

## CHAPTER 32

### PERSONAL PROPERTY

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## A. CONVERSION

### 32:1 ELEMENTS OF LIABILITY

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of conversion of personal property, you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff, (*name*), (owned) (possessed) (had a right to possess) (a) (an) (*insert item of personal property*);**

**2. The defendant, (*name*), intentionally and substantially interfered with the plaintiff's (ownership of) (possession of) (right to possess) (*insert item of personal property*) by (taking possession of the [*insert item of personal property*]) (preventing the plaintiff from having access to the [*insert item of personal property*]) (destroying the [*insert item of personal property*]) (refusing to return the [*insert item of personal property*] after the plaintiff demanded its return) (exceeding the extent and duration of authorized use of the [*insert item of personal property*]); and**

**3. The plaintiff did not consent to the interference.**

**If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Use whichever parenthesized phrases are most appropriate.

2. Historically, interference with chattels was governed by writs at law for conversion, trespass to chattels, or replevin. The technical pleading distinctions of the writ system are now mostly irrelevant to the issues a jury must decide. The practical distinction between the three causes of action is in the remedy sought or awarded. In a conversion action, the allegation is that the defendant so substantially interfered with the property that the plaintiff is entitled to recover its market value at the time of the conversion. In a trespass action, the interference is less substantial and the plaintiff seeks damages for loss of use. In a replevin action, the plaintiff seeks

return of the property (an equitable remedy) and damages for loss of use (a legal claim). If the property cannot be returned, the relief awarded in replevin is the full value of the property.

3. Instruction 32:2 (defining intentional and substantial interference) should be given with this instruction when the issue of intent or the extent of interference is disputed.

### Source and Authority

This instruction is supported by **Mason v. Farm Credit of Southern Colorado**, 2018 CO 46, ¶ 3, 419 P.3d 975, 978 (“Farm Credit alleged that Mason used or disposed of crops, farm products, and machinery that Farm Credit held as collateral without remitting the proceeds to Farm Credit”); **Itin v. Ungar**, 17 P.3d 129, 135 n.10 (Colo. 2000) (“Common-law conversion . . . is distinct from the crime of theft in that it does not require that a wrongdoer act with the specific intent to permanently deprive the owner of his property.”); **Maryland Casualty Co. v. Messina**, 874 P.2d 1058 (Colo. 1994) (quoting the elements of conversion claim from the RESTATEMENT (SECOND) OF TORTS § 222A (1965)); **Schmidt v. Cowen Transfer & Storage Co.**, 170 Colo. 550, 554, 463 P.2d 445, 447 (1970) (“demand is not essential where conversion is otherwise shown or where demand would be unavailing”); **Finance Corp. v King**, 150 Colo. 13, 370 P.2d 432, 435 (1962) (“where possession of the property has been lawfully acquired and the defendant has not asserted title to it nor dealt with it in a manner inconsistent with the rights of the owner, there must be a demand and refusal before an action for conversion will lie”); **Byron v. York Investment Co.**, 133 Colo. 418, 424, 296 P.2d 742, 745 (1956) (a plaintiff must have “had a general or special property in the personalty converted, coupled with possession or the immediate right thereto”); **Herbertson v. Cohen**, 132 Colo. 231, 234, 287 P.2d 47, 48 (1955) (mortgagee under a valid chattel mortgage “had a sufficient title to maintain the [conversion] action”); **Knapp v. Hurd**, 100 Colo. 537, 68 P.2d 557 (1937) (no action for conversion lies because there was never a completed sale of automobile to plaintiff); **Dorris v. San Luis Valley Finance Co.**, 90 Colo. 209, 212, 7 P.2d 407, 409 (1932) (“Any evidence tending to deny plaintiff’s ownership or right of possession [is] competent.”); **McCormick v. First National Bank of Mead**, 88 Colo. 599, 602, 299 P. 7, 9 (1931) (“Even if the plaintiff in trover has title to, or a right of property in, a chattel, this will not alone support an action in trover. It must be united with actual possession or a right of immediate possession.”); **Ferguson v. Turner**, 69 Colo. 504, 506-07, 194 P. 1103, 1103 (1921) (“An action in conversion lies where there has been an appropriation by an agent of the proceeds of a sale.”); **Dutton Hotel Co. v. Fitzpatrick**, 69 Colo. 229, 231, 193 P. 549, 550 (1920) (“The remedy against a holder of a chattel under a lien is to tender satisfaction of the lien and demand possession. Upon refusal, which would amount to conversion, trover lies.”); **Sigel-Campion Live Stock Commission Co. v. Holly**, 44 Colo. 580, 589, 101 P. 68, 72 (1909) (“If this exercise is not inconsistent with plaintiff’s right or title, or if plaintiff consents or acquiesces therein, there is no conversion.”); **Austin v. Van Loon**, 36 Colo. 196, 198, 85 P. 183, 184 (1906) (“A conversion, in the sense of the law of trover, consists either in the appropriation of a chattel by a party to his own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it to the exclusion or in defiance of the rights of the owner, or in withholding the possession from the owner under a claim of title inconsistent with the title of the latter.”); **Beaman v. Stewart**, 34 Colo. 356, 358, 83 P. 629, 629 (1905) (actions “for the wrongful conversion of personalty, demand therefor prior to the commencement of suit is unnecessary, where the taking or seizure was wrongful in the first instance”); **Murphy v. Hobbs**, 8 Colo. 17, 30, 5 P. 637, 638 (1884) (“Any distinct act of dominion” is conversion

