

STATE OF MICHIGAN  
IN THE SUPREME COURT

On Appeal from the Court of Appeals  
Meter, P.J., Hoekstra and Servitto, JJ

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MICHIGAN DEPARTMENT OF  
AGRICULTURE and the  
MICHIGAN APPLE COMMITTEE,

Plaintiffs/Appellants,

-vs-

APPLETREE MARKETING, LLC and  
STEVEN KROPF,

Defendants/Appellees.

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Supreme Court No. 137552

Court of Appeals No. 277743

Kent Circuit Court No. 05-11315-CZ

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**APPELLANTS' REPLY BRIEF ON APPEAL**

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## ARGUMENT

### I. DEFENDANTS NEVER EXPLAINED WHY THE RJA SHOULD NOT APPLY

It is no answer to say, as Defendants argue,<sup>1</sup> that since "there is no provision in the [ACMA] authorizing conversion remedies, treble damages or personal liability," the Revised Judicature Act ("RJA")<sup>2</sup> does not apply. The Plaintiffs are not trying to "graft[ ] the conversion remedy provisions of the RJA into the ACMA" as Defendants argue.<sup>3</sup> Rather, they are pursuing remedies independently available under the RJA as a separate statute.

The ACMA<sup>4</sup> and RJA are both statutes of equal standing that provide "different remedies and encompass different, but not conflicting, goals."<sup>5</sup> The ACMA does not mandate the pursuit of only one statutory remedy, and the RJA specifically states that its remedies are in addition to any other remedy that Plaintiffs may have.<sup>6</sup> What the Plaintiffs are seeking are their remedies under the ACMA **and** their remedies under the RJA.

The Defendants have never offered a reasoned explanation for why Plaintiffs may not pursue remedies under both statutes. The closest they come is their misinterpretation of *South Haven v Van Buren County Bd of Commr's*.<sup>7</sup> Because the plaintiff in *South Haven* was denied the right to pursue the common law remedy of restitution, the Defendants claim that *South Haven* "makes it clear that where a statute

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<sup>1</sup> Defendants' Brief on Appeal, p 10

<sup>2</sup> Revised Judicature Act, MCL 600.2919a

<sup>3</sup> Defendants' Brief on Appeal, p 13

<sup>4</sup> Agricultural Commodities Marketing Act, MCL 290.251, *et seq.*

<sup>5</sup> See, e.g., *Faulkner v Flowers*, 206 Mich App 562, 568; 522 NW2d 700 (1994)

<sup>6</sup> MCL 600.2919a(2)

<sup>7</sup> *South Haven v Van Buren County Bd of Commr's*, 478 Mich 518; 734 NW2d 533 (2007)

provides new remedies, these remedies are exclusive, and preclude both common law remedies *and other statutory remedies as well.*"<sup>8</sup> *South Haven* does not stand for that proposition. In *South Haven*, "the statute at issue" was MCL 224.20b.<sup>9</sup> In *South Haven*, there was a single statute at issue, not two. And the issue in *South Haven* was the remedy available under that single statute.<sup>10</sup>

That a party is seeking a remedy under one Act does not mean that they may not also seek a remedy under another Act. In this case, Plaintiffs are entitled to their remedies under the ACMA, and they are entitled to their remedies under the RJA. The Defendants have cited no authority to the contrary.

## **II. THE ACMA ASSESSMENTS WERE CONVERTED**

The ACMA assessments deducted by the Defendants were the property of the Michigan Apple Committee and were expressly designated as trust funds.<sup>11</sup> The Defendants were to deduct the assessments and to remit the assessments to the Michigan Apple Committee.<sup>12</sup> By operation of law, Defendants held Plaintiffs' assessments in trust for the purpose of remitting them to the Michigan Apple Committee.

