

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,

Docket No. 137552

Plaintiffs/Appellants,

V  
APPLETREE MARKETING, LLC, and  
STEVEN KROPF,

Court of Appeals No. 277743

Lower Court File No. 05-11315-CZ

Defendants/Appellees.

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**BRIEF ON APPEAL - APPELLEES**

**ORAL ARGUMENT REQUESTED**

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**RESPONSE TO STATEMENT OF JURISDICTION**

Defendants/Appellees agree with the Statement of Jurisdiction submitted by  
Plaintiffs/Appellants.

**APPELLEES' COUNTER-STATEMENT OF QUESTIONS PRESENTED**

1. Do the specific remedy provisions of the Michigan Agricultural Commodities Marketing Act preclude the pursuit of remedies for common law and statutory conversion?

The trial court and the Court of Appeals answered: Yes

Appellants answer: No

Appellees answer: Yes

2. Should a distributor and an individual member of the distributor limited liability company both be liable for treble damages under the statutory conversion statute for that company's non-compliance with the Michigan Agricultural Commodities Marketing Act?

The trial court and the Court of Appeals answered: No

Appellants answer: Yes

Appellees answer: No

3. Can a party claim conversion of money where the funds claimed to have been converted were lawfully paid to the party accused of conversion with the approval of the party claiming conversion, and the funds were not segregated or identifiable?

The trial court and the Court of Appeals did not address this question.

The Appellants answer: Yes

Appellees answer: No

4. Have the Appellants satisfied the requirements for "piercing the limited liability company veil" so as to impose personal liability on the member of the company in this matter?

The trial court and the Court of Appeals did not address this question.

The Appellants answer: Yes

Appellees answer: No

## INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Michigan Department of Agriculture (“MDA”) and the Michigan Apple Committee (the “Apple Committee,” and together with MDA, the “Appellants”) filed this suit to recover assessments owed to the Apple Committee as administrator of the Michigan apple growers’ marketing program. Not content with an uncontested judgment against the distributor, Appellee Appletree Marketing, LLC (“Appletree”), for the amount owed, the MDA and the Apple Committee also sought the extraordinary remedies of treble damages from Appletree, and its sole member, Appellee Steven Kropf (“Kropf”). The trial court and the Court of Appeals declined to impose those punitive and unwarranted remedies.

Appletree is a limited liability company formed in 2002 as an apple distributor. Appletree struggled financially in both 2004 and 2005, and, as a result, failed to pay the assessments due to the Apple Committee under the Michigan Agricultural Commodities Marketing Act (the “Act”). The assessments due in 2004 totaled \$26,305.98 and \$28,878.66 in 2005. The MDA and the Apple Committee jointly filed this lawsuit to collect these outstanding assessments from Appletree, and obtained an uncontested judgment against it. They also sought treble damages against Appletree, and Kropf individually, for conversion, which are the subjects of this appeal. The denial by both the trial court and the Court of Appeals of the treble damages and personal liability claims should be affirmed for the following reasons:

1. The treble damages and personal liability remedies sought by the MDA and the Apple Committee are not remedies authorized by the Michigan Legislature for a failure to pay assessments.
2. The Act provides a number of specific new remedies for the Appellants: injunctive relief, and a judgment for the full amount due, plus costs, audit expenses, and reasonable and actual attorney fees against a non-compliant distributor. There are no provisions in the Act for treble damages or personal liability. New remedies not found in the common law are exclusive remedies.

3. Both statutory and common law conversion requires that the defendant was initially unauthorized to have possession of the property converted. Here, Appletree received the funds at issue with the Appellants' consent. Also, conversion claims as to money require violation of an obligation to return specific identifiable funds. Here, the funds were lawfully paid to Appletree as part of collection of its receivables and commingled with its other receipts, as permitted by the Act.
4. Members of limited liability companies are not responsible for company debts under MCL 450.4501(2): "a person who is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company."

For these reasons, this Court should affirm the trial court's and the Court of Appeals' decisions.