“whether such wrongful dominion be exercised for the [trespasser’s] own, or for another’s, use.”); **Omaha & Grant Smelting & Refining Co. v. Tabor**, 13 Colo. 41, 54-55, 21 P. 925, 930 (1889) (“A conversion is defined to be any act of the defendant inconsistent with the plaintiff’s right of possession, or subversive of his right of property.”); **Scott v. Scott**, 2018 COA 25, ¶¶ 31-33, 428 P.3d 626, 634 (“unlike civil theft, conversion does *not* require that the converter act with specific intent to permanently deprive the owner of his or her property”); **Former TCHR, LLC v. First Hand Management LLC**, 2012 COA 129, ¶ 38, 317 P.3d 1226, 1234 (“a secured party may bring a claim for conversion against a party who wrongfully obtained and sold property in which the secured party has a security interest, if the secured party’s interest has priority”); **Stauffer v. Stegemann**, 165 P.3d 713, 717 (Colo. App. 2006) (“conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel” (quoting RESTATEMENT § 222A(1))); **A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy**, 93 P.3d 598 (Colo. App. 2004) (conviction of criminal theft under section 18-4-401, C.R.S., may be preclusive in subsequent civil action for conversion); **Carder, Inc. v. Cash**, 97 P.3d 174, 184 (Colo. App. 2003) (defendant “failed to present evidence that it attempted to mitigate its damages by either investigating alternative uses for the equipment or by requesting permission to remove it”); **Underwood v. Dillon Companies, Inc.**, 936 P.2d 612 (Colo. App. 1997) (approving jury instructions that stated there could be no conversion if the plaintiff demanded return of property on conditions that varied from contract terms); **Montano v. Land Title Guarantee Co.**, 778 P.2d 328, 330 (Colo. App. 1989) (“the wrongful disposition of personal property by a bailee constitutes a conversion”); **Amber Properties, Ltd. v. Howard Electrical and Mechanical Co.**, 775 P.2d 43, 47 (Colo. App. 1988) (“the simple taking of another’s property under an erroneous claim of right and over the protest of its possessor is insufficient to establish grounds for exemplary damages in a conversion action”); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40, 46 (Colo. App. 1987) (“Where there is a wrongful taking, the tort of conversion is complete upon that taking; the victim does not have to demand return of the goods nor does the wrongdoer have to refuse such a demand.”); **Mari v. Wagner Equipment Co.**, 721 P.2d 1208 (Colo. App. 1986) (evidence sufficient to submit to a jury plaintiff’s ownership of property and claim for conversion); **Glenn Arms Assocs. v. Century Mortgage & Inv. Corp.**, 680 P.2d 1315, 1317 (Colo. App. 1984) (“predicates to a successful claim for conversion are the owner’s demand for return of property, and the controlling party’s refusal to return it”); **Electrolux Corp. v. Lawson**, 654 P.2d 340, 342 (Colo. App. 1982) (“Electrolux [failed] to make demand [upon] Lawson to account for the allegedly converted property”); and **Pierce v. Ackerman**, 488 P.2d 1118, 1119 (Colo. App. 1971) (“It is elemental to the successful prosecution of a conversion action that the plaintiff establish his title or right of immediate possession to the property allegedly converted.”) (not published pursuant to C.A.R. 35(f)).

