IN THE NEW MEXICO COURT OF APPEALS

WILLIS S. MUNCEY,

Plaintiff-Appellee,

vs.

EYEGLASS WORLD, LLC,

Defendant-Appellant.

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

BRIEF IN CHIEF OF APPELLANT EYEGLASS WORLD, LLC

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 10,984 words.

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I. INTRODUCTION

A conversion is defined generally as an unlawful exercise of dominion and control over property in defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property. *E.g., Santillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-159, ¶30, 143 N.M. 84, 173 P.3d 6. This appeal raises a question of law regarding the application of that definition: may a jury award conversion damages when (1) a defendant copies the plaintiff's files, (2) the plaintiff learns of the copying while it is ongoing, (3) the plaintiff refuses to reclaim the files on the ground that the act of copying *alone* has "converted" them, but (4) there is no evidence the defendant used the files without permission? As defendant Eyeglass World LLC ("EGW") explains, conversion damages may not be awarded on those undisputed facts, so the judgment must be reversed.

EGW appeals from (1) the conversion portion of a judgment that awards plaintiff Willis Muncey, O.D, $1 for breach of contract, $300,000 in compensatory damages for conversion and $2,000,001 in punitive damages for conversion, and (2) orders denying its motions for a new trial and judgment as a matter of law. The verdict arose out of EGW's copying of patient files that plaintiff left at EGW's store when he terminated his independent contractor relationship with it. Plaintiff initially failed to retrieve his files after ending his relationship with EGW. After EGW copied the files, plaintiff declined to collect them in the apparent hope he could parlay the copying into a damages action. There was no evidence at trial,

however, that EGW used the files after plaintiff left them behind. Plaintiff based his case exclusively on the act of copying alone.

The trial court instructed the jury that to establish a conversion plaintiff must prove EGW acted in "exclusion or defiance" of his rights or engaged in an "unauthorized and injurious use" of his property. (RP2:609, Instr. #3) The court also instructed that plaintiff had the burden of proving the alleged conversion was a proximate cause of his damages (*id.*), and for conversion, the jury could award as damages the difference between the fair market value of the converted property immediately before the conversion and the fair market value following the conversion (RP2:619, Instr. # 13). Since it was undisputed that plaintiff declined to reclaim the files after he learned of the copying, he failed to establish the required defiance as a matter of law. Independently and alternatively, since there was no substantial evidence that EGW ever used the files after copying them, plaintiff also failed to establish injurious use, proximate causation, or damage. Although the record lacks any substantial evidence to support any of these requirements, the jury found EGW was liable for conversion and awarded plaintiff $2.3 million in compensatory and punitive damages. The trial court denied post-trial relief without comment.

That was reversible error because the failure of proof of defiance/injurious use or of proximate causation/damage entitled EGW to judgment on the conversion and appended punitive damages claims. To maneuver the jury around that failure

of proof, plaintiff argued the purported impropriety of the copying. But proof that EGW was not authorized to copy the files does not establish the separate elements of defiance/injurious use or proximate causation/damage. Those elements ensure our courts are not deluged with tort claims concerning acts that have not caused injury or have been nipped in the bud. Were the law otherwise, uninjured parties would sue instead of taking simple steps to avert harm.

Since the evidence does not suffice to establish a conversion, or to award damages for a conversion, the Court should reverse the compensatory and punitive damages on the conversion claim with directions to enter judgment for EGW on that claim. Although EGW also details additional reasons below why that portion of the judgment should be reversed, the Court need not reach those additional reasons because the insufficiency of the evidence to support a finding of conversion or of damages is clear and dispositive, standing alone.

II. SUMMARY OF PROCEEDINGS

A. 1998: EGW And Plaintiff Enter Into A Ten-Year Nonexclusive Contract Whereby Plaintiff Agrees To Provide Optometry Services At EGW's Albuquerque Store For $800 A Day

EGW provides optometric and optical services to patients and customers in 65 stores around the country. (Tr.6/08/2009:98; Tr.6/10/2009:32-33)[1] Its store at

[1] Until January 2009, EGW was a subsidiary of Vision Care Holdings, which also owns LASIK Vision Institute (LVI). National Vision purchased EGW's equity interests in January 2009, with Vision Care retaining LVI. National Vision was not involved in EGW's operations before the purchase. (Tr.6/10/2009:32-33)

Montgomery and Wyoming Boulevards in Albuquerque has an optometry side, where an on-site optometrist examines patients, and an optician side, where eyeglass prescriptions are filled. (Tr.6/08/2009:98-99; Tr.6/09/2009:40-41) The optometrist is an independent contractor under a non-exclusive contract with EGW, while the remaining personnel are EGW employees who work both sides of the store. (Tr.6/08/2009:170; Tr.6/09/2009:14-15)

The files on site include a patient list, consisting of contact and prescription information and purchase history stored in EGW's computer system, and a paper file, containing the optometrist's examination notes, patient history, and the like. (Tr.6/09/2009:15-16, 41-42, 105; RP3:966) Both the on-site optometrist and other EGW employees have access to this data. (Tr.6/09/2009:62)

Plaintiff has practiced optometry in New Mexico for 15 years. (Tr.6/08/2009:97-98) He began working at the Albuquerque EGW store in 1998 under a non-exclusive ten-year contract. EGW's advertising generated a stream of patients for plaintiff, including many repeat customers. (Tr.6/08/2009:98-99)

Plaintiff's contract with EGW paid him $800 for each day he or a replacement optometrist provided services. (Tr.6/08/2009:99-100; Tr.6/09/2009:42) When replacement optometrists worked, plaintiff would profit, since he paid them less than his $800 per diem. (Tr.6/08/2009:146-47) In 2004, 2005, and 2006, plaintiff earned approximately $300,000 annually under his contract with EGW. (Tr.6/08/2009:147-48, Exs. EE, FF, GG) During his tenure

with EGW, plaintiff also worked at Wal-Mart and Eyemart Express, apparently under similar per-diem arrangements. (Tr.6/08/2009:143-45, 148-50, 173-74; Tr.6/10/2009:18-20; Ex. Y)

B. 2005: After Attendance Problems With Plaintiff's Replacement Optometrists, EGW And Plaintiff Discuss Terminating Their Relationship, But The Deal Falls Through

In the early 2000s, plaintiff's replacements often would fail to show up, causing EGW to lose customers and revenue. Customers typically need an eye exam, and without an optometrist on site, customers go elsewhere. (Tr.6/09/2009:48-49) This problem led EGW and plaintiff to negotiate over several months in mid-2005 a termination of their relationship. (Tr.6/09/2009:50, 105-09) At trial, the parties disputed whether this negotiation concerned a buyout of the remainder of plaintiff's contract (EGW's version) or a purchase of plaintiff's patient lists (plaintiff's version). (Tr.6/08/2009:102-10, 165-70; Tr.6/09/2009:23-26, 43-48, 70-75, 105-09; RP3:961-62; Plaintiff's Exs. 1-3)

Whatever the discussion, the deal fell through because the optometrist slated to replace plaintiff dropped out. (RP3:964-65; Ex. 4) In October 2005, plaintiff sued EGW, claiming it owed him $300,000 under a draft and unsigned agreement exchanged during the negotiations (RP1:1-26; Ex. 3 (the "Unexecuted Draft Agreement")). After plaintiff agreed to hold his lawsuit in abeyance, the parties began negotiating a new agreement, which led to three signed agreements in July 2006, as explained below. (Exs. 7, 9, 10)

C. July 2006: The Parties Sign Three Agreements, Including A Lease Agreement That Changes Plaintiff's Compensation, But EGW Continues To Pay Plaintiff His $800 Per Diem