### **COUNTER-STATEMENT OF FACTS AND PROCEEDINGS**

#### **A. Appletree's Business History.**

Appletree is a Michigan limited liability company, formed in 2002, as an apple distributorship for its sister company, apple grower Appletree Farms, LLC, and other orchards.<sup>1</sup> Kropf was the founding and sole member of both Appletree and Appletree Farms, LLC.<sup>2</sup>

The Apple Committee is charged with providing marketing and research programs for Michigan apple producers and sellers. Apple distributors collect payments for the apples they sell and then deduct a designated assessment amount from their payments to apple producers to be paid to the Apple Committee.<sup>3</sup> Apple buyers do not make any separate payments for such assessments, nor are they paid into any separate escrow account, unless a distributor fails to pay the assessment amounts within 92 days<sup>4</sup>.

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<sup>1</sup> See Steven Kropf Dep. Tr., pp. 3-4, 17. Appellants' Appendix ("AA"), pp 90a, 91a, 92a.

<sup>2</sup> See Steven Kropf Dep. Tr., p. 18. AA, p 92a.

<sup>3</sup> MCL 290.655.

<sup>4</sup> *Id.*

As of 2003, Appletree struggled financially.<sup>5</sup> All of its revenue went to pay legitimate creditors and employees.<sup>6</sup> The Appellants have not asserted any fraudulent conveyance or fraudulent transfer claims against Appletree, or against Kropf. Nor have they asserted any claims that Kropf was overpaid.<sup>7</sup>

In 2002 and 2003, Appletree paid all assessments to the Apple Committee. By 2004, however, both the Appletree orchards and distributorship were floundering.<sup>8</sup> Numerous creditors went unpaid.<sup>9</sup> Its sole member, Steven Kropf, stopped receiving any salary.<sup>10</sup> Other employees accepted discounted rates of income, and assets were sold.<sup>11</sup> All of these measures were employed in hopes for a positive turnaround.<sup>12</sup> As an additional sign of the business' struggle, in both 2004 and 2005, Appletree failed to pay the assessments due to the Apple Committee. In 2004, the unpaid sum due was for \$26,305.98 and in 2005, the total was \$28,878.66. Appletree and Kropf did not dispute that, under the Act, Appletree owed \$55,184.64 in total assessments for 2004 and 2005 to the Apple Committee.

**B. The Trial Court and the Court of Appeals Proceedings.**

On November 15, 2005, the MDA and the Apple Committee filed a three-count complaint against Appletree and Kropf for non-compliance with the Michigan Agricultural Commodities Marketing Act (the "Act"), that included common law and statutory conversion claims pertaining to the assessments for the 2004 apple crop. *See* Appellants' Complaint. The

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<sup>5</sup> See Affidavit of Steven Kropf, ¶ 3, which was attached to response to motion for summary disposition, AA p 102a.

<sup>6</sup> See Affidavit of Steven Kropf, ¶ 4.

<sup>7</sup> Appellants reference payments of \$3.4 million by Appletree to Kropf and companies he controlled, but fail to note that most of the funds were for apples sold to Appletree.

<sup>8</sup> See Affidavit of Steven Kropf, ¶ 3 and 5.

<sup>9</sup> See Affidavit of Steven Kropf, ¶ 6.

<sup>10</sup> See Affidavit of Steven Kropf, ¶ 5.

<sup>11</sup> See Affidavit of Steven Kropf, ¶ 5.

<sup>12</sup> See Affidavit of Steven Kropf, ¶ 5.

MDA and the Apple Committee amended their complaint on April 12, 2006 to include the 2005 assessments.

On May 5, 2006, the trial court granted an injunction against any further violations of the Act, although by that time, Appletree was out of business. *See* Trial Court Order dated May 5, 2006. The MDA and the Apple Committee moved for summary disposition on their claims on October 11, 2006, seeking the imposition of treble damages for statutory conversion against both Appletree and Kropf individually. *See* Appellants' Motion for Summary Disposition. The request for a judgment against Appletree for the unpaid assessment amounts was not contested. The motion was argued and taken under advisement on November 3, 2006.

