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Conversion

PLF claims that DFT intentionally took [kept] [destroyed] [sold] [threw out] [describe act] PLF's PPR [name the personal property] without the right to do so. We call this a "conversion" claim. To prove this claim, PLF must show that, more likely than not, the following four things are true:

1. PLF [owned] [had the right to possess] the PPR.
2. DFT intentionally acted to own or control the PPR.
3. DFT had no right to possess the PPR at the time
4. DFT's actions harmed PLF.[1]

(a) Ownership And Control

<*if elements 1 is, or both 1 and 3 are, uncontested*> The parties agree that [PLF owned] [PLF had the right to possess] the PPR [and that DFT did not] So I will explain the other parts of this claim in more detail.

<*if elements 1 or 3 is contested*>[2] First, PLF must prove that s/he/it [owned] [had the right to possess] the PPR. PLF does not have to own the PPR, but must prove that s/he/it [actually possessed] [had the right to immediate possession of] the PPR.[3] [If PLF owned the PPR then s/he/it had

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[1] "To state a plausible claim of conversion, a plaintiff must allege that the defendant wrongfully exercised dominion or control over the personal property of the plaintiff." *Hornibrook v. Richard*, 488 Mass. 74, 83 (2021); *Weiler v. PortfolioScope*, 469 Mass. 75, 87-88 (2014) ("conversion may lie if an individual wrongly exercises dominion or control over the money of another," but there must be a right to specific "funds themselves" and not just a claim for the payment of money); Gossels v. Fleet Nat'l Bank, 453 Mass. 366, 372 (2009) ("Conversion occurs only when a defendant exercises wrongful control over specific personal property, not a debt."); *Third Nat'l Bank of Hampden County v. Continental Ins. Co.*, 388 Mass. 240, 244 (1983); *Spooner v. Holmes*, 102 Mass. 503, 506 (1869). *Cahaly v. Benistar Property Exchange Trust Co., Inc.*, 68 Mass App. Ct. 668, 679-680 (2007); *Grand Pacific Finance Corporation v. Brauer*, 57 Mass. App. Ct. 407, 412 (2003).

[2] Rarely, ownership may contested. The judge should incorporate the applicable instruction on contract or may have to draft a case-specific instruction about ownership of real estate.

[3] *Mazeikis v. Sidlauskas*, 346 Mass. 539, 544 (1963) ("To show conversion of the furniture, Mazeikis must establish that at the time of his demands for the furniture, he had an

the right to possess the property immediately, unless DFT proves otherwise.].

(b) Intentional Act of Ownership or Control

[Second,] PLF must prove that DFT intentionally acted to own or control the PPR. This requires showing that DFT acted intentionally. [Insert definition of "Intentionally"].

An honest mistake is no excuse if someone acts intentionally to control an object.[4] However, mere carelessness is not enough.

DFT's intentional actions must control the PPR or act in some other way that is seriously inconsistent with PLF's rights. It is not enough just to use the PPR, even without permission.

<*if defendant originally had lawful possession*> If DFT had lawful possession of the PPR, then PLF must prove that s/he/it reasonably demanded that DFT return the property and that DFT refused to return it. The refusal to return the property upon reasonable demand is seriously inconsistent with PLF's rights.][5]

<*if further explanation is appropriate*> For instance, if I intentionally destroy, steal, alter, sell, lease or throw something out, I have acted to own or control that property. The same is true if I refuse to give up the property upon reasonable demand by the owner. However, if I am just a little late in returning chairs that I rented from a rental company, I might have violated

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immediate right to its possession."). See *Mass. Lubricant Corp. v. Socony-Vacuum Oil Co.*, 305 Mass. 269, 272 (1940) ("The plaintiff showed that it had complete ownership of its property which, in the absence of any evidence tending to prove the contrary, carried with it the right to present possession.").

[4] *Row v. Home Sav. Bank*, 306 Mass. 522, 525 (1940) ("It is no defence to an action for conversion that a defendant who exercised dominion over the goods did so in good faith, reasonably being mistaken in thinking the facts to be such as would give him a legal right to the goods. [citations omitted] The exercise of due care does not excuse a conversion.").

[5] *Waxman v. Waxman*, 84 Mass. App. Ct. 314, 321 (2013) (Affirming summary judgment for the plaintiff where "refusal to return [plaintiff's vehicle] after a valid demand resulted in the car's conversion").

my rental contract, but I have not committed conversion, because I did not act in a way that is seriously inconsistent with the company's ownership rights.[6]

To decide whether DFT's use was seriously inconsistent with PLF's rights, you should consider the following questions:

- How much control did DFT exercise over the PPR?
- For how long did DFT exercise that control?
- Did DFT intend to make a claim that conflicted with PLF's right of control?
- Did DFT act honestly or did s/he/it have a bad intention?
- How much did DFT interfere with PLF's right to control the PPR?
- How long did that interference last?
- How much expense and inconvenience did PLF suffer?[7]

Your answers to these questions should help you decide whether DFT acted to control or own the PPR in a way that was seriously inconsistent with PLF's rights to possess or own the property.[8]

(c) Defendant's Right to Possession

Third, PLF must prove that DFT had no right to possess PPR at the time. If DFT owned the PPR, then s/he/it had the right to possess the property immediately, unless PLF proves otherwise – for instance by proving that DFT

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[6] See *Spooner*, 133 Mass. at 275 (taking a circuitous route to return a horse was not inconsistent with plaintiff's ownership).