After negotiations, plaintiff and EGW signed three new contracts, effective July 31, 2006: (1) a "Termination Agreement," under which (a) plaintiff agreed to dismiss his pending lawsuit and (b) the parties terminated the 1998 contract and a subsequent oral agreement; (2) a "Professional Services Agreement" (which is not relevant here); and (3) a "Lease Agreement," which leased space to plaintiff in the Albuquerque store. (Exs. A-C, 11; Tr.6/08/2009:112-13, 141-43; Tr.6/09/2009:50-52)

The Lease Agreement required plaintiff or a replacement optometrist (whose presence plaintiff would assure) to provide services during business hours—seven days a week (partial day on Sunday), except for holidays. It required EGW to maintain and equip an additional examination room, which potentially would increase patient traffic. (Tr.6/08/2009:113-14, Ex. C at 1, 4; RP3:973-75) Finally, in lieu of a per diem, the Agreement required EGW to pay plaintiff 90% of his billings, with 10% retained for rent; which was intended to prod him to maximize revenue and reduce losses from coverage lapses. (Ex. C; Tr.6/09/2009:50-53, 58-59, 112-14; RP3:972)

D. 2006-07: EGW Continues To Have Coverage Issues With Plaintiff And Plaintiff Becomes Dissatisfied With His Compensation

In 2006, EGW reduced its weekly newspaper ads in favor of more mailings, appointment reminders, and radio spots. This was not an advertising decrease, but rather, a different mix of mediums. (Tr.6/09/2009:55-57) Plaintiff believed, however, that EGW had cut its advertising, which he said "dramatically" affected his business. (Tr.6/08/2009:114-15, 158) Thus, although the Termination Agreement required plaintiff to dismiss his lawsuit, he refused, although that Agreement did not discuss advertising or represent EGW would maintain any particular advertising level (Tr.6/08/2009:114-15, 157-58; Tr.6/09/2009:55; Ex. A at ¶3)

In mid-October 2006, plaintiff emailed David Hernandez, EGW's VP of Risk Management, stating the Lease Agreement had never been "implemented" due to a downturn in patient traffic, which, plaintiff said, "rendered the rent payment formula in the lease impossible to sustain." (Ex. 12) He stated EGW had "elected to void the lease" and continue paying him under his "old contract rate without abatement" but he was "willing to work out some mutually agreeable arrangement with EGW, including one based on rent payments tied to percentage of gross." (*Id.*; Tr.6/08/2009:115-17, 170; Tr.6/09/2009:58-59)

Hernandez replied the same day, disagreeing that the Lease was void, but noting he had not "push[ed] [its] implementation," stating he believed he would be

able to "cut the rents in half (or about)," and emphasizing "we need to comply and use this contract as a way to manage our relationship." He added that he would "confirm the rent amounts" and "work out the operational aspects" over the next month. (Ex. 12; RP3:983-85, 990) At trial, he testified (through deposition) that the Lease Agreement was in effect but "we were trying to see if we could rethink the percentages of the lease so that it would be a little bit easier on Dr. Muncey." (RP3:984, 990, 996-97, 1000-01) In the meantime, because of decreased patient traffic, EGW paid plaintiff the per diem under his former contract. (RP3:979-80, 998) When Hernandez left EGW in December 2006, there had been no resolution of these issues. (RP3:952, 993-94, 1000-01; Tr.6/08/2009:118-19)

In January 2007, EGW again asked plaintiff to dismiss his lawsuit. (Ex. 13) He refused. (Tr.6/08/2009:120-21; Tr.6/09/2009:101-02; Exs. 13, 14)

E. February-April 2007: Plaintiff Starts Looking To Move His Practice, And Gives EGW Notice He Is Terminating His Contract With It; EGW Agrees To Pay Him Through May 31 At The $800 Per Diem Rate

In February 2007, Plaintiff started looking to move his practice. (Tr.6/08/2009:121) While plaintiff worked at Eyemart and Wal-Mart, he spent less time at EGW and instead attempted to find optometrists to replace him there. (Tr.6/08/2009:148-51) On some days, however, his replacements did not show, leaving EGW without coverage. (Tr.6/08/2009:151-52; Exs. V, W, X, Z)

On March 16, 2007, Matt Zifrony, EGW's then-outside counsel, informed plaintiff that EGW had for seven months been paying him $800 per diem rather than under the 90%-of-revenue formula in the Lease Agreement. (Tr.6/08/2009:171-72; Ex. D) Zifrony explained that under the latter, EGW had overpaid plaintiff by $2,265 such that it would deduct that amount from his next paycheck unless plaintiff paid it. (*Id.*) Zifrony added that plaintiff had failed to meet his coverage duties, that he was in default under the lease, and that EGW would exercise its lease remedies unless he cured this default. (*Id.*, *see also* Tr.6/09/2009:109) After plaintiff failed to pay, EGW deducted the $2,265 from his next paycheck. (Tr.6/09/2009:114) Plaintiff's version, however, was that he had been told he would be paid the $800 per diem until EGW "made other arrangements," which never occurred. (Tr.6/08/2009:122)

The coverage problems increased—for 7 of the 21 days between March 29 and April 18, plaintiff either failed to, or announced his intention not to, provide coverage. (Ex. E; Tr.6/09/2009:114-15)

On April 17, plaintiff's attorney, Christopher Bauman, informed Zifrony that the reason plaintiff had been receiving per diem payments under his old contract was that the July 31 agreement had never been "instituted"; Bauman demanded that EGW reimburse plaintiff for the $2,265 deduction, and gave Zifrony notice of plaintiff's departure. (Ex. F) He stated that unless EGW assured plaintiff it would pay him "in accordance with its past practices," plaintiff would make "no effort" to

provide coverage past April 20, but that if it complied, plaintiff would attempt to provide coverage through May 31. (*Id.*)

On April 23, Zifrony responded, disputing the Lease Agreement was unenforceable, accepting plaintiff's termination, objecting to his self-shortening his tenure, and agreeing to pay him $800 for each day of coverage. (Ex. G, *see also* Tr.6/09/2009:117-18) Through Bauman, plaintiff accepted EGW's offer and agreed to provide coverage through May 31, provided he received $800 a day and was reimbursed the $2,265 deduction. (Tr.6/09/2009:114-15, 118-19; Ex. H) EGW agreed and refunded the deduction. (Tr.6/08/2009:122-25, 155-56, 160, 171-72; Tr.6/09/2009:61, 117-19; Exs. I, J, K, L, M, N) Plaintiff nonetheless did not provide coverage consistently through May 31. (Tr.6/09/2009:118-19)

F. June 2007: Plaintiff Having Left His Patient Files Behind, EGW Copies Them And Stores The Originals And Copies At Its Store Without Using The Files

Before the end of his coverage duties, plaintiff stopped coming to the EGW store and left about 20,000 patient files there without informing EGW whether he intended to retrieve them. (Tr.6/08/2009:125-26; Tr.6/09/2009:37, 63) At trial, he explained he wanted his replacement optometrists to have access to them until his coverage duties to EGW ended on May 31, and the files were voluminous, so he needed to find a way to house them. (Tr.6/08/2009:126) He never gave that explanation to EGW, however. (Tr.6/09/2009:63)

Not knowing plaintiff's intentions regarding the files, EGW decided to copy them in case plaintiff returned and took the originals and a copy was needed for a replacement optometrist to service patients. (Tr.6/09/2009:38-39, 62-63, 77-80, 152-53) Ben Cook asked John Geary, Director of Business Support, to ask Zifrony whether the copying was permissible. (Tr.6/09/2009:31-33) Zifrony opined that neither the Lease Agreement nor New Mexico law precluded the copying. (Tr.6/09/2009:88-89, 98-99) The Lease provided, however, that plaintiff was to "maintain full and independent responsibility and control over all files and records relating to [his] patients[.]" (Tr.6/09/2009:34-35, 88; Ex. 11, ¶3(e))

In early June 2007, Geary hired an outside copy service to copy the files. (Ex. 37; Tr.6/09/2009:36, 63) The service copied the files over several weeks, at night, and in plain view (leaving the copiers in the middle of the store during the day), with an EGW supervisor observing at all times to ensure no copies were removed from the premises. (Tr.6/08/2009:186; Tr.6/09/2009:8-11, 17-21, 65; Ex. 37) The copying concluded on July 10. (Tr.6/09/2009:149) Afterwards, the copies were placed in a storage room. (Tr.6/09/2009:18) There was no evidence at trial that EGW ever used the copies or originals after Plaintiff's May 31, 2007 termination of his relationship with EGW.

