tr. 6/09/2009; 120:15-21).

EGW's corporate attorney Mr. Zifrony also testified, "[w]e made the copies so that we had a set of the patient records available for a replacement optometrist in case Dr. Muncey decided to come and take his originals from Eyeglass World." (Tr. 6/09/2009; 142:1-8, 16-23).

Mr. Geary, EGW's Director of Risk Management, also admitted that the copies were intended for the replacement optometrist.

> Q. And you authorized the copying of the files, is that correct?
> A. That's correct.
> Q. And why did you do that?
> A. We did that so that the optometrist that took over the store from Dr. Muncey—for the benefit of that optometrist and for the benefit of the patients.

(Tr. 6/09/2009; 153:24-154:4).

The jury was free to make their conclusions by direct and inferential evidence. *See e.g. Rutledge v. Johnson*, 81 N.M. 217, 221, 465 P.2d 274, 278 (1970). The jury heard testimony that the copying was unauthorized and that Dr. Muncey was a valuable commodity. (Tr. 6/10/09 19:6-13, 21:16-20, 23:7-21; RP 959:13-14, 1001:17-25-1002:2). In addition, the jury heard testimony that the value of Dr. Muncey's practice was in keeping the exclusivity and confidentiality of those files. (Tr. 6/8/09 106:3-15, 169:2-7). The evidence shows that there was a direct economic correlation between the ability of an optometrist to quickly and efficiently service patients and

the subsequent retail revenue from optical sales by EGW. (Tr. 6/9/09 76:6-77:3). The evidence supported a reasonable inference that the files were in fact used by the replacement doctor – an inference that was carefully weighed by the trial court upon a motion for directed verdict. (Tr. 6/9/09 164:20-165:4). Lastly, the evidence also revealed that the copied files were still on the active shelves at the EGW location, to be accessed and used by the replacement doctor. (Tr. 6/9/09 80:15-23). These points of evidence provided a sufficient basis for the jury to conclude, either directly or by reasonable inference, that EGW's actions in copying the files constituted an unauthorized and injurious use of his property.

iii. Conversion by "Demand and Refusal" is Inapplicable

EGW argues that the verdict should be overturned based on a theory of conversion known as "demand and refusal." This form of conversion was not claimed by Dr. Muncey or tried to the jury. *See Bagwell v. Shady Grove Truck Stop*, 104 N.M. 14, 715 P.2d 462 (Ct.App.1986) (The issue is not whether there is evidence to support an alternative result but, rather, whether the trial court's result is supported by substantial evidence).

In any event, EGW makes serious misstatements of the facts and the applicable law in support of its "demand and refusal" argument. In *Nosker*, the court explained that "[w]here demand and refusal are relied on as the

sole evidence of conversion, or where a defendant is rightfully in possession of property, the demand must be made before the action for conversion is brought." *Id.* at 339, 757 P.2d at 809. First, "demand and refusal" was not relied on by Dr. Muncey as the sole claim of conversion and therefore is not applicable. Second, EGW's statement that it is "undisputed" that it came into possession of the files "lawfully" is a total misrepresentation of the facts. (BIC at 28). The New Lease granted Dr. Muncey "full and independent responsibility and control over all lists and records relating to [his] patients..." (Plaintiff's Exh. 3). Dr. Muncey limited access to his files to those EGW employees working for him. (Tr. 6/8/09 130:4-7). Furthermore, it is common practice and knowledge that the patient files belong to the doctor. (Tr. 6/08/2009; 183:2-8; RP 0992:12-25). Dr. Muncey's decision to make the patient files available to the doctors he had procured and who were under contract with him did not confer a right of possession to EGW.[6]

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[6] EGW argues that because Dr. Muncey left his files for the use of other doctors, it and/or the replacement doctor was implicitly authorized to use them. There is a discernable difference between that doctors that Dr. Muncey contracted with to provide doctor coverage, who were accessing the patient files with Dr. Muncey's explicit authority, and the replacement doctors hired by EGW, who were not known or authorized by Dr. Muncey, to access the files. This also raises the question that if EGW was authorized to use the files, why did it need to copy them?

The jury adduced from the evidence that the files were the exclusive property of Dr. Muncey, that EGW never had authorization from Dr. Muncey to access or copy the files, and therefore EGW could not come into possession of them lawfully. This is precisely why EGW never sought permission to copy the files, but instead had them copied under the cover of darkness.