On December 6, 2006, the trial court issued an opinion and order granting in part and denying in part the MDA's and the Apple Committee's motion for summary disposition. *See* Opinion and Order dated December 6, 2006. The trial court awarded an uncontested judgment against Appletree for the assessments deducted but not remitted in 2004 and 2005. *Id.* Additionally, the court ordered that Appletree pay 1% interest per month, costs, expenses, and reasonable and actual attorney fees, each as provided in the Act. *Id.* The trial court refused to award treble damages to the Appellants, and concluded that Kropf was not personally liable for the debts of Appletree, holding that the Apple Committee is entitled only to the remedies specifically stated in the Act. *Id.*

On December 20, 2006, the MDA and the Apple Committee filed a motion for reconsideration of the trial court's decision denying treble damages and personal liability. *See* Appellants' Motion for Reconsideration. Before the trial court ruled on the motion for reconsideration, the MDA and the Apple Committee filed a notice of withdrawal of that motion, and a motion for approval of costs, attorney fees and for entry of final judgment on March 12,

2007. See Appellants' Notice of Withdrawal. On April 10, 2007, the trial court approved a Stipulation for Approval of Costs and Attorney Fees, and entered its Final Order and Judgment in the case. See Final Order and Judgment dated April 10, 2007.

An appeal to the Court of Appeals followed.

The Court of Appeals issued a published opinion on September 16, 2008 (the "Opinion"), *Department of Agriculture v Appletree Marketing, LLC*, 280 Mich App 635; 761 NW2d 277 (2008). The Opinion includes a detailed summary of the uncontested facts, and of the Act, and the special civil and criminal remedies for violations of the Act. The Court of Appeals concluded:

In addition, the ACMA sets forth mechanisms by which the director of the Department of Agriculture may sue for an unpaid assessment or to ensure compliance with ACMA. MCL 290.655(f); MCL 290.669. Accordingly, because the ACMA sets forth new rights and responsibilities not found in the common law and prescribes new remedies for those rights, the remedies conferred by the ACMA are the exclusive remedies for a violation of the Act. *Monroe Beverage Co, supra*.

Opinion at p. 644.

As to the Appellants' argument that the conversion claim should survive anyway, the Court of Appeals provided the following analysis:

Nonetheless, plaintiffs argue that even if the remedies contained in the ACMA are the exclusive remedies for a violation of the act, their claim for common-law conversion is not barred because the claim provides a complementary, rather than a conflicting, remedy to those in the ACMA. Similarly, plaintiffs argue that their statutory conversion claim is not barred because the Legislature, through the Revised Judicature Act, MCL 600.101 *et seq.*, and specifically MCL 600.2919a(2), which states, "The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise," provided a separate statutory means for redress. See e.g., *Faulkner v Flowers*, 207 Mich App 562; 522 NW2d 700 (1994) a

plaintiff may simultaneously pursue claims under the Whistleblowers' Protection Act, MCL 15.261 *et seq.*, and the wage and fringe benefits act, MCL 408.471 *et seq.*)

We reject both of plaintiffs' arguments for the same reason. Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Plaintiffs' claim that Appletree wrongfully exerted domain over the assessments is based entirely on Appletree's duty, imposed by the ACMA, to remit the deducted assessments to the Michigan Apple Committee. In other words, plaintiffs' common-law and statutory conversion claims do not exist without the ACMA. Because the remedies conferred by the ACMA are the exclusive remedies for a violation of the ACMA, plaintiffs are barred from seeking damages for Appletree's violation under claims of common-law and statutory conversion. *Monroe Beverage Co, supra*. We affirm the trial court's order granting in part and denying in part plaintiffs' motion for summary disposition. [footnotes omitted]

Opinion, at pp 644-645.

This Court granted leave to appeal through its Order dated May 7, 2009.

### ARGUMENT

#### **I. THE REMEDY PROVISIONS OF THE MICHIGAN AGRICULTURAL COMMODITIES MARKETING ACT PRECLUDE THE PURSUIT OF REMEDIES FOR COMMON LAW AND STATUTORY CONVERSION.**

##### **A. Standard of Review.**

As stated in the Opinion, this issue is subject to de novo review.

##### **B. The statutory provisions as to payment of collected assessments.**

The purpose of the Michigan Agricultural Commodities Marketing Act is to pool resources and unify marketing and research efforts for Michigan agriculturalists.<sup>13</sup> Individual producers and growers of the commodity provide the funding for specific marketing programs.<sup>14</sup>

<sup>13</sup> *Dukesherer Farms, Inc v Ball*, 405 Mich 1; 273 NW2d 877 (1978).