[7] *Cahaly,* 68 Mass App. Ct. at 680 n. 18, citing Restatement (Second) of Torts, § 222A(2) (1965).

[8] See, e.g., *Prime Bus. Co. v. Drinkwater*, 350 Mass. 642, 645 (1966) (conversion occurred when defendant sold a bulldozer that was subject to a perfected security interest); *Cahaly,* 68 Mass App. Ct. at 679-680 (upholding summary judgment for the plaintiff where the defendant's violations of contractual restrictions upon the duration and use of funds "seriously violated the right of the plaintiffs to control their" funds and were "sufficiently serious to amount to conversion"). It does not matter that the defendant originally came into possession of the property lawfully, if he later converts the property. See *Waxman v. Waxman*, 84 Mass. App. Ct. 314, 321 (2013).

contracted for PLF to have the PPR. However, if DFT does not own the PPR, PLF must still show that DFT had no right to immediate possession of the PPR.[9]

<If the case involves conversion of fixtures by a tenant>

A tenant may remove certain things that it owned and physically attached to the apartment unit.[10] Because those things are physically attached to the unit, we call them "fixtures." Question __ on the verdict slip asks: "Did DFT have the right to remove the fixtures?"

First, you should determine whether the landlord and tenant expressed an intention for the items to remain attached to the unit after the tenant leaves the unit. They may express that intention by action, speech or writing, such as a lease. If you can determine what the landlord and tenant intended, then that intent governs.[11] If PLF proves that they intended for the fixtures to remain attached to the unit, you answer question ___ "No." If they intended for the tenant to remove the items, then you answer "Yes."

Often, the landlord and tenant do not express any particular intention about removal of items attached to the unit. In that situation, the tenant has the right to remove its items that it attached to the unit if five things are true:[12]

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[9] *Mazeikis v. Sidlauskas*, 346 Mass. 539, 544 (1963) ("To show conversion of the furniture, Mazeikis must establish that at the time of his demands for the furniture, he had an immediate right to its possession."). See *Mass. Lubricant Corp. v. Socony-Vacuum Oil Co.*, 305 Mass. 269, 272 (1940) ("The plaintiff showed that it had complete ownership of its property which, in the absence of any evidence tending to prove the contrary, carried with it the right to present possession.").

[10] See generally *Worcester Redevelopment Authority v. Department of Housing and Community Development*, 47 Mass. App. Ct. 525, 529-530 (1999); *Consiglio v. Carey*, 12 Mass. App. Ct. 135, 138-140 (1981) and cases cited.

[11] *Worcester Redevelopment Authority*, 47 Mass. App. Ct. at 529 ("[T]he intent of the parties, if it can be ascertained, governs.").

[12] *Worcester Redevelopment Authority v. Department of Housing and Community Development*, 47 Mass. App. Ct. 525, 529-530 (1999); *Consiglio v. Carey*, 12 Mass. App. Ct. 135, 138-140 (1981) and cases cited.

(1) it attached the items at its own expense;

(2) it installed the items for [ornament or domestic convenience] [its own trade or business purposes];

(3) it removed the items before the lease expired;[13]

(4) removing the items did not change the essential nature or value of the items; and

(5) removing them did not significantly damage the unit.

PLF must show that, more likely than not, at least one of these things is **not** true. On this issue, you should ask the following questions:

- How did the tenant attach the item to the unit?
- When did the tenant attach the item?
- What damage or effect, if any, would removing the item have upon the unit?
- If removed, would the item lose its essential character or value?
- Would removing the item violate common understanding and practice?

Finally, you must decide whether removing the items caused damage to the unit. If so, TNT must restore the premises to the condition they were in before the tenancy, reasonable wear and tear excepted.[14] Therefore questions ___ and ___ ask whether TNT damaged the unit when s/he removed the items and, if so, whether TNT restored the premises to the condition they were in before the tenancy, except for reasonable wear and tear.

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[13] *Consiglio*, 12 Mass. App. Ct. at 138, 139 ("may be removed by [the tenant] before the expiration of his term."; "The general right of a tenant to remove fixtures installed by him before the end of the term of the tenancy.").

[14] *Consiglio*, 12 Mass. App. Ct. at 139-140 ("As to that damage [short of material injury to the real estate], the defendant has an obligation to restore the premises to the condition they wee in before the tenancy, reasonable wear and tear excepted ….").