EGW's reliance on *Taylor v. McBee*, 78 N.M. 503, 433 P.2d 88 (Ct. App. 1967), is misplaced as that case is completely distinguishable. *Taylor* dealt with a claim of conversion where the patient files were commingled and shared between doctors. *Id.* at 504, 433 P.2d at 89. The Court of Appeals ruled that by virtue of this "commingling" the defendant doctor had come into lawful possession of plaintiff's files, and thus could not be liable for conversion until such time as he refused to return them after plaintiff's demand. *Id.* at 506, 433 P.2d at 91. The language cited from *Taylor* is inapplicable here. In discussing the holding of *Taylor*, court in *Larranaga v. Mile High Collection & Recovery Bureau, Inc.*, 807 F. Supp. 111, 115 (D.N.M. 1992), explained:

> *Taylor* simply stands for the proposition that when two or more individuals freely and voluntarily mix their personal property together such that by joint agreement one individual effectively exercises possession and control over all of the property, one cannot later claim that the individual in possession of the property is liable for conversion until such

time as the individual in possession refuses to return such property after demand.

Taylor is further inapplicable because Dr. Muncey did not need to send an additional demand for the patient files, as adversity of ownership had already been established by his refusal to dismiss his suit seeking to enforce EGW's offer of $300,000.00 for these very files. EGW knew of the adversity of interest when it secretly copied the files.

Finally, EGW asserts that a refusal must be absolute and amount to a denial of a Dr. Muncey's title to possession. (BIC at 30). Again, this statement applies only to a case of lawful possession and is inapplicable here. Moreover, a converter does not necessarily have to deny possession to rightful owner. *See Doughty v. Aurora Towing*, 1993 U.S. App. LEXIS 23074 (9th Cir. 1993) (Court cites directly to *Nosker* in refuting claim by defendant that demand and refusal to return the property are essential to a conversion claim).

D. The District Court Properly Refused EGW's Requested Jury Instruction on Conversion

EGW's requested instruction on "exclusion or defiance" and "injurious use" was not a proper statement of New Mexico law and therefore the District Court correctly refused to allow the instruction. Jury instructions are reviewed "to determine whether they ***correctly state the law***

and are supported by the evidence introduced at trial." *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-45, ¶ 11, 130 N.M. 532, 27 P.3d 1019 (emphasis added). The trial court may refuse a requested jury instruction when it is inconsistent with New Mexico law. *See e.g., Lucero v. Torres*, 67 N.M. 10, 16, 350 P.2d 1028, 1032 (1960) (refusing to follow California's abandonment of unavoidable accident defense as inconsistent with New Mexico law); *Malczewski v. McReynolds Constr. Co.*, 96 N.M. 333, 336, 630 P.2d 285, 288 (Ct. App.1981) (upholding trial court's refusal to give requested instruction because closing argument was a proper substitute for the non-UJI instruction).

The Court instructed the jury on the applicable New Mexico law on conversion, derived from the *Nosker* case. (RP 0618). EGW requested the District Court to go further and instruct the jury as follows:

> There is no exclusion or defiance [or injurious use of records] of the owner's rights when a party copies the records, with or without authorization, and returns the original records or makes the original records available to the other party that claims entitlement to those records.

(RP 0649).

NMRA 1-051(F), which prohibits EGW's proposed instruction, provides:

> Whenever the court determines that the jury should be instructed on a subject, the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

EGW's proposed instruction is certainly not "brief, impartial and free from hypothesized facts" as required by the Rule. Rather, it is a convenient summary of EGW's defense at trial, which is not a subject for jury instructions but rather for closing argument. As the Supreme Court of New Mexico has explained:

> It is for the advocate in argument to apply the law to the facts in evidence . . . The philosophy behind these uniform jury instructions includes . . . a dislike of instructions which single out a particular item of evidence for comment, it being felt that this is a function of counsel in argument and not a function of the court.

Dunleavy v. Miller, 116 N.M. 353, 358, 862 P.2d 1212, 1217 (1993).

As required by NMRA 1-051(A), the District Court provided the jury with the applicable rule of law while leaving it to counsel to convince the jury to apply the law according to their respective contentions. EGW's counsel had ample opportunity to argue to the jury that there was no "exclusion," "defiance," or "injurious use" and therefore no conversion of Dr. Muncey's property. There was no error in the Court's refusal to tender EGW's proposed jury instruction

In addition, the proposed jury instruction was not a proper statement of New Mexico law, relying instead on cases from New York and

Washington, D.C.,[7] with conversion standards that are different from Mexico law. Most importantly, none of the foreign cases cited by EGW define or even discuss the term "injurious use." The District Court properly refused to give EGW's requested jury instruction.

E. Compensatory Damages Should Not Be Remitted

There are two tests to determine whether an award is so excessive that it shocks the conscience: "1) whether the evidence, viewed in the light most favorable to plaintiff, substantially supports the award and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder." *Sandoval v. Chrysler Corp.*, 1998-NMCA-85, ¶ 9, 125 N.M. 292, 295, 960 P.2d 834, 837 (citations omitted). The decision of the trial court is reviewed for an abuse of discretion. *Id.* at ¶ 12. In determining whether an award is excessive, the trial judge may not weigh the evidence but must determine excessiveness as a matter of law. *Id.* at ¶ 14.