G. June-August 2007: Plaintiff Learns Of The Copying But Plaintiff Retrieves Only His LASIK Patient Files And Never Retrieves The Remaining Files

Plaintiff learned that the copying was taking place in mid-June—the "12th, 15th, something like that"—and contacted his attorney, Bauman. Bauman advised plaintiff "not to go near the files, that we needed to investigate this matter," and Bauman would do that. (Tr.6/08/2009:128-31) Plaintiff thus did not ask EGW to stop.

For its part, EGW next contacted plaintiff on July 25, when Zifrony wrote Bauman. Zifrony noted plaintiff had left behind his files "some time ago," that doing so could "prevent him from providing follow-up care" for his patients (prevention of which EGW did not wish to be accused), and he should "immediately" remove his files or expect delivery of them. (Ex. O; Tr.6/08/2009:132) Up to that time, plaintiff still had not advised EGW whether he intended to retrieve his files. (Tr.6/09/2009:153)

On July 27, Bauman responded, stating plaintiff was on vacation until August 9 but had made arrangements to retrieve 20 boxes of LASIK files and the others would be dealt with upon his return. (Ex. P; Tr.6/08/2009:133, 188-89) Zifrony responded on July 30, disputing that plaintiff was on vacation until August 9 (since he had been available for appointments through July 28), noting Bauman had not shown plaintiff "intends on removing [his files]," and asking for a removal date certain or EGW would discard them beginning August 5. (Ex. Q;

Tr.6/08/2009:134-35) Bauman responded on July 31, stating plaintiff was on vacation and was making arrangements to remove the files; he also stated that discarding them would violate state and federal law. (Ex. R)

On August 1, Zifrony wrote Bauman, confirming an appointment for August 9 for Doug Mayton to pick up files for plaintiff, and stating EGW would send unretrieved files to the New Mexico Board of Optometry ("Board"). (Ex. S; Tr.6/08/2009:134-35; Tr.6/09/2009:122) That same day, however, Mayton came and retrieved 15 to 20 boxes of plaintiff's LASIK files. (Ex. T; Tr.6/08/2009:162, 188-89) Based on his attorney's advice, plaintiff directed Mayton not to retrieve any non-LASIK files and claimed at trial he was figuring out what to do about the copying and how to store the remaining files. (Tr.6/08/2009:126-27, 160-63, 189, 192)

In August or early September, Zifrony called the Board, and, without mentioning plaintiff by name, explained an optometrist had left his files, creating a storage problem. (Tr.6/09/2009:123-24) The person at the Board responded that the Board could not accept the files but urged Zifrony to file a complaint. (*Id.*) The Board then faxed Zifrony a complaint form, which Cook completed on September 10, explaining plaintiff had provided optometric services, had terminated his lease a few months before, and had since refused to retrieve the majority of his records, despite EGW's request. (Ex. U; Tr.6/09/2009:123-4)

Nowhere did the complaint mention any ethics, service, or license issues. (Ex. U; Tr.6/08/2009:172-73; Tr.6/09/2009:67)

Plaintiff claimed, however, that EGW filed the complaint in an attempt to cause him to lose his license and that he lost sleep over the issue. (Tr.6/08/2009:137, 172-73) He nonetheless did not retrieve the files. (Tr.6/09/2009:67-68)

On November 29, Bauman responded to the complaint. (Ex. 33) He recounted the dispute and litigation between the parties and attached copies of the parties' July 2007 correspondence. (*Id.*) He added that because the files had been "surreptitiously copied by EGW without patient authorization" and that the copying "infringes" on "patients rights," plaintiff would take no further action to retrieve the files until the matter could be "investigated and verified." (*Id.*; Tr.6/09/2009:132) He stated that the copying "may have" violated HIPAA. (Ex. 33)

The Board "dismiss[ed] and close[d]" the complaint in February 2008, explaining that there was "no cause for disciplinary action" and that New Mexico law was "very specific in the reasons disciplinary action can be taken against a licensee." (Ex. 34; Tr.6/08/2009:138-39; Tr.6/09/2009:124)

By the time of trial, the originals and copies of the files were still at the Albuquerque store and had not been removed. (Tr.6/09/2009:80-81) As Zifrony

testified, "[t]he files are sitting in EGW right now. He can come and get them today if he wants them." (Tr.6/09/2009:122, 124)

Cook noted EGW already had patients' names and identifying information in its computer system and could advertise to them from its own database. (Tr.6/09/2009:41-42, 62-64) He added EGW would not have been disadvantaged if plaintiff had retrieved his files, because its name and location, not the optometrist, draw customers. (Tr.6/09/2009:62-65) Zifrony offered a similar explanation. (Tr.6/09/2009:119-21) There was no evidence that either EGW or any replacement optometrist ever used the originals or copies after Plaintiff ended his relationship with EGW.

For his part, plaintiff said he left the files at EGW not because he wanted to sue—although he cited his lawsuit as one factor [Tr.6/08/2009:136]—but because he did not want to get "trapped into an issue with HIPAA." (Tr.6/08/2009:163) He did not explain how retrieving patient files would implicate HIPAA, however, and neither he nor Bauman ever asked for the originals or the copies. (Tr.6/08/2009:163-64, 172) Even Mayton, plaintiff's colleague, said he had "no idea" why HIPAA would have prevented plaintiff from retrieving his files. (Tr.6/08/2009:191-92)

H. 2008-2009: After Plaintiff Adds A Conversion Claim To His Existing Lawsuit, The Matter Goes To Trial, With The Jury Awarding Plaintiff $1 For Breach Of Contract And $2.3 Million For Conversion

Plaintiff never dismissed his lawsuit. (Tr.6/09/2009:74-75, 99-103) Instead, in May 2008, he filed a First Amended Complaint, repleading breach of contract and fraud claims and adding a claim for conversion with a prayer for punitive damages. (RP1:156-220)

In September 2008, EGW filed two motions for summary judgment—(1) on all claims relating to events before July 31, 2006 (the date of the parties' three signed agreements), on the grounds that plaintiff had agreed to dismiss his October 2005 complaint and that the Unexecuted Draft Agreement provided no basis for relief, and (2) on the conversion count. (RP1:267-84, 288-312) In January 2009, the trial court granted the first motion (dismissing with prejudice plaintiff's allegations relating to "any and all events prior to July 31, 2006") and denied the second. (RP2:380-83)

In late May 2009, the trial court granted EGW's motion in limine to exclude evidence of any alleged HIPAA violations but denied its motions to exclude evidence of the $300,000 claimed value of plaintiff's patient lists. (RP2:537-38) On the first day of trial (June 8, 2009), the court again rejected plaintiff's attempts to introduce evidence that EGW had violated HIPAA. After confirming that no patients had sued plaintiff for violating their HIPAA rights, and there is no private

right of action to redress a violation of patients' HIPAA rights (Tr.6/08/2009:10-11), the court emphasized that this was a tort damages lawsuit and any HIPAA violations were irrelevant to establishing the elements of the claim:

> This is an action by him against them, and it is for damages your client . . . may have sustained at the hands of defendant's actions. And I have ruled that as far as bringing HIPAA into play, it doesn't have any bearing on those issues. [¶] . . . [B]ecause there's not a private right of action; in other words, whatever they may have done did not do any harm to your client. (Tr.6/08/2009:11)

In opening statement, plaintiff's counsel argued that in the Unexecuted Draft Agreement, EGW had offered to pay $300,000 for plaintiff's patient files, it had surreptitiously copied them, the copying was improper, and plaintiff had declined to thereafter retrieve them on his lawyer's advice. (Tr.6/08/2009:65-77) While suggesting the files were valuable and explaining his refusal to collect them, this argument nowhere identified any *harm* that plaintiff had suffered from the copying or any loss in whatever value the files purportedly had.