## 32:2 INTENTIONAL AND SUBSTANTIAL INTERFERENCE — DEFINED

In determining whether the interference was intentional and so substantial that the defendant should be required to pay the full value of (*insert item of personal property*), the following factors may be considered:

1. The extent and duration of the defendant’s possession or control;
2. The defendant’s intent to assert a right inconsistent with the plaintiff’s right of possession, control, or ownership;
3. Whether the defendant commingled the plaintiff’s (*insert item of personal property*) with other property;
4. The extent and duration of the resulting interference with the plaintiff’s right of possession, control, or ownership;
5. The harm done to (*insert item of personal property*); and
6. The inconvenience and expense caused to the plaintiff.

The defendant’s act or omission may be intentional even if the defendant mistakenly believed (he) (she) (it) had a right to interfere with (*insert item of personal property*), or was unaware of the plaintiff’s rights in (*insert item of personal property*).

### Notes on Use

This instruction should be given with Instruction 32:1 (elements of liability for conversion) when the issue of intent or the extent of interference is disputed.

### Source and Authority

1. This instruction is supported by **Maryland Casualty Co. v. Messina**, 874 P.2d 1058 (Colo. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 222A (1965)); **Rosenthal v. Whitehead**, 159 Colo. 565, 570, 413 P.2d 909, 912 (1966) (defendant had “no lawful right, title, or interest in the tractor” and was liable for conversion as a matter of law); **McCartney v. Foster**, 150 Colo. 537, 539, 374 P.2d 704, 705 (1962) (“there is no competent evidence that the property was wrongfully taken into [defendant’s] possession, nor was any demand made by McCartney for the return of the property”); **Davis v. American National Bank of Denver**, 149 Colo. 34, 37, 367 P.2d 325, 326 (1961) (“where possession of the property has been lawfully acquired and the defendant has not asserted title to it nor dealt with it in a manner inconsistent with the rights of the owner, there must be a demand and refusal before an action for conversion will lie”); **Schlittenhardt v. Bernasky**, 147 Colo. 601, 604, 364 P.2d 586, 587 (1961) (“Only in cases in which possession has been lawfully acquired in the first instance by the person who allegedly thereafter converts it to his own use, may the question of qualified refusal be submitted to the jury.”); **Colorado Kenworth Corp. v. Whitworth**, 144 Colo. 541, 548, 357 P.2d 626, 631 (Colo. 1960) (“for the purposes of an action for unlawful conversion, demand and refusal are

never necessary, except to furnish evidence of the conversion, and when, without these, the circumstances are sufficient to prove the conversion, they are superfluous”); **Byron v. York Investment Co.**, 133 Colo. 418, 427, 296 P.2d 742, 746 (1956) (holding on the facts of the case that temporary exclusion of possession by owner did not constitute conversion: “a man may be compelled by threats, or even by physical coercion, to forego the full exercise of his own dominion as owner, yet if the wrongful act falls short of a disseisin of the property, the wrongdoer is not guilty of a conversion”); **Kranz v. Rubush**, 120 Colo. 264, 268, 209 P.2d 555, 557 (1949) (“a vendor who retakes his chattel on default of conditional sale is not liable in conversion for not tendering back the payment made on the purchase price”); **International Harvester Co. v. Lawrence Investment Co.**, 95 Colo. 523, 525, 37 P.2d 529, 530 (1934) (“an action for trover and conversion does not lie in Colorado at the instance of a mortgagor of chattels merely because the mortgagee has taken possession in compliance with the terms of the mortgage”); **Lutz v. Becker**, 89 Colo. 360, 364, 2 P.2d 1081, 1082 (1931) (“When one admittedly has in his possession goods and chattels belonging to another, something more than a mere offer to permit the owner to repossess himself of his own property is necessary, if he desires to avoid an action in conversion for damages.”); **Lininger Implement Co. v. Queen City Foundry Co.**, 73 Colo. 412, 216 P. 527 (1923) (no conversion could lie where defendant “always and persistently, so far as the evidence shows, recognized the plaintiff’s right to the beet pullers”); **Platt v. Walker**, 69 Colo. 584, 587, 196 P. 190, 191 (1921) (“It is immaterial in an action of conversion whether the property be converted innocently or knowingly. The gist of the action is the unauthorized appropriation of one’s property.”); **Worley v. Sancetta**, 540 P.2d 355, 357-58 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (“at the inception [defendant] had a right to [the property’s] possession . . . [therefore] a demand for the return of the property and refusal to comply therewith were prerequisites to [a right] to recover under a conversion theory”); **Beneficial Finance Co. of Arvada v. Sullivan**, 534 P.2d 1226, 1228 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (“lists of customers, bakery routes, or laundry routes are not property subject to conversion”); **Aetna Casualty & Surety Co. v. Chisman**, 528 P.2d 1317, 1318 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) (“because [defendant’s] initial possession of the automobile was unauthorized, no demand for possession was necessary to perfect Aetna’s claim for relief for conversion”); **Shockley v. Wigton**, 490 P.2d 77, 78 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)) (where plaintiff failed for two years to retrieve repaired car, held no conversion when defendant demanded “two years’ storage on the automobile”); and **Deeb v. Canniff**, 29 Colo. App. 510, 488 P.2d 93, 96 (1971) (conversion exists as a matter of law where “a landlord evicted his tenant prior to termination of the lease, locked the tenant out, and refused to permit the tenant’s chattels to be removed”).