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[7] New York, "[t]o establish a cause of action in conversion, the plaintiff must show [illegible]nership or an immediate superior right of possession to a specific identifiable [illegible]ust show that the defendant exercised an unauthorized dominion over the [illegible]n, to the alteration of its condition or to the exclusion of the plaintiff's [illegible]*Giustino v Estate of DelPizzo*, 21 AD3d 523, 523, 799 N.Y.S.2d 909 [illegible]Washington D.C. defines conversion as "the unlawful exercise of [illegible]r control over the personal property of another in denial or [illegible]on's rights thereto." *Furash & Company, Inc. v. McClave*, 130 [illegible].C. 2001).

In *Sandoval*, both the trial judge and the Court of Appeals were faced with the issue of whether or not compensatory damages were excessive. *Id.* at ¶ 13. As the *Sandoval* court recognized, "[w]ithout a doubt, the valuation of pain and suffering is a difficult, inexact undertaking at best." *Id.* The same considerations are not present here. It is difficult to imagine how the compensatory damages award "shocks the conscience" or was the result of passion, prejudice, or mistake by the jury when Mr. Cook testified that the $300,000 valuation for the files was "not a pie in the sky" but rather based on fair market value. (Tr. 6/9/09 29:13-30:3). This evidence, combined with Dr. Muncey's testimony about the value of the files, (Tr. 6/8/09 at 105:19-106:2), especially when reviewed in the light most favorable to Dr. Muncey and under the deferential abuse of discretion standard as required, substantially supports the compensatory damage award. *See Romero v. Philip Morris Inc.*, 2005-NMCA-35, ¶ 95, 137 N.M. 229, 255, 109 P.3d 768, 794.

EGW's argument that the jury ignored the mitigation instruction is equally without merit. There is a presumption that the jury understood and complied with the court's instructions.[8] *See Vigil v. Miners Colfax Med.*

[8] Here, we have the added benefit of knowing that the jury paid particularly close attention to the instructions as it caught a one-word error in a jury instruction that was overlooked by counsel and the trial court. (Tr. 63:8-64:5).

Ctr., 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct. App. 1994). In closing arguments, EGW's counsel argued to the jury that it should find for EGW on mitigation. (Tr. 6/10/09 51:25-52:6). By awarding the full value of the files, the jury clearly rejected EGW's mitigation argument as it was entitled to do. The verdict should not be disturbed. *See Blea v. Fields*, 2005-NMSC-29, ¶ 5, 138 N.M. 348, 351, 120 P.3d 430, 433 ("maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care"); *Mascarenas v. Gonzales*, 83 N.M. 749, 751, 497 P.2d 751, 753 (Ct.App.1972) ("We will indulge all reasonable inferences in support of the verdicts, disregarding all inferences or evidence to the contrary. It is for the jury, not us, to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of a witness, and say where the truth lies").

The claim that Dr. Muncey failed to mitigate his damages is simply an attempt to blame Dr. Muncey for not preventing EGW from stealing his files in order to deflect attention away from EGW's theft of the files. There was substantial evidence that Dr. Muncey did not "sit on his hands" and do nothing. Instead, he contacted his attorney who instructed him to first verify the rumors that his files were being copied, and once certain, to amend his

complaint to add a claim for conversion. (Tr. 6/8/09 162:21-163:8; RP 0084). The duty to use "reasonable diligence" to mitigate damages arose after Dr. Muncey determined he had been damaged. *Elephant Butte Resort Marina v. Wooldridge*, 102 N.M. 286, 294, 694 P.2d 1351, 1357 (1985). Dr. Muncey did not determine that his files had been copied until he was able to reasonably verify the rumors, well after EGW had completed copying his files. (*Compare* Plaintiff's Exh. 3, pg. 2 "In the meantime, we have reviewed credible information..." with RP 0581, Dr. Roland letter dated 8/27/07). By that time, the damages resulting from loss of exclusive use and control over his files had already occurred. And, given that the pending suit already demanded payment from EGW for the files, it is unclear what more Dr. Muncey could have done to protect his interests or limit his damages.

II. THERE IS SUBSTANTIAL EVIDENCE THAT EGW'S CONVERSION PROXIMATELY CAUSED DAMAGE TO DR. MUNCEY

Proximate cause is a question of fact for the jury. *See Cox v. Calkins Estates*, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990). Although EGW asserts that the evidence is "undisputed," the evidence presented to the jury was that copying the files effectively destroyed the value of those files.

EGW copied Dr. Muncey's files in complete disregard and contempt of his suit seeking to enforce EGW's $300,000 offer to purchase those same

files. By copying Dr. Muncey's files without permission, and then intentionally hiding from Dr. Muncey the fact that it copied his files, EGW effectively paid only $6,000 for a $300,000 business asset.