Plaintiff then presented his case in chief. During the June 9 afternoon session, the trial court became concerned about the adequacy of the conversion count, and again became frustrated with plaintiff's continued reliance on a supposed HIPAA violation. The court stated, "[t]he fact that there may have been HIPAA violations produces no damage, produces nothing that you don't already have. . . . You can't base it on that, because even though it's a violation of HIPAA, it has nothing to do with the issues in this case." (Tr.6/09/2009:85-86)

The court also became frustrated with plaintiff's non-responsiveness when asked to identify the damage from the purported conversion, remarking "[a]gain, I'm asking you what time it is, and you are telling me green." (Tr.6/09/2009:85)

EGW moved for a directed verdict. (Tr.6/09/2009:156-57) On conversion, EGW claimed there was no evidence of damage, since the files "have remained in place," they were never damaged and have "always been available," and there had been no "exclusion" of the files from plaintiff or "injurious use." EGW also claimed there was no basis for punitive damages. (Tr.6/09/2009:157)

As to conversion, plaintiff responded there was evidence of the files' value based on the Unexecuted Draft Agreement and Cook's admission that the files had value in servicing customers. (Tr.6/09/2009:162) The trial court queried how EGW's exercise of even unauthorized "dominion and control" was to plaintiff's "exclusion" or resulted in "injurious use." (Tr.6/09/2009:162-64) Here is the colloquy:

> MR. BAUMAN: Well, they said they copied them so that the replacement optometrist could use them. That's the whole purpose. That's their whole rationale for copying the files. We didn't --
>
> THE COURT: I heard that. *I didn't hear that they were actually utilized by other doctors*, but I guess there is *an assumption* in there.
>
> MR. BAUMAN: Sure, sure. That's why they copied them, so that the replacement doctors could have them and use them.
>
> THE COURT: How is that injurious to your client?

> MR. BAUMAN: Because if they hadn't copied them and if they wanted them, they would have bought them from him, like they offered to at one point.
>
> THE COURT: I don't understand because at no time did your client make any effort to get the files. That's what I'm getting stuck with.
>
> MR. BAUMAN: He made no effort because he found out that they had been copied.
>
> THE COURT: That's a non-sequitur, though.
>
> MR. BAUMAN: No. Because he testified that he talked to his lawyer who said, you know, "There is law that has been violated here; let's investigate it." And then he was told that they will be sent to the Board of Optometry, and then he figured out -- he just figured that this lawsuit would take care of it because we amended the Complaint to add the conversion claim.
>
> THE COURT: Keep going.
>
> MR. BAUMAN: So, you know, in terms of sufficient evidence to bring a conversion claim, certainly we have done so, Your Honor. There is enough evidence in front of the jury that they can find that these files belong to Dr. Muncey, that Dr. Muncey never gave permission for them to be copied; that EGW copied them, without his authorization, in defiance of his rights; and that *as a result, those files are being used by an optometrist; they now no longer have any value to Dr. Muncey.* I mean, that's the only thing that I know, Your Honor. *Once someone else is using those files, their value is zero.* So I believe that there is plenty of evidence for a conversion.

(Tr.6/09/2009:164-66 (emphasis added)) Thus, plaintiff survived a directed verdict by asserting that the files had lost value through use by a replacement optometrist—even though, as the trial court noted, there was no evidence of any such use.

As for punitive damages, the court was likewise skeptical, querying, "What's so egregious in this particular instance?" (Tr.6/09/2009:167) After plaintiff's counsel attempted to portray the episode as malicious, the court stated it was granting the directed verdict motion as to punitive damages:

> THE COURT: You and I disagree. I will discharge the punitive damages, but I'll leave the other two in. The motion to dismiss is granted as to the punitive damages claim, but not as to the breach of contract or conversion. There is enough evidence from which the jury could conclude that the contract was breached and or that there was -- that the plaintiff's property was unlawfully converted. So that leaves you with -- it will put your first -- I mean, your only witness tomorrow morning. (Tr.6/09/2009:169)

After plaintiff argued that conversion is an intentional tort and thus gives rise to a claim for punitive damages, the court backtracked and allowed the punitive damages claim but restricted it so it attached only to the conversion count. (Tr.6/09/2009:169-70) It also left the breach of contract claim standing because plaintiff could pursue nominal damages. (Tr.6/09/2009:171)

The following day, over EGW's objection, plaintiff recalled Ben Cook to testify that National Vision had purchased all of EGW's equity interests in January 2009 for $29 million. (Tr.6/10/2009:32-33) Cook also indicated National Vision had no involvement in EGW's operations before that. (*Id.*; see n.1, *ante*)

As to conversion, EGW objected to the omission of an instruction defining the elements of "exclusion," "defiance," and "injurious use" and objected to both

the compensatory and punitive damages instructions given the lack of evidence to support either kind of damages. (Tr.6/10/2009:35-36)

In closing argument, plaintiff's counsel asked for an award of $300,000 for conversion, asserting this "was the value that EGW placed upon those files in 2005. You'll recall that Dr. Muncey said that once those files were copied *and were used by another optometrist*, they represent little or no value to him." (Tr.6/10/2009:48 (emphasis added)) He also requested punitive damages "for two reasons, first the blatant theft of his files, and, second, the vindictive filing of a groundless complaint with the New Mexico Board of Optometry." (*Id.*) He asked for an award, "for the theft of his files, in the amount of $1 million, and for the vindictive filing of the complaint, of another $1 million,. . . ." (*Id.*)

The jury complied, awarding $1 for breach of contract, and for conversion, $300,000 in compensatory and $2,000,001 in punitive damages. (Tr.6/10/2009:64-65; *see also* RP2:603-04, 694-95)

I. EGW Moves For A New Trial And For Judgment As A Matter Of Law But The Trial Court, Without Comment, Leaves The Judgment As-Is

EGW moved for a new trial and judgment as a matter of law, asserting (1) the insufficiency of the evidence to support the conversion verdict or punitive damages, (2) excessiveness of the compensatory and punitive damages (including federal constitutional grounds), and (3) the award of the $1 million in punitive damages that plaintiff had requested based on EGW's complaint to the Board was

improper because plaintiff had not pleaded any cause of action based on that complaint, and the court had confined punitive damages to the conversion count. (RP2:721-42; RP3:746-69).

The trial court denied these motions without comment and awarded plaintiff $93,397.23 in attorney's fees on the breach of contract count pursuant to a fee provision in the Lease Agreement. (Tr.7/14/2009:19; RP3:944-46, 1077-78). EGW timely appealed from the judgment and post-trial orders.[2] (RP3:1079-87).

III. ARGUMENT

A. EGW's Copying Of Plaintiff's Files, Without More, Did Not Constitute Conversion

As the trial court instructed, to establish conversion, plaintiff had to prove that EGW "unlawfully exercised dominion and control" over his patient files "in exclusion or defiance of his rights" or their copying "constituted an unauthorized and injurious use" of his property. (RP2:609, Instr. #3) It further instructed that (1) plaintiff "had the burden of proving that such Conversion ... was a proximate cause of ... his damages" (*id.*); and (2) if the jury found these elements proven, it may award plaintiff "the difference between the fair market value of the converted personal property immediately before the conversion and its fair market value immediately after the conversion." (RP2:619, Instr. #13)

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[2] EGW's post-trial motions also challenged the breach of contract verdict on the ground that proof of actual damages was required, and plaintiff's "nominal damages" theory was impermissible. EGW is not challenging that issue nor the award of attorney's fees on the contract claim in this appeal.