2. An interference that is less substantial and for which a plaintiff seeks only recovery of damages for loss of use may support a claim for trespass to chattels. *See* **Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.**, 147 Colo. 166, 170, 363 P.2d 166, 177 (1961) (“Trespass to chattels is defined as the intentional interference with the possession, or physical condition of a chattel in the possession of another, without justification.”); **Rifle Prod. Credit Ass’n v. Wagner**, 543 P.2d 91 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)).

### 32:3 DAMAGES

**If you find in favor of the plaintiff, you shall award as (his) (her) (its) damages the full value of the (*insert item of personal property*) at the time of the interference.**

#### Notes on Use

1. A plaintiff may not receive the property and at the same time recover its full value. A plaintiff may not be compelled to receive the property in mitigation of damages, but if he does so, his recovery will be reduced accordingly.

2. If the plaintiff has recovered and is in possession of the property, the measure of damages is the difference in the value of the property before and after the interference, or the cost of repair minus any remaining diminution of value after the repair. *See* Instruction 6:12.

3. Special and consequential damages are not ordinarily awarded in conversion cases. *But see Rosen Novak Auto. Co. v. Hartog*, 168 Colo. 536, 538, 454 P.2d 932, 933 (1969) (affirming jury verdict for plaintiff in conversion action awarding special damages for “shock to their nerves and nervous system, great humiliation and embarrassment, loss or impairment of their credit, loss of use of their car, and loss of sleep and time”).

4. Where a jury concludes that property was converted, legal interest is allowed and should be awarded by the court from the time of conversion to the time of trial.

5. Exemplary damages may be awarded upon a proper showing. *Montgomery v. Tufford*, 165 Colo. 18, 437 P.2d 36 (1968).

#### Source and Authority

This instruction is supported by *Mason v. Farm Credit of Southern Colorado*, 2018 CO 46, ¶ 29, 419 P.3d 975, 983 (“Actions for conversion often, if not always, seek money damages equivalent to the value of the personal property that was converted.”); *Masterson v. McCroskie*, 194 Colo. 460, 465, 573 P.2d 547, 551 (1978) (“Generally, the measure of damages for conversion is the value of the converted property at the time and place of the misappropriation plus legal interest from the time of the conversion to the time of trial.”); *Rosenthal v. Whitehead*, 171 Colo. 347, 348, 467 P.2d 831, 831 (1970) (the measure of damages was “the value of the tractor in question as of the time of conversion”); *Rosen Novak Auto Co. v. Hartog*, 168 Colo. 536, 454 P.2d 932 (1969) (jury verdict for plaintiff in conversion action awarded damages for emotional distress, humiliation and embarrassment, impairment of credit, loss of use of car, and loss of sleep and time); *Montgomery*, 165 Colo. at 27, 437 P.2d at 41 (“one whose property is converted is entitled, as part of his damages, to interest at the legal rate from the time of the conversion on the amount found to be the value of the property converted”); *Gates Factory Store v. Coleman*, 142 Colo. 246, 249, 350 P.2d 559, 560 (1960) (jury verdict reversed because “there was no evidence offered as to the value of the tires taken at the time and place of their conversion,” and “the value of the property taken, plus an additional amount equal to the legal rate of interest upon such value from the time of conversion to the time of the trial, is the proper measure of damages in trover and conversion actions”); *Colorado*