New Mexico recognizes that the value of an asset with little or no available market can be ascertained by offers to purchase the asset, on probable and inferential as well as upon direct and positive proof. *See Romero*, 2005-NMCA-35, ¶ 95, 137 N.M. at 255, 109 P.3d at 794. Mr. Cook admitted that the offer to purchase Dr. Muncey's patient files for $300,000 was not "pie in the sky" and was based on a fair market value analysis. (Tr. 6/9/09 29:13-20:3).

Pursuant to their business relationship, Dr. Muncey's patients became EGW's customers. (Tr. 6/8/09 98:16-99:11). Stated a little differently, there would be no EGW customers without Dr. Muncey first treating his patients and then referring them next door to the EGW retail store. (Tr. 6/8/09 98:13-99:11). EGW admitted that without doctor treatment, there would be no retail sales. (Tr. 6/9/09 49:13-24). This symbiotic relationship between Dr. Muncey and EGW, required that EGW have access to Dr. Muncey's patients. As long as Dr. Muncey retained exclusive control over his patient files he possessed something of tremendous value to EGW. Once EGW

converted those files by copying them, Dr. Muncey's original files lost all their value.

Consequently, the entire value of the patient files resided in Dr. Muncey's exclusive control and ownership of them. Without that exclusive control, the patient files have no discernable economic value or interest to anyone. Once EGW divested Dr. Muncey of his exclusive control over the files, all value disappeared. "The measure of damages, in conversion, is the value of the property at the time of the conversion with interest. A fair and reasonable basis for determination is all that is required." *Crosby v. Basin Motor Co.*, 83 N.M. 77, 79,488 P.2d 127, 129 (Ct. App. 1971); *see also Frank Bond & Son v. Reserve Minerals Corp.*, 65 N.M. 257, 260, 335 P. 2d 858, 861 (1959) ("Where a person is entitled to judgment for the conversion of a chattel or the destruction of any legally protected interest in land or other thing, the damages include...the exchange value of the subject matter or the plaintiff's interest therein, at the time and place of the conversion...."); *Cornell v Albuquerque Chemical Co., Inc.*, 92 N.M. 121, 584 P.2d 168 (Ct. App. 1978).

EGW could not run the risk of losing access to Dr. Muncey's files, and it could not afford allowing those files to leave as it would certainly have caused it to lose customers. EGW acknowledged that Dr. Muncey had

a loyal patient following, and EGW wanted to either keep Dr. Muncey at EGW, or if he left, prevent him competing against it. Thus, Dr. Muncey had a competitive advantage that came with his exclusive control of the files. Unless EGW was able to obtain those files for the use and benefit of Dr. Muncey's replacement, and thereby service and retain its own customer base, there was nothing EGW could do to stop Dr. Muncey from referring his patients to a competing business "right across the street." (Tr. 6/08/09 105:1-5). By copying Dr. Muncey's files, EGW ensured that it would be able to maximize its revenues. As Dr. Muncey testified, "EGW's goal was to make money through volume [of patients] per day." (Tr. 6/8/09 100:16-101:5). A replacement optometrist can treat many more patients per day with access to the patients' medical history contained in the files, as opposed to not having those files and having to start from scratch with each patient. (Tr. 6/8/09 102:23-103:11; 6/9/09 77:22-78:4). And, because EGW had difficulty in finding optometrists (RP 965:12-24; Tr. 6/9/09 50:4-12), a ready made practice with 20,000 patient files created value and made attracting a replacement for Dr. Muncey much easier. (Tr. 6/8/09 178:6-24). EGW converted Dr. Muncey's valuable and considerable competitive and economic advantage by copying his files.

Numerous courts have recognized that copying patient files defeats the exclusivity of the information resulting in the loss of the intrinsic value of confidential patient files. In *Tessnar v Grosner*, 128 A.2d 467 (N.J. 1957), the court found that information contained in a Doctor's patient files had "something of value...and that the appellant as effectively took them by making copies as if he had taken them away and never returned them." *Id.* at 470. In *Warshall v Price*, 629 So.2d 903 (Fla. App. 1993), the plaintiff/counterdefendant copied information taken from the defendant/counterplaintiff's patient files without permission and argued that the copies had no value, especially since the defendant was never deprived access to his files. The court disagreed holding that the defendant was denied the benefit of the data as it was no longer confidential. *Id.* at 905. The court found that the value of the patient files was in its potential use to solicit patients, and that the defendant was "denied the benefit of his confidential patient list when [plaintiff] took the list and used it to [defendant's] disadvantage." *Id.*

Other courts have found that the copying of confidential information representing a material investment of time and money are valuable assets to their owners. Accordingly, wrongfully depriving the owners of this confidential information results in compensatory and punitive damages. "It

is apparent that such a list, containing such information, would be of value to a competitor and that it would be unfair trade competition for a competitor to wrongfully secure possession of and make use of such a confidential trade list, and this is true even though the names...contained upon that list might be obtained from other sources." *Giovinazzi v Chapman,* 1982 Ohio App. LEXIS 13516; *see also Conant v Karris*, 520 N.E. 2d 757, 763 (Ill. App. 1987) ("Once confidential information is [copied and] released to competitors, it hardly can be said that the data is still confidential. Thus the original owner would be deprived of the benefit of the information.")