There was no evidence, however, that after copying the files, EGW ever used them. It was also undisputed that after learning of the copying, plaintiff never demanded that EGW turn the files over to him. Far from it, upon learning of the copying, plaintiff refused to reclaim them, apparently in the erroneous belief that the copying alone permitted him to recover damages. These undisputed facts establish two independent and alternative failures of required proof. There was no evidence either that (1) EGW acted in "exclusion or defiance" of plaintiff's rights, or engaged in an "injurious use" of his property, or independently or alternatively, (2) any conversion proximately caused plaintiff damage, i.e., the alleged conversion had caused any impairment in the files' value.

Because the second point is simple and clear and disposes of the conversion and appended punitive damages award, EGW begins with that point.

All claims in part III(A) of this brief are reviewed for substantial evidence, which is "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). The evidence is viewed "in a light most favorable to the prevailing party," disregarding evidence and inferences to the contrary. *Montoya v. Torres*, 113 N.M. 105, 109, 823 P.2d 905, 909 (1991). EGW preserved these claims by directed verdict and post-judgment motions. (Tr.6/09/2009:156-57; RP2:721-42; RP3:746-69).

1. No Substantial Evidence Established That The Copying Proximately Caused The Files To Lose Value

The evidence was undisputed that after the copying, a stalemate ensued with plaintiff refusing to collect the files and EGW leaving the originals and copies untouched. The trial court appeared to recognize this undisputed fact left plaintiff unable to prove damages (*see* pp. 17-19, *ante*), but unfortunately, did not then grant EGW's directed verdict or JMOL motions. When the court pressed plaintiff's counsel to identify how the copying had harmed plaintiff, counsel responded with a speculative "assumption"—not evidence—that EGW had used the files and other non-sequiturs. (Tr.6/09/2009:164-66) In jury argument, counsel used similar non-sequiturs, arguing $300,000 "was the value that EGW placed upon those files in 2005" and plaintiff had testified that once they "were copied *and were used by another optometrist*, they represent little or no value to him." (Tr.6/10/2009:48) (italics added) The lack of any evidence that EGW used the files precluded a finding that their value had been impaired. Independently and alternatively, the absence of any evidence of how mere use would impair the files' value precluded any finding of proximate causation of damages.[3]

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[3] As noted, the parties disputed whether in offering $300,000 in the 2005 Draft Unexecuted Agreement, EGW had valued the files in that sum—as opposed to offering to pay that sum to terminate its contractual obligations to Muncey. *See* p. 5, *ante*. That dispute is irrelevant since even assuming *arguendo*, the files had that value, there is no substantial evidence EGW's conduct impaired that value.

A court may find lack of proximate causation of damages as a matter of law where no substantial evidence supports the damages claim. *See, e.g., Aetna Finance Co. v. Gaither*, 118 N.M. 246, 248-49, 880 P.2d 857, 859-60 (1994) (reversing judgment due to insufficiency of evidence of proximate causation).

What is required is *evidence*, not speculation. *See Archibeque v. Homrich*, 88 N.M. 527, 530-31, 543 P.2d 820, 823-24 (1975); RP3:632, Instr. #26 (jury instructed, "Your verdict should not be based on speculation, guess or conjecture.").

Thus, plaintiff was required to demonstrate an impairment in the files' value with specificity, not mere self-serving conjecture. *See Ruiz v. Varan*, 110 N.M. 478, 482, 797 P.2d 267, 271 (1990) (trial court properly rejected testimony of plaintiff's partner that plaintiff suffered $1 million in damages from improper filing of *lis pendens* notice, where partner's estimate was not "based on any actual lost opportunity, increased transaction costs, or anything else specific").

Plaintiff's speculation that because EGW copied the files, it must have given the copies to a replacement optometrist to use is not substantial evidence that it did so. Accordingly, there is no substantial evidence that EGW's copying proximately caused any impairment in the files' value. Rather, this verdict awards plaintiff a pure windfall, not proven damages. The verdict thus contradicts "[t]he theory of damages in New Mexico," which "is to make an injured party whole, not to allow

him a profit on damages." *Public Service Company of N.M. v. Jasso*, 96 N.M. 800, 802, 635 P.2d 1003, 1005 (Ct. App. 1981).

Due to the lack of evidence of proximate causation or damages alone, the Court should reverse and direct entry of judgment for EGW on the conversion and appended punitive damages award. *See* RP3:620 (Instr. #14) & RP3:603-04 (Verdict form indicating punitive award dependent on conversion finding). Although the Court need go no further, EGW now shows an independent failure of proof on the defiance/injurious use element of conversion.

2. Independently And Alternatively, No Substantial Evidence Supports The Defiance/Injurious Use Element

Plaintiff's conversion claim failed independently and alternatively for lack of substantial evidence proving the element that EGW exercised dominion and control over the files "in exclusion or defiance of [Dr. Muncey's] rights" or that it committed an "unauthorized and injurious use" of those files.

The latter prong is quickly disposed of because, as EGW has just shown, there was no substantial evidence it used the files after copying them, and hence, there was no substantial evidence of any "injurious use."

As for "exclusion or defiance," it was undisputed plaintiff became aware of the file copying in mid-June 2007 but took no action to halt the copying or have the originals and copies returned. EGW asked plaintiff repeatedly in writing to retrieve the files. (Exs. O, Q) Plaintiff instead sent Mayton to the store to collect

only the Lasik files. (Ex. T) Cook testified that plaintiff remained free to collect the originals and copies at all times. (Tr.6/9/2009:68)[4]

This evidence precluded an inference of the "exclusion or defiance" element. *Taylor v. McBee*, 78 N.M. 503, 433 P.2d 88 (Ct. App. 1967) illustrates this point. In *Taylor*, two ophthalmologists who shared access to patient charts terminated their relationship acrimoniously. 78 N.M. at 505. Plaintiff took some of his charts with him, but left behind others that were commingled with the defendant's charts. *Id.* Plaintiff's attorney then wrote the defendant, demanding "all" of plaintiff's charts and filed a grievance with the local committee of the Medical Association. Pursuant to the grievance committee's decision, defendant removed approximately 500 charts from his files and delivered them to the committee, who then delivered them to the plaintiff. As a result, plaintiff received about 95% of his charts. This Court held that defendant was not liable for conversion, noting defendant had come into possession of the charts lawfully and "[d]efendant did not make any absolute refusal or denial of the demand. About the most that can be said of his conduct was that he remained silent." *Id.* at 506.

Other cases likewise confirm that where the defendant lawfully comes into possession of the plaintiff's property, the plaintiff must explicitly assert his right to the return of the property before a conversion can be established. *See Nosker v.*

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[4] And as of this writing, he has still continued to refuse EGW's request that he retrieve them.

Trinity Land Co., 107 N.M. 333, 339, 757 P.2d 803, 809 (Ct. App. 1988) ("where a defendant is rightfully in possession of property, the demand must be made before the action for conversion is brought.").

Similarly, here, the evidence is undisputed that EGW originally came into possession of the files lawfully. Plaintiff admitted he left the files at EGW so his replacement optometrists could provide coverage until Plaintiff's coverage duties ended on May 31. (Tr.6/08/2009:126) It also was undisputed that Plaintiff never advised EGW before it made the copies what his intentions were regarding the files. (Tr.6/08/2009:125-26; Tr.6/09/2009:37, 63) Because EGW acquired possession of the files lawfully, plaintiff was still required to insist on the return of all files and copies to establish the required "exclusion or defiance." *Nosker*, 107 N.M. at 339; *Taylor*, 78 N.M. at 506. But plaintiff admitted that when he learned of the file copying, he elected to leave the files at EGW and pursue a lawsuit instead. (Tr.6/08/2009:136; Tr.6/09/2009:165) Just like in *Taylor*, with respect to the only category of files plaintiff attempted to recover—the LASIK files—he recovered them without incident. Thus, as in *Taylor*, that other files remained cannot support conversion liability because "[d]efendant did not make any absolute refusal" with respect to those remaining files. 78 N.M. at 506.