**Kenworth Corp. v. Whitworth**, 144 Colo. 541, 357 P.2d 626 (Colo. 1960) (the mere taking of property under a claim of right over the protest of one in possession is not sufficient to establish grounds for exemplary damages in a conversion action); **Byron v. York Investment Co.**, 133 Colo. 418, 428, 296 P.2d 742, 747 (1956) (“The cost price of chattel must be related to the condition of the property at the time of the alleged conversion.”); **Sigel-Campion Live Stock Commission Co. v. Holly**, 44 Colo. 580, 583, 101 P. 68, 70 (1909) (“in trover the measure of damages is the fair market value of the property converted at the time of conversion, and in this jurisdiction an additional amount equal to the legal rate of interest upon such value from the time of conversion to the time of trial”); **Omaha & Grant Smelting & Refining Co. v. Tabor**, 13 Colo. 41, 58, 21 P. 925, 931 (1889) (“The general rule in trover is that the damages should embrace the value of the property at the time of the conversion, with the interest up to the time of judgment.”); **Murphy v. Hobbs**, 8 Colo. 17, 31, 5 P. 637, 638 (1884) (“appellant [is] answerable in this action for the value of the wagon when converted, less its value when recovered by appellee”); **Mercantile Financial Corp. v. Hamitt**, 680 P.2d 239, 241 (Colo. App. 1984) (“we conclude that Hamitt’s refusal to pay rental thereafter . . . was tantamount to . . . a conversion of Mercantile’s equipment [and] the appropriate measure of damages would be the fair market value of the property at the time the lease expired”); **Payne v. Russ Vento Chevrolet, Inc.**, 528 P.2d 935, 938-39 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)) (“a wrong doer cannot, after his conversion of property has become complete, lessen the actual damages recoverable by tendering back the property”); **Fair Bowl, Inc. v. Brunswick Corp.**, 502 P.2d 957, 958 (Colo. App. 1972) (not published pursuant to C.A.R. 35(f)) (“the proper measure of damages for the conversion of property is the value of that property at the time of conversion”).

## B. CIVIL THEFT

### 32:4 ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of civil theft, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff (owned) (possessed) (had an ownership interest in) the *(insert thing of value)*;

2. The defendant knowingly (without authorization) (by threat) (by deception) (obtained) (retained) (exercised control over) the plaintiff's *(insert thing of value)*; and

3. The defendant did so with the intent to permanently deprive the plaintiff of the use or benefit of the plaintiff's *(insert thing of value)*.

If you find that any one or more of these *(number)* statements have not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Paragraph 1 of this instruction requires the plaintiff to have a possessory or proprietary interest in a specific thing of value. § 18-4-401(1.5), C.R.S.; **Tisch v. Tisch**, 2019 COA 41, ¶ 52, 439 P.3d 89, 103 (“‘interest’ is a legal or equitable claim to or right in property”; “‘ownership’ implies the right to possess a thing, regardless of actual or constructive control”). However, a plaintiff's status as a mere creditor of a debtor defendant, without more, does not establish a proprietary interest in any specific property. **People v. Rotello**, 754 P.2d 765, 767 (Colo. 1988) (the “county court correctly concluded that a mere debtor-creditor relationship was established in dismissing the four count information”).

2. Paragraph 3 of this instruction describes the most common conduct that satisfies the third element. There are four other ways in which the third element of theft may be proven. They are:

(a. The defendant knowingly used, concealed, or abandoned the plaintiff's *[insert thing of value]* in such manner as to permanently deprive the plaintiff of the use or benefit of *[insert thing of value]*.)

(b. The defendant used, concealed, or abandoned the plaintiff's *[insert thing of value]* intending that such use, concealment, or abandonment would permanently deprive the plaintiff of the use or benefit of the *[insert thing of value]*.)

(c. The defendant demanded *[describe the thing demanded]*, to which the defendant was not legally entitled as a condition of restoring *[insert thing of value]* to the plaintiff.)

(d. The defendant knowingly retained the plaintiff's *[insert thing of value]* more than seventy-two hours after the agreed upon time for return in a lease or hire agreement.)

Any one or any combination of these five ways of proving theft may be considered by the jury where supported by the evidence. This instruction should be modified when supported by the evidence. If the jury is instructed to consider more than one circumstance, care must be taken to ensure that the jury understands that proof of any one of the five satisfies the third element of theft. The jury may also be instructed under Instruction 6:14 that damages may be awarded only once for the same loss.