EGW copied the files for its own pecuniary benefit. In addition, it certainly can be reasonably inferred that EGW would not spend $6000 to copy Dr. Muncey's patient files for no particular purpose or benefit. Hearing how cavalierly EGW ignored its own contractual obligations to uphold state and federal statutes requiring that Dr. Muncey retain exclusive control over his patient files, the jury had no difficulty believing that EGW copied Dr. Muncey's patient files in order to convert them for its own financial benefit. Dr. Muncey's patient files are "property" and use of those files for the benefit of EGW is conversion. *See Hanger Prosthetics & Orthotics, Inc. v. Capstone Ortheopedic, Inc.,* 556 F. Supp 2d 1122 (E.D. Cal. 2008).

III. THE PUNITIVE DAMAGE AWARD IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND COMPORTS WITH DUE PROCESS AND CONSTITUTIONAL PARAMETERS

The jury's punitive damage award should not be disturbed. There was substantial evidence to support the jury's award of punitive damages and the award was well-within constitutional parameters. Although review of a punitive damages award is *de novo*, any doubt concerning what appropriate punitive damages may be in the abstract should be resolved in favor of the jury verdict. *Aken v. Plains Elec. Gen. & Trans. Coop., Inc.*, 2002-NMSC-21, ¶ 19, 132 N.M. 401, 408, 49 P.3d 662, 669. A punitive damages award will be upheld if substantial evidence supports the jury's finding. *Id.* at ¶ 17. Substantial evidence is "that which a reasonable mind accepts as adequate to support a conclusion." *Bill McCarty Constr. Co. v. Seegee Eng'g Co.*, 106 N.M. 781, 783, 750 P.2d 1107, 1109 (1988).

Courts assessing a punitive damages award consider three criteria: 1) the degree of reprehensibility of the defendant's conduct; 2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases. *Aken*, 2002-NMSC-21, ¶ 20 (*citing BMW v. Gore*, 517 U.S. 559, 574-75 (1996)).

A. There was Substantial Evidence Presented Establishing that Defendant's Conduct was Reprehensible to a Significant Degree

The degree of reprehensibility is "the most important indicium of the reasonableness of a punitive damage award." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 37, 140 N.M. 478, 143 P.3d 717 (*quoting State Farm v. Campbell*, 538 U.S. 408, 419 (2003)). Courts determine reprehensibility by evaluating whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident." *Campbell*, 538 U.S. at 419 (*citing BMW v. Gore*, 517 U.S. at 576-77).

Conversion is an intentional tort, which presupposes the requisite intent for a punitive damage award. Conversion of Dr. Muncey's property was so significant that it required a team of outside copying personnel to work over a month under the cover of darkness to complete their work. (Tr. 6/9/09 9:23-10:1). EGW ordered the copying of the files, notwithstanding a pending suit seeking payment for the same files. After converting the files to its own use, EGW then attempted to cover up its misdeeds by filing a

complaint with the NMBO claiming that Dr. Muncey had abandoned his files. (Plaintiff's Exh. 32).

The jury heard testimony which showed that EGW's conduct was reprehensible to a significant degree. Mr. Cook, Mr. Zifrony, and Mr. Geary all testified that there was nothing to prevent them from copying Dr. Muncey's files, (Tr. 6/9/09 at 20:22-25, 21:1-3; 87:14-25, 89:6-18), despite the unambiguous language of the New Lease and the common knowledge in the industry that the patient files are under the exclusive control and are the property of the doctor. (Tr. 6/8/09 at 183:2-8). Mr. Cook, despite all documentary evidence to the contrary, testified at trial that the $300,000 offer was not for the purchase of the patient files but instead was a tax benefit for Dr. Muncey. (Tr. 6/9/09 44:3-45:17, 74:2-6). Mr. Geary testified that making a demand that Dr. Muncey pick up the files shortly after the copying was completed was mere coincidence. (Tr. 6/9/09 150:9-22). Mr. Zifrony and Mr. Cook each testified that they did not remember that Dr. Muncey's pending lawsuit when they authorized the wholesale copying of the files. (Tr. 6/9/09 74:22-75:13; 101:25-104:3). Not one of EGW's personnel could answer the "$300,000 question": "If Dr. Muncey had abandoned the files why did you need to copy them?" (Tr. 6/9/09 142:1-8; 147:9-23). Nor could they explain why EGW did not ask Dr. Muncey for

permission to copy the files, or why EGW failed to inform Dr. Muncey and the NMBO that it had copied Dr. Muncey's files.