Plaintiff maneuvered around this failure of proof by taking advantage of incomplete instructions. Although an "exclusion or defiance" or "injurious use" were not household concepts, the trial court declined to give the jury EGW's

Requested Instruction #2, which would have explained those terms. (RP2:649; Tr.6/10/2009:35); *Cf. Benavidez v. City of Gallup*, 2007-NMSC-026, ¶19, 141 N.M. 808, 161 P.3d 853 ("[a] party is entitled to instructions on all of his or her correct legal theories of the case if there is evidence in the record to support the theories"). Capitalizing, plaintiff argued EGW managed through $6,000 worth of copying to obtain what it had agreed to pay $300,000 to acquire. Tr.6/10/2009:43. This argument, while appealing to the incompletely instructed lay jury, cannot be reconciled with the settled meaning of the defiance element, as *Taylor* shows.

Cases in other jurisdictions likewise have rejected the notion that conversion liability attaches upon an unauthorized copying alone, in the absence of affirmative plaintiff efforts to reclaim the files. *See Baker v. J. Hall Services, Inc.*, No. A.3-02-CV-1433-P, 2004 WL 2965004, *3 (N.D. Tex. Dec. 14, 2004) (granting summary judgment on conversion claim where plaintiff "made no demand whatsoever for return of his property, and when it was offered to him refused to claim it."); *A&G Research, Inc. v. GC Metrics, Inc.*, 862 N.Y.S.2d 806, 2008 WL 2150110, *26 (N.Y. Sup. Ct. May 21, 2008) (dismissing conversion claim; "[a]lthough Defendants copied Plaintiff's computer data and uploaded such data on their own computer system, an essential element of conversion is that the owner of the property is excluded from use thereof...").[5]

[5] *Alliance for Telecomm. Industry Solutions v. Hall*, No. CCB-05-440, 2007 WL 3224589, *12 (D. Md. Sept. 27, 2007) (copying of billing database did not

Since these cases are founded upon the same common law principles that New Mexico follows, they provide persuasive guidance. These cases, like *Taylor*, correctly recognize that the tort of conversion is premised on a *property* deprivation. *See Taylor*, 78 N.M. 505-06; *Baker*, at *3. As such, the cases correctly require that the defendant must refuse to comply *after the plaintiff clearly asserts his property rights*—in *Taylor*'s words, the defendant must make "an absolute refusal or denial of the demand." 78 N.M. at 506. This ensures that the tort is limited to a real and substantial property deprivation, and not merely temporary dispossessions that easily could have been nipped in the bud. Were the rule otherwise, our courts would become embroiled in an endless variety of

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constitute conversion as matter of law because plaintiff was not denied right to possess database); *Calence v. Dimension Data Holdings*, No. C06-0262RSM, 2007 WL 1526350, at *7-*8 (W.D. Wash. May 23, 2007) (defendant's allegedly unauthorized taking of plaintiff's confidential notebook failed to established conversion where defendant subsequently returned notebook); *Alpha Funding Group, Inc. v. Aspen Funding LLC,* 851 N.Y.S.2d 67, 2007 WL 3375871, at *7 (N.Y. Sup. Ct. Oct. 29, 2007) (no conversion where plaintiff "retained possession" of customer information and "could have ... solicited [customers] and attempted to retain them"; finding "no unauthorized possession ... to the exclusion of [plaintiff's] rights"); *Furash & Company v. McClave,* 130 F.Supp.2d 48, 58-59 (D.D.C. 2001) (no conversion where owner not "deprived of the beneficial use" of copied documents); *Rao v. Verde*, 222 A.D.2d 569, 570 (N.Y. App. Div. 1995) (complaint failed to state cause of action for conversion because defendants agreed to return medical records and patient lists); *Pearson v. Dodd,* 410 F.2d 701, 706 (D.C. Cir. 1969) (no conversion although plaintiff's documents were copied and copies were given to and published by press; conversion not established where "intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property").

avoidable disputes—given the innumerable scenarios in which a dispute could arise where one party's property is in another's possession.

This case well illustrates why conversion liability cannot attach based on unauthorized file copying alone, and must instead attach only if the copying is either followed by use or a refusal to return the files. Given EGW's expressed desire to return the files and plaintiff's refusal to take them, there is every reason to believe that a timely demand from plaintiff would have quickly and mercifully brought this dispute to an end. Indeed, with regard to the LASIK files that plaintiff chose to recover, he recovered them without incident. The above cases show, however that courts consistently and correctly have refused to let conversion law become a vehicle for spawning litigation over such entirely avoidable harms.

Thus, for example, in *Taylor*, this Court kept New Mexico courts above the fray over the break-up of an optometric practice by requiring the plaintiff to show that defendant failed to comply with an explicit assertion by the plaintiff of his property rights in patient charts. 78 N.M. at 505-06. Similarly, in *Calence*, the court refused to recognize a conversion based upon the defendant's taking of plaintiff's confidential notebooks because the defendant had subsequently returned the notebooks. *Calence*, at *8. A similar reluctance to embroil the courts in avoidable harms also appears in the other cases cited above.

This judicial reluctance to stretch the tort of conversion mirrors other limits in tort law. For example, to explain why the tort element of proximate causation imposes legal limitations in addition to factual causation, Dean Prosser explains,

> "[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' Therefore, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." (W.P. Keeton, *Prosser and Keeton on the Law of Torts* §41 at p.264 (5th ed. 1984)).

To avoid setting society on edge and filling the courts with endless litigation, tort law strikes a balance—imposing liability only where necessary to prevent harm and compensate the injured. Here, however, plaintiff was aware of the copying while it was occurring and could have quickly ended any problem and avoided any harm by reclaiming his files. He chose instead to sue to "take care" of the copying. To recognize his claim would encourage parties involved in disputes to pursue litigation at the first sign of a problem, rather than taking simple steps to efficiently end the dispute before any injury occurs.

It bears emphasis that there are civil causes of action (*e.g.*, misappropriation of trade secrets) or criminal offenses (conspiracies or attempts) that punish an act alone, even before it ripens into actual harm. That those laws carefully delineate the narrow circumstances in which such nascent acts are actionable is another

indication that conversion law cannot be stretched to impose liability without proof that the plaintiff made and the defendant refused an explicit demand for the return of plaintiff's property. Since plaintiff made no such demand here, the Court should reverse the conversion verdict, along with the compensatory and punitive damages awarded on that count, and direct entry of judgment for EGW on that count.

B. At A Minimum The Compensatory Damages Should Be Remitted

A damages remittitur or a new trial under Rule 1-059 NMRA is required when a jury's damages award "is so grossly out of proportion to the injury received as to shock the conscience[.]" *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶9, 125 N.M. 292, 960 P.2d 834 (internal quotation marks omitted). Two alternative tests guide the inquiry: "(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." *Id.* The trial court's ruling is reviewed for abuse of discretion. *Id.* at ¶12. EGW preserved this claim in its motion or remittitur. (RP2:721-42).

As noted, there was no basis for awarding *any* conversion damages because there was no evidence that EGW used *any* files, much less *which* files were used, or how any such "use" destroyed the files' "value." Plaintiff was not entitled to compensation for the claimed value of all the files unless he proved how the value of all the files was impaired. Finally, the "lawyer's advice" to plaintiff that this

action would "take care of" the copying issue confirmed that plaintiff purposefully failed to mitigate his damages. By awarding $300,000 in compensatory damages, the jury disregarded the Court's mitigation instruction (RP2:622, Instr. #16), which prohibited damages for losses plaintiff "reasonably could have avoided." UJI 13-860. Just as a terminated employee must seek new employment rather than relying on a lawsuit to "take care" of a dispute with a former employer, plaintiff could not rely on his lawsuit in lieu of reasonably avoiding damages by retrieving his files. *See Hickey v. Griggs*, 106 N.M. 27, 30, 738 P.2d 899, 902 (1987) ("The legal rule of mitigation is designed to discourage persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts....")