(d) Harm

Finally, PLF must prove that DFT's acts caused him/her/it to suffer harm, or what we call "damages". If the harm would have occurred anyway, then DFT did not cause PLF to suffer harm.

(e) Damages

If PLF has proven all four things I mentioned, then you should award money damages to PLF. By instructing you on damages, I am not suggesting anything about your answers to questions x or y.

DFT must pay money damages for all the harm that flowed from his/her/its actions. The purpose of damages is to compensate PLF for the harm that the conversion caused. You may not award damages for the purpose of rewarding PLF or punishing DFT.

As with the other elements of his/her/its claim, PLF must prove that DFT's conduct more likely than not caused the damages. You should not award damages for any harm that PLF or someone other than DFT caused.

<*fair market value*> PLF is entitled to recover money damages for the fair market value of the PPR at the time DFT took it [acted to control it].[15] Fair

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[15] *George v. Coolidge Bank & Trust Co.*, 360 Mass. 635, 641 (1971) ("In an action for damages for the conversion of stock, or for breach of a contract to deliver stock, the measure of damages is the fair market value at the time of conversion or failure to deliver, with interest."); *Jackson v. Innes*, 231 Mass. 558, 560-61 (1919); *Clapp v. Haynes*, 11 Mass. App. Ct. 895, 897 (1980). In an appropriate case, the judge should instruct the jury to disregard alterations made by the defendant to the converted property. *Welch v. Kosasky*, 24 Mass. App. Ct. 402, 404 (1987) (damages for conversion of valuable antiques were equal to the difference between the value of the items at the time they were returned and the appreciated value they would have had then but for alterations made by the converter.).

There may be some flexibility in the use of market value as a measure of damages. See *Jackson v. Innes*, 231 Mass. 558, 560-561 (1919) ("It is settled that ordinarily the measure of damages in an action for conversion is the fair and reasonable market value of the property with interest, or what the property was actually worth if there is no market value, or the special value to the owner if the article had an inappreciable commercial value.").

market value is the highest price that a willing buyer would pay to a willing seller in a free and open market.[16]

<*Alternative - if plaintiff has decided to accept return of the property*[17]> You should award money damages for the difference between the market value of PPR when DFT took it and the market value when it was returned. Fair market value is the highest price that a willing buyer would pay to a willing seller in a free and open market. [if applicable: In valuing the property, you should disregard any changes that DFT made to the PPR].

<*If Plaintiff seeks damages for loss of use or lost rental value*> You should also award damages for loss of use of PPR during that period. Damages for loss of use are the fair rental value of PPR [during the time when DFT possessed PPR. Fair rental value is the highest price that a willing buyer would pay to a willing seller for the PPR in a free and open market.[18]

<**emotional distress**> <*If the court decides that emotional distress damages are recoverable for conversion (and not covered in an instruction on intentional infliction of emotional distress), it may use the emotional distress damages instruction included in the Model Instruction for Trespass*.[19]>

<*out of pocket damages*> In addition, if the DFT's actions caused PLF to incur any reasonably foreseeable expenses, you should compensate PLF by

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[16] *Clapp*, 11 Mass. App. Ct. at 897, citing *Epstein v. Boston Hous. Auth.*, 317 Mass. 297, 299-300 (1944).

[17] *George*, 360 Mass. at 641 ("The owner is not bound to accept a return of his property, but if he retakes it he may recover as damages the difference between the value of the property when converted and when returned, plus damages for loss of use during the period of wrongful detention.").

[18] *Jackson v. Innes*, 231 Mass. 558, 560-561 (1919) (fair market rental value for the use of a boat).

[19] In *Welch*, 24 Mass App. Ct. at 408, n.4, the court stated: "The Welches cite no authority for their suggestion that consequential damages might include compensation for mental anguish. Restatement (Second) of Torts Section 927 comment m (1979), seems to contemplate situations where plaintiff makes out the elements of intentional infliction of emotional distress."

awarding money damages for those expenses. You may not, however, consider expenses or attorneys fees for this lawsuit itself.[20]

<*Mitigation of Damages*> DFT claims that PLF failed to take reasonable steps to reduce the amount of damages that s/he/it suffered. Unlike the issues I have discussed earlier, it is DFT, not PLF, who has the burden to prove that, more likely than not, PLF failed to take reasonable steps to reduce or eliminate his/her/its damages. If DFT has proven this, you must eliminate from the amount you award damages for any potential harm that PLF reasonably could have avoided.

<*Conclusion*> <*Use Trespass, Conclusion-Damages*>

[20] For instance, plaintiff may have incurred expense in trying to locate and recover the property or in restoring the property to its former condition. See *Jackson v. Innes*, 231 Mass. 558 (1919) (restoration cost). Cf. *Welch*, 24 Mass. App. Ct. at 407 (discussing award of fees for services of an attorney whose efforts resulted in return of the converted property). But see *George*, 360 Mass. at 640 (plaintiff is not entitled to an award of counsel fees incurred in the conversion suit itself).