The jury also considered EGW's ever-changing story to avoid culpability. First, it denied copying the files. (RP 0246, ¶ 27). Second, it claimed that Muncey abandoned his files. (RP 0248, ¶ 28). Third, EGW took the position that it only copied its own patient files. (RP 0353, ¶ 2). Finally, it now claims that it never used the files. And why? So EGW could acquire for $6,000.00 what it previously valued $300,000.00.

Punitive damages are "intended to punish the defendant and to deter future wrongdoing." *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Absent an award of punitive damages in this case, EGW has no incentive to refrain from the copying of patient files that belong to the numerous doctors it contracts with throughout the country. Without the economic stimulus provided by an award of punitive damages, EGW would not feel compelled to refrain from the same practices in the future, and may be emboldened to repeat its reprehensible behavior. In awarding punitive damages, the jury determined that EGW's conduct was reprehensible to a degree that demanded an award in excess of the amount Dr. Muncey asked the jury to award.

B. The Ratio of the Punitive/Compensatory Damages Award is Well-Within Constitutional Limits

The jury awarded Dr. Muncey $300,000.00 in compensatory damages for conversion and $2,000,001.00 in punitive damages. (RP 0603-0604). The 6.6 to 1 ratio of compensatory damages to punitive damages is well-within constitutional guidelines and even less than ratios approved by New Mexico appellate courts in cases involving economic damages. "The test under the second guidepost in New Mexico is that '[t]he amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.'" *Aken*, 2002-NMSC-21, ¶ 23. *Campbell* indicated that punitive damage awards reflecting "a single-digit ratio between punitive and compensatory damages" are most likely to comport with due process. *Campbell*, 538 U.S. at 425.

New Mexico refuses to set an absolute limit on the ratio for a punitive damages award. Assessing the ratio of punitive damages to compensatory damages is a somewhat imprecise inquiry. *Bogle v. Summit Inv. Co.*, 2005-NMCA-24, ¶ 35, 137 N.M. 80, 91, 107 P.3d 520, 531. Given EGW's reprehensible behavior, a substantial punitive damages award was appropriate. The jury's award was not the product of passion or prejudice,

but fairly related to the conversion and the actual damages proven. In fact, one need look no further than the award itself to see that it was not the product of passion or prejudice, but of restraint. Dr. Muncey's counsel asked the jury to award $2,000,000.00 in punitive damages during closing argument. (Tr. 6/10/09 48:18-22). The jury awarded $2,000,001.00. The message sent by the jury in awarding $1 dollar more than requested is unmistakable: that had Dr. Muncey asked for more, the jury would have awarded more.

EGW's argument that in cases involving economic harm a punitive damages award at a ratio of 1 to 1 is at the outermost limits of due process is without support in New Mexico case law. In *Weidler v. Big J Enters.*, 1998-NMCA-21, ¶ 48, 124 N.M. 591, 604, 953 P.2d 1089, 1102, an economic damage case, the ratio of punitive damages to actual damages was eight to one. The Court explained:

> In economic injury cases, if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally should not exceed ten to one....We do not believe that the ratio here of eight to one is impermissibly large. It falls well within the ratios contemplated by the court in *BMW*.

See also Chavarria, 2006-NMSC-46, ¶ 39 (affirming a 16.6 to 1 ratio to compensatory damages, explaining "it appears that the trial court reduced the initial punitive damages award under the mistaken belief that it reflected

an unconstitutionally large ratio between compensatory and punitive damages"); *Hudson v. Cook*, 105 S.W.3d 821, 832 (Ark. App. 2003) (Upholding a 7 to 1 ratio in a conversion case); *Schwigel v. Kohlmann*, 280 Wis. 2d 193, 207 (Wisc. App. 2005) (upholding a 30 to 1 ratio in a conversion case).

C. The Civil and Criminal Penalties for Conversion are Potentially Significant

It is appropriate for the Court to consider the potential civil and criminal penalties that could be imposed as a result of EGW's actions. A civil penalty can be imposed up to $250,000.00 for each HIPAA violation. Because EGW copied thousands of patient files, the potential civil penalties it would face is in the millions of dollars. Moreover, the potential criminal penalties are significant. NMSA § 30-16-1(F) provides that "[w]hoever commits larceny when the value of the property stolen is over twenty thousand dollars ($20,000) is guilty of a second degree felony," which provides for a maximum of nine years imprisonment and a fine of up to $10,000.00. *See* NMSA § 31-18-15(A)(6) and (E)(6). New Mexico law has consistently characterized conversion as "theft," "stealing," and/or a criminal act. *See State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537 (Evidence of conversion sufficient to uphold conviction of embezzlement under NMSA § 30-16-8); *Chavarria*, 2006-NMSC-46, ¶ 39

(stating that a third-degree felony weighs in favor of the reasonableness of 16.6 to 1 punitive damage award).