If this record permits any damages at all, it could not permit the sum awarded. Accordingly, if the Court does not direct entry of judgment for EGW on the conversion count, it should remit the damages to a nominal amount or order a new trial. *See Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct. App. 1982) (party in receipt of "manifestly excessive" award required to "either remit a specific amount or submit to a new trial.").

C. There Was Insufficient Evidence To Award Any Punitive Damages, And The Amount Awarded Was Excessive And Violates Due Process

1. The Evidence Is Insufficient To Permit Punitive Damages

To recover punitive damages, plaintiff needed to establish that EGW not only converted his property, but did so with a heightened culpable mental state. *See, e.g., Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶ 53, 127 N.M. 1, 976 P.2d 1 (filed 1998); *see also* UJI 13-1827. This claim is reviewed for substantial evidence. *See* standards at p. 23, *ante*. EGW preserved this claim through directed verdict and post-judgment motions. (Tr.6/09/2009:156-57; RP2:721-42; RP3:746-69).

Any conversion here, however, must be seen in light of the case's unusual circumstances—plaintiff left without advising of his intentions regarding these files. EGW copied them while he continued to remain mum about his plans, and only after seeking and receiving advice from its attorney that the copying was permissible. Even if the attorney was wrong, that does not make the client's actions malicious.

Moreover, Plaintiff could have solved the problem quickly and simply by demanding that EGW turn over all files and copies. Instead, he used the copying to resurrect litigation that he had agreed to dismiss in mid-2006.

Punitive damages are supposed to be reserved for the most egregious offenses—those that expose the vulnerable to grievous harm. The trial court had it

right initially when it first stated it would dismiss the punitive damages claim: "What is so egregious...?" (Tr.6/09/2009:167) Although sufficiency of the evidence review is deferential, when a punitive damages award exceeds those bounds, the award should be reversed. *See, e.g., Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶¶56-61, 132 N.M. 631, 53 P.3d 398 (holding evidence insufficient to permit punitive damages). Given that plaintiff had not disclosed his intentions when the copying occurred, EGW sought counsel's advice before approving the copying, and plaintiff could have brought the whole episode to a halt quickly by simply reclaiming the files, the conduct here cannot reasonably be deemed to meet the extra level of opprobrium associated with punitive damages. To so hold would encourage undesirable litigation-seeking in lieu of remedial, problem-solving action. The Court should reverse the punitive damages award with directions to enter judgment for EGW on the claim.

2. Due Process

The punitive award also exceeded due process limits. EGW preserved this claim in its post-judgment motions. (RP2:721-42; RP3:746-69). This Court decides this claim de novo. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *Aken v. Plains Elec. Gen. & Transmission Coop, Inc.*, 2002-NMSC-021, ¶19, 132 N.M. 401, 49 P.3d 662 (after *Cooper* "we will apply de novo review"). The Court evaluates "(1) the reprehensibility of the defendant's conduct"; (2) "the relationship between the harm suffered and the punitive

damages award"; and (3) "the difference between the punitive damages award and the civil and criminal penalties authorized or imposed in comparable cases." *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶36, 140 N.M. 478, 143 P.3d 717; *see also* N.M. Const., art. II, §18.

a. Defendant's Conduct, If Reprehensible At All, Threatened Only Economic Harm, Was Not Part Of Any Pattern, And Did Not Harm Plaintiff

Conduct that produces physical injury is more reprehensible than conduct that poses only economic risks. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (court must determine "reprehensibility" "by considering whether the harm caused was physical as opposed to economic"); *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶48, 124 N.M. 591, 953 P.2d 1089 (filed 1997) ("where there is harm to health and safety, the [punitive-to-compensatory damages] ratio might be much higher").

Reprehensibility also focuses on how much the defendant's conduct harmed *the plaintiff*. *See Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (punitive damages not permissible to "punish[ ] a defendant for harming others"); *State Farm*, 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business").

And, isolated conduct is less reprehensible than a pattern or practice. *Id.* at 419; *Weidler*, 1998-NMCA-021, ¶47 ("evidence of repeated engagement in prohibited conduct knowing or suspecting it is unlawful is relevant support for a

substantial award"); *Akins v. United Steelworkers of Am.*, 2009-NMCA-051, ¶32, 146 N.M. 237, 208 P.3d 457, *cert. granted*, 2009-NMCERT-005, 146 N.M. 728, 214 P.3d 793 (No. 31,637, 5/14/09) (reprehensibility factor examines "type of harm inflicted; whether the conduct was repeated or isolated....").

The conduct here was purely economic. In addition, plaintiff offered no evidence of any actual harm he sustained. The conduct was not part of any pattern of repeated, willful misbehavior, but rather was the product of unusual case-specific circumstances. And, the defendant sought the advice of counsel first, and engaged in the conduct only after counsel advised that it was lawful to do so.

Thus, if reprehensible at all, the conduct was at the low end of the scale.

b. Any Compensatory Award Will More Than Compensate Plaintiff, So Anything Higher Than A One-To-One Ratio Would Violate Due Process

Although the "ratio" factor often looks to the jury's compensatory damages award as a shorthand measure of the harm the defendant's conduct caused, the relevant consideration is the plaintiff's harm. *See Chavarria*, 2006-NMSC-046, ¶36 (ratio factor evaluates the relationship "between the harm suffered and the punitive damages award"). Accordingly, where highly reprehensible conduct has caused substantial harm but the difficulty of quantifying the harm or its intangible nature has produced a low compensatory award, courts permit a higher punitive-to-compensatory damages ratio. *See id.*, ¶38 (permitting higher ratio "[g]iven the

truly reprehensible behavior in this case, the relatively low compensatory damage award, and the intangible nature of the harm that [the plaintiff] suffered").

But the converse is also true: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Here, it is difficult to fathom how plaintiff suffered any harm, so the $300,000 compensatory award (assuming it or something comparable stands) is "substantial." Due process thus permits at most a small punitive award.

c. There Is No Comparison Between The Punitive Damages Award And Comparable Penalties

In analyzing the "penalties" factor, it is important to remember the trial court's observation that this is a conversion case, not a HIPAA action and the controlling principle that the plaintiff may not use punitive damages to redress the purported rights of third parties. There are few meaningful conversion penalties to compare, however, because a defendant's bare exercise of dominion over the plaintiff's property, without denying the plaintiff access or injuriously using it, is generally not punished or punishable at all. This factor, too, then, indicates that the due process maximum is at the lowest end of the scale.

d. Other Considerations

The party that the punitive damages award will punish is National Vision because it owns EGW's equity interests. But National Vision did not do *anything*

wrong. As noted, Vision Care directed the conduct, and National Vision acquired EGW's equity interests after all acts in question. (Tr.6/09/2009:23-24; Tr.6/10/2009:32) To make matters worse—over EGW's objection (Tr.6/10/2009:9-10)—plaintiff introduced the $29 million price that National Vision paid to acquire EGW's equity interests. Tr.6/10/2009:32-33. In other words, National Vision paid the wrongdoing party to acquire EGW's equity interests, and now must pay punitive damages based on the wrongdoer's acts, and those damages were themselves inflated by National Vision's acquisition price.