3. This instruction should be modified in accordance with section 18-4-401(1), C.R.S., where there is evidence that the defendant knowingly pawned, pledged, or disposed of stolen property.

### Source and Authority

1. This instruction is supported by section 18-4-401; **Bermel v. BlueRadios, Inc.**, 2019 CO 31, ¶ 31, 440 P.3d 1150, 1157 (“to recover on a claim for civil theft under section 18-4-405, a rightful owner of stolen property must establish the statutory elements of criminal theft, including the requisite culpable mental state”); **Van Rees v. Unleaded Software, Inc.**, 2016 CO 51, ¶ 23, 373 P.3d 603, 608 (“We therefore find that Van Rees’s complaint fails to allege the knowing deprivation of a thing of value.”); **Steward Software Co. v. Kopcho**, 266 P.3d 1085, 1086 (Colo. 2011) (concluding that “federal copyright law does not apply to a claim under Colorado law for civil theft of a work”); **Itin v. Ungar**, 17 P.3d 129, 133 (Colo. 2000) (“the General Assembly intended for this statute to require proof of the commission of a criminal act, but not proof of a prior conviction of the defendant as a condition for recovery of treble damages”); **Tisch**, 2019 COA 41, ¶ 65, 439 P.3d at 106 (“we conclude that whether the diverted profits constituted a distribution in which the Tisch siblings had a proprietary interest was a question for the jury”); **Franklin Drilling & Blasting Inc. v. Lawrence Construction Co.**, 2018 COA 59, ¶ 18, 463 P.3d 883, 887 (“To prove civil theft a plaintiff must prove that the defendant ‘knowingly obtains, retains, or exercises control over anything of value of another without authorization’ and must prove one of five alternative culpable mental states[.]”); **Scott v. Scott**, 2018 COA 25, ¶ 29, 428 P.3d 626, 634 (defendant’s “refusal to return the funds was simply based on her assertion that she was legally entitled to the funds as the named beneficiary

under the policy; we do not view her conduct as articulating her intent to permanently deprive” the plaintiff of the proceeds); **Black v. Black**, 2018 COA 7, ¶ 95, 422 P.3d 592, 608 (“A finding of deception requires proof that the defendant made misrepresentations to the victim.”); **Huffman v. Westmoreland Coal Co.**, 205 P.3d 501, 510 (Colo. App. 2009) (concluding that “the stock options were not property and that plaintiff failed to present evidence that defendant intended to permanently deprive him of them”); **Rhino Fund, LLLP v. Hutchins**, 215 P.3d 1186, 1196 (Colo. App. 2008) (“Hutchins’s action in diverting the proceeds of the [nonperforming loans] for his own use also established the elements of civil theft”); **Becker & Tenenbaum v. Eagle Restaurant Co.**, 946 P.2d 600, 602 (Colo. App. 1997) (affirming civil theft judgment where “the funds represented by the check were disbursed to pay Eagle’s other creditors during the period the check was wrongfully withheld, and plaintiffs were, thus, deprived of the use or benefit of the value of the check by the withholding”); and **Cedar Lane Investments v. American Roofing Supply of Colorado Springs, Inc.**, 919 P.2d 879, 882 (Colo. App. 1996) (summary judgment properly granted in favor of Cedar Lane because it no longer had “possession of the money, having used it for matters relating to its business”).

2. The owner of stolen property who brings a civil action for theft must prove all elements of criminal theft by a preponderance of the evidence. **Dep’t of Nat. Res. v. 5 Star Feedlot, Inc.**, 2019 COA 162M, ¶ 14 (*cert. granted* Apr. 27, 2020).

3. A claim for civil theft is not barred by the economic loss rule. **Bermel**, 2019 CO 31, ¶ 43, 440 P.3d at 1159 (“we hold that the judge-made economic loss rule cannot bar BlueRadios’ statutory counterclaim for civil theft”).

4. The intent to permanently deprive another of the use and benefit of his property may be inferred from the defendant’s conduct and circumstances. **Huffman**, 205 P.3d at 509 (“The intent permanently to deprive the owner of the use or benefit of a thing of value may be inferred from the defendant’s conduct and the circumstances of the case, but requires proof of a knowing use by the defendant inconsistent with the owner’s permanent use and benefit.”).