The Plaintiffs have characterized this as a form of bailment in the broad sense in which one holds the personal property of another in trust for a specific purpose.<sup>13</sup> The Defendants, however, assert that a bailment only applies to specific

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<sup>8</sup> Defendants' Brief on Appeal, pp 9-10 (emphasis added)

<sup>9</sup> *South Haven*, 478 Mich at 521

<sup>10</sup> *South Haven*, 478 Mich at 529 ("a party seeking a remedy under *the act* is confined to the remedy conferred thereby and to that only") (Emphasis added)

<sup>11</sup> MCL 290.655(e)

<sup>12</sup> MCL 290.655(c)

<sup>13</sup> *In re George L Nadell & Co, Inc*, 294 Mich 150, 154; 292 NW 684 (1940)

personal property "other than money."<sup>14</sup> Defendants' assertion is contradicted by their own authorities, and others. The three words that Defendants quoted out of context -- "other than money" -- have their origins in *Godfrey v City of Flint*,<sup>15</sup> which Defendants cite. In *Godfrey*, this Court discussed three types of bailments, and relying on 6 Am Jur, § 14, described a "bailment for the benefit of both parties" as applying to specific personal property other than money. The limiting phrase "other than money" applies only to the third type of bailment -- that being a bailment for the benefit of both parties.<sup>16</sup> That limitation does not exist for other types of bailments. "Any kind of personal property, whether tangible or intangible, may be the subject of bailment. The bailed property therefore may consist of *money or a chose in action*, as well as other chattels."<sup>17</sup>

The authorities also recognize that one may be a "constructive bailee," which is defined as "a person who acquires possession of another's property by mistake or accident, *or by force of circumstances under which the law imposes upon him or her the duties of a bailee.*"<sup>18</sup> "A constructive bailment arises when one person has lawfully acquired possession of another's personal property, other than by virtue of a bailment contract, and *holds it under such circumstances that the law imposes on the recipient of the property the obligation to keep it safely and to redeliver it to the owner.*"<sup>19</sup> Michigan

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<sup>14</sup> Defendants' Brief on Appeal, pp 13-14

<sup>15</sup> *Godrey v City of Flint*, 284 Mich 291, 295-296; 279 NW 516 (1938)

<sup>16</sup> *Godfrey*, 284 Mich at 295

<sup>17</sup> 8A Am Jur 2d, *Bailments*, § 3 (emphasis added). "Personal property" in its "broad and general sense" means "everything that is the subject of ownership not coming under denomination of real estate." *City of Holland v Twp of Fillmore*, 363 Mich 38, 42; 108 NW2d 840 (1961)

<sup>18</sup> 8A Am Jur 2d, *Bailments*, § 2 (emphasis added)

<sup>19</sup> 8A Am Jur 2d, *Bailments*, § 12 (emphasis added)

cases recognize that money may be the subject of a bailment.<sup>20</sup> And regardless of its characterization, numerous cases recognize that money, checks, notes, and other monetary items may be the subject of a conversion action.<sup>21</sup>

### III. DEFENDANTS MISSTATED THE LAW OF CONVERSION

The Defendants claim that they cannot be liable for conversion because "*Appletree was supposed to receive the payments.*"<sup>22</sup> To argue that they may not be liable for conversion because Appletree had the right to the temporary possession of the trust funds is nonsense. In most cases of conversion, the defendant has, at least initially, a legitimate possessory interest in the property in question. The tort is committed, however, by the defendant acting contrary to or inconsistent with the rights of the owner of that property.

The Defendants' argument fails because it assumes that the ACMA assessments were Defendants' property rather than the property of the Michigan Apple Committee. That argument is foreclosed by the statute itself, which identifies the assessments as trust funds belonging to the Michigan Apple Committee. Consequently, while Defendants had a limited right of possession for the purpose of transmitting the assessments to the Michigan Apple Committee, title to the assessments remained with the Michigan Apple Committee.