"[T]he limited purpose of punitive damages is '"punish[ing] a wrongdoer," and deterring future tortious conduct.'" *McNeill v. Rice Engineering and Operating, Inc.*, 2003-NMCA-078, ¶32, 133 N.M. 804, 70 P.3d 794. Under the circumstances here, forcing National Vision to pay punitive damages does not accomplish those goals. This is another reason to sharply reduce the award.

e. Due Process Warrants Reduction Of The Punitive Damages To At Most A One-To-One Ratio To Whatever Compensatory Award Is Appropriate

A substantial compensatory award has justified a one-to-one ratio of punitive damages even when egregious conduct has caused death. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598, 602-03 (8th Cir. 2005) (reducing punitives to 1:1 ratio although cigarette manufacturer engaged in "highly reprehensible" conduct). This purely economic case, then—involving (1) isolated conduct that plaintiff was unable to show caused him any harm, and (2) an award

of compensatory damages in the full amount he sought—is the type of case *State Farm* had in mind in noting when a one-to-one ratio is at the "outermost" limits. If the Court does not strike the punitive damages award altogether, it should reduce the award to match whatever compensatory award survives appellate scrutiny. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (reducing punitive award to 1:1 ratio).

The Court should then enter an amended judgment reflecting the reduction. *See Aken*, at ¶22 (reducing punitive award from $1 million to $300,000).

3. Plaintiff's Closing Argument Request For $1 Million In Punitive Damages Based On EGW's Complaint To The Optometry Board Improperly Injected An Unpleaded Legal Theory On Which The Jury Was Not Instructed

Neither the Pretrial Order (RP2:528-36) nor the Court's instructions (RP2:606-36) authorized any claim based on EGW's filing of a complaint with the Board. Had plaintiff pled such a claim, EGW would have defended it by showing that it made the complaint in good faith and without malice. After all, section 61-1-7(G) of the Uniform Licensing Act [NMSA 1978, §61-1-1, *et seq.*] (1993) (the "ULA") states: "There shall be no liability on the part of and no action for damages against a person who provides information to a board in good faith and without malice in the reasonable belief that such information is accurate." The ULA applies to the Board of Optometry. *See* NMSA 1978, §61-1-2(A)(3) (ULA applies to any "board, commission or agency that administers a profession or

occupation licensed pursuant to Chapter 61 NMSA 1978"); *see also* Optometry Act, §61-2-1 *et seq.* The ULA's privilege is consistent with similar privileges that apply to many communications on subjects of public importance. *See, e.g.*, *DiMarco v. Presbyterian Healthcare Servs.*, 2007-NMCA-053, ¶10, 141 N.M. 735, 160 P.3d 916 (applying NMSA 1978, §50-12-1 (good faith job references)); UJI 13-1012 (privilege for communications made in good faith).

As its terms confirm, section 61-1-7(G) forbids "liability" or "damages" against a person for having provided "information," "in good faith and without malice," to a "board." Here, however, without warning, plaintiff's counsel urged the jury in closing argument to award $1 million in punitive damages for EGW's filing of a complaint with the Board. (Tr.6/10/09:48) By waiting until closing argument to launch this bolt-from-the-blue, plaintiff deprived EGW of the opportunity to defend itself on the issue. Prior to that point, the complaint to the Board had been introduced solely as part of the factual background, and EGW had no notice it needed to defend against liability for that conduct. By waiting until closing argument, plaintiff also deprived the jury of instructions explaining the requirements of the privilege. The $1 million in punitive damages that plaintiff urged on this theory should therefore be reversed.

Counsel's argument also was improper because it had nothing to do with conversion—on which the jury's punitive damages award depends. The complaint to the Board was irrelevant to any of the required conversion elements. Thus,

instead of focusing the jury on whether *the acts purportedly constituting a conversion* merited punitive damages, counsel's argument invited the jury to punish EGW for conduct that was not pled as a basis for damages, was not the subject of instructions setting forth the criteria to impose liability, and which EGW had no opportunity to demonstrate was privileged.

Finally, counsel's argument was prejudicial—the jury's award was within one dollar of the precise sum that counsel white-boarded, including the $1 million he improperly requested based on the complaint to the Board.

Although EGW did not raise its objection to the improper argument until post-trial motions, the argument constitutes a non-waivable "fundamental error." *See Gracia v. Bittner*, 120 N.M. 191, 194-95, 196-97, 900 P.2d 351, 354-55, 356-57 (Ct. App. 1995). As *Gracia* notes, "the common element in civil cases that have been reversed for unpreserved error has been the total absence of anything in the record of the case showing a right to relief in the person granted relief." *Id.* *Gracia* summarized some examples:

> For example, in *De Baca v. Perea*, 25 N.M. 442, 446, 184 P. 482, 484 (1919), a judgment was rendered on the pleadings in a case in which the pleadings clearly failed to state facts showing entitlement to relief. Similarly, in *Sais v. City Electric Co.*, 26 N.M. 66, 68-69, 188 P. 1110, 1111 (1920), a judgment was rendered upon one party's failure to reply to a pleading to which no reply was legally required. In both cases, the Supreme Court found the judgment fatally and inherently defective. *Id.* at 69, 188 P. at 1111-12. [¶] In *Schaefer v. Whitson*, 32 N.M. 481, 482, 259 P. 618, 618 (1927), a judgment was reversed because there was a total lack of evidence showing any right to relief. Similarly, in *Thwaits v. Kennecott Copper Corp.*, 52 N.M. 107, 114,

> 192 P.2d 553, 557 (1948), a judgment was reversed when the evidence indisputably showed a right to relief.

Id., 120 N.M. at 197, 900 P.2d at 357.

Fundamental error permitting a reversal even if no objection was made at trial also may be found when the reviewing court is "'satisfied that the argument presented to the jury was so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct,' such as going outside the record." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶57, 146 N.M. 853, 215 P.3d 791 (citation omitted).

This case qualifies because plaintiff *succeeded* in obtaining *$1 million* based on a liability theory that had *not even been submitted to the jury*. Because the jury had not been instructed on the legal requirements applicable to the theory, the record lacks any foundation for the $1 million award. And to argue a theory on which the jury has not been instructed "is so flagrant and glaring in fault and wrongdoing as to leave the bound of ethical conduct" because the absence of instructions leaves any jury award on the theory fundamentally unfair—just like when counsel asks a jury to rely on matters "outside the record." The Court should grant a new trial or strike $1 million from the punitive damages award.

D. If The Court Does Not Strike Or Remit The Punitive Damages On Other Grounds, It Should Remit That Award As The Product Of Passion And Prejudice

"The 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." *Chavez-Rey*, 99 N.M. at 379, 658 P.2d at 454. The Court determines "excessiveness as a matter of law." *Id.* EGW preserved this claim in its post-judgment motions. (RP2:721-42; RP3:746-69).

As shown, there was *no* evidence that plaintiff suffered any compensable conversion damages or that EGW reprehensibly inflicted injury on him. Although plaintiff's counsel acknowledged in closing that "$2 million is a lot of money," in addition to his other misdirections discussed above, he also urged the jury:

> to send a message to the boardroom in Fort Lauderdale, Florida, and to all the different places that EGW operates, that this type of corporate behavior against Dr. Muncey, or anyone else, will not be tolerated and must stop. (Ex. C; Tr.6/10/2009:48-49)

The disproportion between the punitive damages award and any compensable injury, combined with plaintiff's misdirections and this express appeal to potential bias against a large, out-of-state chain business warrants a substantial remittitur—if the Court does not strike this component of the judgment altogether. *See Chavez-Rey*, 99 N.M. at 379, 658 P.2d at 454.

IV. CONCLUSION

No substantial evidence supports either the required defiance or proximate causation of damages elements of the conversion claim. This Court should therefore reverse the $2,300,001 awarded on that cause of action, and order judgment for EGW on that claim. In all events, the Court should reverse and order judgment for EGW on the punitive damages award, or, at a minimum, reduce that award to a 1:1 ratio with an appropriate compensatory damages award.

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Respectfully submitted,

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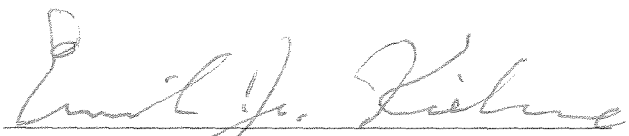
By: 
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