5. Defendant’s ownership of the thing of value is a defense to the claim. **Steward Software Co.**, 266 P.3d at 1087 (“Because a person must commit theft of the property *of another*, ownership of the property at issue is a defense to civil theft.”).

6. A claim for civil theft must be brought within two years after the “date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.” **Black**, 2018 COA 7, ¶ 87, 422 P.3d at 607 (quoting § 13-80-108(1), C.R.S.).

### **32:5 INTENTIONAL AND KNOWINGLY — DEFINED**

**A person acts with intent when (his) (her) conscious objective is to cause a specific result.**

**A person acts knowingly with respect to conduct or to a circumstance when (he) (she) is aware that (his) (her) conduct is of such nature or that such circumstance exists. A person acts knowingly with respect to a result of (his) (her) conduct when (he) (she) is aware that (his) (her) conduct is practically certain to cause the result.**

#### **Notes on Use**

This should be given with instruction 32:4.

#### **Source and Authority**

This instruction is supported by **Bermel v. BlueRadios, Inc.**, 2019 CO 31, ¶ 31, 440 P.3d 1150, 1157 (“to recover on a claim for civil theft under section 18-4-405, a rightful owner of stolen property must establish the statutory elements of criminal theft, including the requisite culpable mental state”); section 18-1-501(5), C.R.S. (“A person acts ‘intentionally’ or ‘with intent’ when his conscious objective is to cause the specific result proscribed by the statute defining the offense.”); and section 18-1-501(6), C.R.S. (“A person acts ‘knowingly’ or ‘willfully’ with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts ‘knowingly’ or ‘willfully’ with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.”).

## 32:6 DAMAGES — ACTUAL

The plaintiff has the burden of proving by a preponderance of the evidence the nature and extent of (his) (her) (its) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the defendant's theft.

In determining such damages, you shall consider the following:

1. Any economic losses which the plaintiff had or will probably have in the future, including *(insert recoverable economic losses, e.g., the value of lost property, for which there is sufficient evidence)*; and

2. Any noneconomic losses or injuries which the plaintiff has had or will have in the future, including *(insert recoverable noneconomic losses, e.g., pain and suffering, emotional distress, and inconvenience, for which there is sufficient evidence)*.

### Notes on Use

1. If the jury awards actual damages, the amount should be trebled by the court after the jury verdict in the final judgment. § 18-4-405, C.R.S.; **Tisch v. Tisch**, 2019 COA 41, ¶ 1, 439 P.3d 89.

2. Plaintiffs awarded actual or statutory damages are entitled to reasonable attorney's fees in addition to actual or statutory damages, to be awarded by the court after the verdict.

### Source and Authority

1. This instruction is supported by **Gorsich v. Double B Trading Co.**, 893 P.2d 1357, 1363 (Colo. App. 1994) (“Actual damages’ include non-economic damages as well as economic damages”; approving jury instruction allowing jury to consider pain and suffering, inconvenience, and emotional distress.).

2. The treble damages component of section 18-4-405 is a statutory penalty subject to C.R.C.P. 98's requirement that the action be tried in the county where the claim arose. **Ehrlich Feedlot, Inc. v. Oldenburg**, 140 P.3d 265, 270 (Colo. App. 2006) (“We therefore conclude the treble damages provision of section 18-4-405 imposes a statutory penalty governed by C.R.C.P. 98.”).

3. Prejudgment interest should not be awarded on the treble damages portion of a judgment. **Becker & Tenenbaum v. Eagle Rest. Co.**, 946 P.2d 600, 603 (Colo. App. 1997) (“treble damages portion of the award was not properly subject to prejudgment interest”).

4. “[I]f attorney fees and costs are a component of damages for a statutory claim, a judgment for damages on such a claim is not appealable until the amount of the attorney fees and costs has been set.” **Chavez v. Chavez**, 2020 COA 70, ¶ 28, 465 P.3d 133 (quoting **Hall v. Am. Standard Ins. Co.**, 2012 COA 201, ¶ 14, 292 P.3d 1196, 1200).

**32:7 DAMAGES — STATUTORY**

**If you find in favor of the plaintiff, but do not award any actual damages, you shall award the plaintiff statutory damages in the amount of \$200.**

**Notes on Use**

None.

**Source and Authority**

This instruction is supported by section 18-4-405, C.R.S.