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<sup>20</sup> *Layton v Seward Corp*, 320 Mich 418; 31 NW2d 678 (1948); *Cadwell v Peninsular State Bank*, 195 Mich 407; 162 NW 89 (1917)

<sup>21</sup> *Hogue v Wells*, 180 Mich 19; 146 NW 369 (1914) (conversion of money); *Moore v Andrews*, 203 Mich 219; 168 NW 1037 (1918) (conversion of money); *Burrows v Keays*, 37 Mich 430 (1877) (conversion of promissory note); *Van Allsburg v Loan & Deposit State Bank*, 267 Mich 454; 255 NW 225 (1934); *Feige v Burt*, 118 Mich 243; 77 NW 928 (1898) (stock certificate/chose in action). See Plaintiffs' Brief on Appeal, pp 26-33 and Apx. 72a-85a, 110a-118a.

<sup>22</sup> Defendants' Brief on Appeal, p 19 (emphasis in original)

**A. Defendants Converted Specific Identifiable Funds**

Defendants argue that because they commingled the ACMA assessments with other funds that they cannot be held liable for conversion.<sup>23</sup> That is not the law. Nothing in the ACMA specifically authorizes the Defendants to commingle assessments prior to the time they are required to be placed in a separate escrow account. If Defendants chose to commingle the funds, they did so at their own risk because commingling the property of another with one's own is not a defense to conversion.<sup>24</sup> Their argument also ignores the fact that they refused to place the trust funds in a separate, interest-bearing, joint account as the statute requires.<sup>25</sup>

More fundamentally, the Defendants fail to appreciate the branch of conversion law under which this case falls:

Although an action cannot be maintained for conversion of money unless there is an obligation on the part of the defendant to return the specific money entrusted to its care, *it is not necessary that the money should be specifically earmarked for its return. The defendant must obtain the money without the owner's consent to the creation of a debtor and creditor relationship. . . .*<sup>26</sup>

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<sup>23</sup> Defendants' Brief on Appeal, pp 19-21

<sup>24</sup> *Crane Lumber Co v Bellows*, 116 Mich 304; 74 NW 481 (1898); *Stephenson v Little*, 10 Mich 433 (1862); *Erwin v Clark*, 13 Mich 10 (1864); *Isle Royale Mining Co v Hertin*, 37 Mich 332 (1877). "A wrongful commingling of a bailor's money or property by a bailee with his or her own, which has the purpose or effect of avoiding and preventing the later identification of the subject matter of the bailment, constitutes a denial of the bailor's title. Such conduct thus also amounts to a conversion, especially when coupled with the bailee's use and appropriation of the mixed funds or property." 8A Am Jur 2d, *Bailments*, § 74; *In re Computrex, Inc*, 403 F3d 807, 812-813 (6<sup>th</sup> Cir, 2005) (commingling funds entrusted to one's care does not give a defendant a property interest in the funds) ("control over commingled funds . . . does not mean the ability to steal the money, or use it for personal purposes in breach of duty")

<sup>25</sup> First Amended Complaint, ¶ 14 (Apx. 8a); **admitted** Answer, ¶ 14 (Apx. 46a)

<sup>26</sup> *Citizens Ins Co of America v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989) (emphasis added)

Plaintiffs and Defendants in this case do not stand in the relationship of creditor and debtor.<sup>27</sup> This case falls within the line of conversion cases identified in footnote 3 in *Head v Phillips Camper Sales*,<sup>28</sup> and is typified by such cases as *Hogue v Wells* and *Citizens Ins Co v Delcamp Truck Center*.