D. The Purposes for Punitive Damages Are Served by Affirming the Punitive Damages Award

EGW argues for the first time on appeal that punitive damages should not be awarded because it will punish National Vision because it owns EGW's equity interests.[9] (BIC at 39). Due to its failure to raise this issue to the District Court and EGW is not permitted to raise this issue for the first time on appeal. *See Reule Sun Corp. v. Valles*, 2010-NMSC-4, ¶ 9, 226 P.3d 611, 614 (a "matter not brought to the attention of the trial court cannot be raised for the first time on appeal); *see also Fenstermacher v. Telelect, Inc.*, 1994 U.S. App. LEXIS 6054 (10th Cir. 1994) (Affirming the District Court's holding that by defending the action and by failing to raise the issue of successor corporation liability until the punitive damages proceeding, the issue was waived, and further noting that this "premise is highly questionable, because it would allow companies to avoid liability for punitive damages through simple corporate transactions).

Even if this issue were properly preserved, the punitive damage award is still valid. In *Richmond v. Madison Management Group, Inc.*, 918 F.2d

[9] It should be noted that EGW's sale to National Vision was a stock sale encompassing all assets and liabilities. (Tr. 6/10/09 33:4-7).

438 (4th Cir. 1990), the court explained that "the weight of authority is against [defendant] because most courts addressing the issue have held that if a successor in interest is liable for its predecessor's torts, it is subject to punitive damages for those torts." *Id.* at 455 (citations omitted). Moreover, the *Richmond* court explained that a punitive damage award against a successor is still proper because the purpose of a punitive damage award is not simply to deter the wrongdoer from future wrongdoing; it is "to display *to others* an example of the consequences *they* may expect if they engage in similar conduct." *Id.* at 456. (emphasis in original) (citation omitted); *accord Rhein v. ADT Auto., Inc.*, 1996-NMSC-66, ¶ 30, 122 N.M. 646, 930 P.2d 783 (purpose of punitive damages is to deter others from engaging similar conduct). The *Richmond* court further explained that "[t]hat purpose is served equally well irrespective of whether the award is imposed on the actual wrongdoer or the wrongdoer's successor in interest. 918 F.2d at 456.

E. Defendant Failed to Object to Counsel's Closing Argument and Therefore Waived The Issue

As a threshold matter, EGW's contention that counsel's closing argument was improper should not be considered because it was not objected to at any time. *See e.g. Lopez v. Southwest Community Health Servs.*, 114 N.M. 2, 8, 833 P.2d 1183, 1189 (Ct. App. 1992) (Failure to

object to closing argument precludes appellate review); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 29, 766 P.2d 280, 289 (1988) ("'[O]bjections to the argument of counsel should be made in time for the court to rule on them, and, if necessary, to correct them before the jury retires'"); *Allen v. Tong*, 2003-NMCA-56, ¶ 37, 133 N.M. 594, 604, 66 P.3d 963, 974 ("Absent an objection, we will review the propriety of [a closing argument] statement only in 'exceptional cases where the interest of substantial justice is at stake'").

EGW now claims the injection of the complaint to the NMBO was a "bolt-from-the-blue," that it was deprived "of the opportunity to defend itself on the issue," and that its failure to object is excused as "non-waivable 'fundamental error'" due to "total absence of anything in the record," (BIC at 41-43). However, the entire record shows that this issue was always part of the proceedings.

Prior to trial, Dr. Muncey argued that "a reasonable jury could conclude that in furtherance of their ends, the Defendant filed a frivolous Complaint with the Optometry Board in order to obtain cover for their scandalous actions." (RP 0325). Dr. Muncey also raised this issue in his response to the NMBO complaint, which was received and reviewed by EGW's attorney a year and a half before trial. (RP 0336; Tr. 6/9/09 131:9-

25). That response states that "[t]he complaint by EGW is nothing more than an attempt to use the ... compliance office as a means of influencing ongoing litigation between Dr. Muncey and EGW, as well as to deflect attention away from EGW's own apparent violation of state and federal laws." (RP 0336).