In *Hogue v Wells*,<sup>29</sup> this Court stated:

Defendant urges that this money, for the wrongful conversion of which this suit is instituted, if in his hands, was a general indebtedness on his part to the plaintiff, and that this suit is brought in trover to recover money generally and not a specific fund of money delivered to him to be returned to her in specie. There is no dispute in this case but that the relation between plaintiff and defendant was that of principal and agent. He was a collector for her of the amount of this note and was recognized and had acted as such for nearly two years, about which there is no dispute. ***A specific portion of the proceeds of the check which Miles gave defendant and which the bank paid him was the property of plaintiff received by defendant to be delivered in a prescribed manner to her.*** And this is not disputed by defendant, and in fact his contention on this proposition now under consideration admits it. ***This fund never came to his hands as his money. He never had any right to its possession except for a certain purpose. His relations in this matter to plaintiff were fiduciary. His retention of this fund was therefore an unlawful conversion, . . . .***

Defendants in this case "never had any right to possession except for a certain purpose." The Defendants were to collect the assessments and remit them to the Michigan Apple Committee. The cases consistently recognize that an action for conversion may be maintained against a defendant who fails to transmit funds to one with a greater right of possession:

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<sup>27</sup> See Plaintiffs' Brief on Appeal, pp 28-31

<sup>28</sup> *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112, n 3; 593 NW2d 595 (1999)

<sup>29</sup> *Hogue v Wells*, 180 Mich at 24 (emphasis added)

If it shall, however, turn out that the money taken by the defendant was the money of the corporation at all times, as claimed by the plaintiff, the same having been demanded, we are of the opinion that trover would lie for its conversion.<sup>30</sup>

The ACMA assessments that were converted were *specific identifiable funds* within the law of conversion. In many cases where liability was found for conversion of money or other monetary items, the defendants were liable not because they failed to return a specific identifiable bank note or particular asset represented by a stock certificate; but rather, because title to the money or property remained with the plaintiff, and the defendant acted in some way in derogation of the owner's rights or interests.<sup>31</sup>

This point is also made clear in the more rigorous criminal law context of conversion of money. For example, in *People v Mason*,<sup>32</sup> the defendant (Mason) received down payments from five individuals for delivery of mobile homes. Mason, however, used the money for other purposes and never delivered the mobile homes. He was charged with larceny by conversion of the money received in down payment on the mobile homes. Mason argued that he could not be guilty of larceny by conversion because:

there was no evidence that he agreed to deliver specific money to the complainants. Nor, he argued, was there any evidence that he promised to segregate the funds and apply them only to the purchase price of the homes. Because the complainants only expected to receive a mobile home and never expected to receive any money, Mason contended that they each surrendered possession and title to their down payments to

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<sup>30</sup> *Moore v Andrews*, 203 Mich at 232

<sup>31</sup> See n 21, *infra*; see also Plaintiffs' Application for Leave to Appeal, pp 28-31; *Morton v Preston*, 18 Mich 60 (1869); *Warren Tool Co v Stephenson*, 11 Mich App 274, 298-300; 161 NW2d 133 (1968)

<sup>32</sup> *People v Mason*, 247 Mich App 64; 634 NW2d 382 (2001)

Mason. Essentially, Mason claimed that because the money was his, he could not be guilty of conversion.<sup>33</sup>

The Court of Appeals recognized that "a person cannot convert his own property." However, the court concluded that the down payments were not Mason's property; that the victims retained legal title to the down payment money but not possession of it. The fact that Mason commingled the funds with his own made no difference because the victims had entrusted him with funds for a specific purpose and had retained title to those funds. That Mason had not agreed to return the specific bank notes or checks that were received in down payment was not a defense to larceny by conversion of the money in question.

**B. Plaintiffs Are Not Required to "Pierce the Corporate Veil" to Hold Steven Kropf Liable for Conversion**

Defendants' assertion that it is necessary to pierce the corporate veil in order to hold Steven Kropf liable for tortious conduct is a misstatement of law. "Piercing the corporate veil" is not necessary to a determination of personal liability for intentional torts.<sup>34</sup> "A corporate officer is personally liable for the tortious injury committed by him regardless of a piercing of the corporate veil."<sup>35</sup> "A person may be guilty of a conversion by actively aiding or abetting or conniving with another in such act. Indeed, one may be liable for assisting another in a conversion though acting innocently. These rules are especially applicable where the defendant received benefit from the conversion and subsequently approved and adopted it."<sup>36</sup> "When conversion is committed by a corporation, the agents and officers of the corporation may also become personally liable for their active

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<sup>33</sup> *People v Mason*, 247 Mich App at 69

<sup>34</sup> *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986)

<sup>35</sup> *Capitol Indemnity Corp v Interstate Agency, Inc*, 760 F2d 121, 124 (6<sup>th</sup> Cir, 1985)

<sup>36</sup> *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982)

participation in the tort, even though they do not personally benefit."<sup>37</sup>

Consequently, Plaintiffs were neither required to plead nor prove the specific elements for piercing the corporate veil as Defendants argue. This same argument was rejected by the U.S. Bankruptcy Court in adversary proceedings involving Roger Lee Kropf (Defendant Steven Kropf's father) for Roger Kropf's involvement in the conversion of ACMA trust funds in prior years.<sup>38</sup> Moreover, even if Plaintiffs were required to "pierce the corporate veil" in order to impose personal liability, those requirements have been met. Defendants admit that they knowingly and intentionally used statutory trust funds for an improper purpose (to pay their own expenses), and that they refused to surrender the trust funds upon demand. These facts satisfy the standards in *Olympic Forest Products*,<sup>39</sup> the case upon which Defendants rely. What Defendant Kropf is seeking is a radical form of immunity from the consequences of his intentional torts, which should be rejected by this Court.

**C. Plaintiffs' Conversion Claims are Governed by the Current  
Version of the RJA**

The RJA in its current form was effective June 16, 2005.<sup>40</sup> Defendants have admitted that the assessments in question were demanded by the Plaintiffs on

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<sup>37</sup> *Citizens Ins Co*, 178 Mich App at 576

<sup>38</sup> See *In re Roger Lee Kropf*, US Bankruptcy Court, Western District of Michigan, Case No. SG 05-14840; Adversary Proceeding No. 05-8162. (Apx. 161a.) Appletree Marketing is a successor to Kropf Fruit Company, which, along with Roger Kropf, were found liable for common law and statutory conversion of ACMA trust funds in 2000 and 2001.

<sup>39</sup> *Olympic Forest Products*, 140 F Appx 260; 2005 US App LEXIS 14854 (6<sup>th</sup> Cir, 2005)

<sup>40</sup> The Defendants frequently cite authorities pre-dating the 2005 amendments to the RJA in their discussion of statutory conversion at pp 16-19 of their Brief on Appeal.


June 29, 2005 (the 2004 assessments) and March 22, 2006 (the 2005 assessments).<sup>41</sup>

A conversion occurs when one refuses to surrender a chattel on demand.<sup>42</sup>

Prior to June 16, 2005, only a person who knowingly bought, received, or aided in the concealment of property that had already been converted could be found liable for statutory conversion -- not the person who first converted the property. The 2005 amendments to the RJA removed that distinction and provided a remedy for statutory conversion against anyone converting the property of another. Moreover, even if the former version of the RJA applied to the 2004 assessments, Plaintiffs would still be entitled to pursue a remedy for statutory conversion against Steven Kropf, who aided Appletree Marketing in the concealment of converted property.<sup>43</sup>

Respectfully submitted,

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<sup>41</sup> First Amended Complaint, ¶¶ 19, 20, 24, 27, 31 (Apx. 8a-11a); admitted Answer, ¶¶ 19, 20, 24, 27, 31 (Apx. 46a-47a); Defendants' Responses to Plaintiffs' Second Request for Admissions to Defendants, ¶¶ 13, 34, 35, 39, 47, Ex. 2 (Apx. 26a-35a)

<sup>42</sup> *Citizens Ins Co*, 178 Mich App at 575

<sup>43</sup> See *Shelton & Associates, PC v Mayer*, 2001 Mich App LEXIS 1478 (Apx. 78a) (where the court affirmed findings of liability for common law conversion against a professional corporation and statutory conversion against the owner of the professional corporation for refusing to refund the overpayment of legal fees)