Furthermore, both parties included the NMBO complaint in their respective exhibit lists, without objection. (RP 0579-0586). The NMBO complaint was a significant issue from the outset of the trial. Dr. Muncey's counsel discussed the NMBO complaint in opening arguments, its impact on the Dr. Muncey, and informed the jury that he would ask for punitive damages at the close of trial. (Tr. 6/8/08 74:9-25, 75:1-25, 76:1-25, 77:1-2). Dr. Muncey testified about the impact of the NMBO complaint on him both personally and professionally. (Tr. 6/8/09 136:16-25, 137:1-19, 138:22-25, 139:1-21). Counsel for EGW cross-examined Dr. Muncey on this issue. (Tr. 6/8/08 172:12-25, 173:1-15). Counsel queried Mr. Cook and Mr. Zifrony about the NMBO complaint. (Tr. 6/9/09 37:19-38:14; 123:8-124:5: 131:9-133:12).

The injection of new issues, such as privilege and the Uniform Licensing Act are not proper post-trial issues, and therefore they should be

disregarded.[10] *See e.g. Townsend v. United States Rubber Co.*, 74 N.M. 206, 209, 392 P.2d 404, 406 ("The evidence must be taken as it existed at the close of the trial").

The failure to object is dispositive on the issue. Notwithstanding, the closing arguments of counsel were proper and a fair comment on the evidence. "Counsel have considerable latitude in closing arguments." *See McDowell v. Napolitano*, 119 N.M. 696, 702, 895 P.2d 218, 221 (1995). The evidence clearly established that EGW commenced converting the Dr. Muncey's property in June 2007 and subsequently filed a complaint with the NMBO on September 25, 2007. (Plaintiff's Ex. 32). Dr. Muncey offered evidence at trial that the filing of the complaint was malicious, how it could detrimentally affect his license and his insurability, and that it was done to cover up EGW's intentional theft of his files. (Tr. 6/8/09 137:9-19; 139: 8-15; 172:12-173:7; RP 0336). EGW's motive for filing the complaint is a classic question for the jury to decide. *See e.g. Aken,* 2002-NMSC-21, ¶ 22, 132 N.M. 401, 410, 49 P.3d 662, 671 (attitude of "spite, ill-will or

[10] EGW's invocation of the Uniform Licensing Act, NMSA § 61-1-1 *et seq.*, and its privileges for information provided in "good faith" and "without malice" is unconvincing. Assuming arguendo that § 61-1-7(G) would apply to this appeal, the jury heard ample testimony regarding the filing of the complaint and it was a question for the jury to determine what motives the Defendant had for filing the complaint with the Optometry Board. Implicit in the jury's award of punitive damages to Plaintiff is that the jury found Defendant's actions were "malicious, willful, reckless, wanton, fraudulent, or in bad faith." *See* N.M. U.J.I. 13-1827. Therefore, the Uniform Licensing Act would not protect EGW from liability in any event.

vengeance" supports a punitive damages award); *Jolley v. Energen*, 2008-NMCA-164, ¶ 32, 145 N.M. 350, 359, 198 P.3d 376, 385 (In reviewing the reasonableness of a punitive damage award, the court compares the award to the enormity of Defendant's wrong *apart* from the actual injury sustained) (emphasis in original); *Allsup's. v. North River Ins. Co.*, 1999-NMSC-6, ¶ 53, 127 N.M. 1, 19, 976 P.2d 1, 19 (punitive damages are proper if there co-exists a "culpable mental state" indivisible from the conduct constituting liability); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (Upholding a 10:1 punitive damage award because the "scheme employed . . . was part of a larger pattern of fraud, trickery and deceit"); *Leavey v. UNUM/Provident Corp.,* 2006 U.S. Dist. LEXIS 34810 (D. Az. 2006) (Court found that Defendants' efforts to conceal their actions occurred in tandem with the conduct, and that a reasonable juror could construe those efforts as an attempt to avoid further liability, which in turn harmed Plaintiff and supports punitive damage award); *Roboserve, Inc. v. Kato Kagaku Co.*, 873 F. Supp. 1124, 1136 (N.D. Ill. 1995) (cover-up was evidence of a pattern of conduct sufficient to support a claim for punitive damages); *Davis v. Rennie*, 264 F.3d 86, 115 (1st Cir. 2001) ("[A] punitive damages award may be justified not only by defendant's actions on [the date in question] but also by their subsequent behavior").

CONCLUSION

For the foregoing reasons, the jury verdict should be affirmed.

WHEREFORE, Plaintiff/Appellee respectfully requests that the Court affirm the jury verdict, award costs, and grant such further and other relief the Court deems just and proper.

Respectfully submitted,

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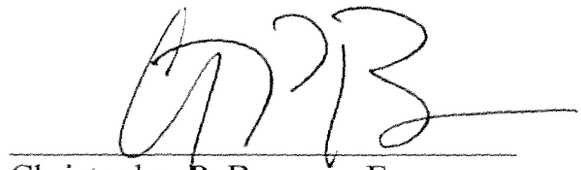

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