<sup>14</sup> MCL 290.655(a).

The committees created to run the programs do not collect the monies directly from the producers, but rather from distributors and others who "collect the assessment from the producer by deducting the assessment from the gross amount owing to the producer."<sup>15</sup> The distributor then is to pay these sums to the Apple Committee.<sup>16</sup> The Apple Committee was created to effect the purpose of the Act for the Michigan apple industry specifically.

**C. The Act provides detailed procedures and specific new remedies when distributors fail to pay sums to the Apple Committee.**

Under the Act, any distributor, processor, or handler "who fails to deduct or remit the assessment is liable to the committee for any assessment not deducted or remitted" (emphasis added).<sup>17</sup> The Act sets forth specific and detailed procedures for collections of overdue payments:

A committee may file a written complaint with the director documenting that a processor, distributor, handler, or producer has failed to deduct or remit any assessment due to the committee pursuant to a marketing program. Upon receipt of such a complaint, the director shall conduct an investigation of the allegations. If, after investigation, the director finds that the processor, distributor, handler, or producer has failed to deduct or remit an assessment to the committee, the director shall request by certified mail the processor, distributor, handler, or producer to remit the assessment within 10 days after the director determines that a deduction or remittance was not made. In the case of a failure to deduct an assessment, the director shall compute the amount that reasonably should have been deducted and impose an assessment in that amount. If the assessment is not remitted within 30 days after the request or is not in compliance with a written agreement for full payment, the director may file an action in a court of competent jurisdiction to collect the assessment. Venue in such an action is the place where the processor, distributor, handler, or producer has its primary place of business. In any action to recover an assessment under this subsection, if the director prevails, the court shall award to the director all costs and expenses in bringing the action, including, but not limited to,

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<sup>15</sup> MCL 290.655(c).

<sup>16</sup> MCL 290.655(c).

<sup>17</sup> MCL 290.655(c).

reasonable and actual attorney fees, court costs, and audit expenses. If the director does not prevail, he or she shall charge the committee for reasonable and actual attorney fees, court costs, and expenses incurred in bringing about this action.<sup>18</sup>

Thus, only a distributor – and not the members or shareholders of a distributor – is liable for (1) the amount of the assessment; (2) audit expenses; and (3) any court costs, reasonable and actual attorney fees, and other expenses incurred in bringing a lawsuit to collect the assessment.<sup>19</sup> Criminal sanctions are also included in the Act. *See* MCL 290.673. These are the only available remedies identified in the Act (other than injunctive relief against violations, which the Appellants did obtain in this matter).

**D. The Act's remedies are exclusive and preclude treble damages for conversion and personal liability.**

The Court of Appeals is correct that the remedies stated in the Act are new remedies and therefore the exclusive remedies available for failing to comply with the Act's requirements. This is consistent with other Michigan statutes that provide specific remedies. *See Jackson v PKM Corp*, 430 Mich 262; 422 NW2d 657 (1998) (holding that the Dram Shop Act provides an exclusive remedy preempting other common law claims against tavern owners). "As a general principle of law, where a statute creates a new right and prescribes a particular remedy, the remedy is exclusive and must be strictly construed."<sup>20</sup> *See Kraft v Detroit Entertainment, LLC*, 261 Mich App 534; 683 NW2d 200, 206 (2004) (holding that the Michigan Gaming Control and Revenue Act barred common law claims); *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183-184; 413 NW2d 17 (1987) (holding that the Dramshop Act's exclusive remedy provision barred additional negligence claim); *In Re Quinney Estate*, 287 Mich 329; 283 NW

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<sup>18</sup> MCL 290.655(f).

<sup>19</sup> MCL 290.655(f).

599 (1939) (holding that where a new right and a new remedy are given by statute, the statutory remedy is exclusive).

This Court has specifically recognized that state statutes with new remedies preempt common law claims, as the Court of Appeals noted at p 642 of the Opinion: "If a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Monroe Beverage Co v Stroh Brewery Co, Inc*, 454 Mich 41, 45; 559 NW2d 297 (1997) (quotations and citation omitted)."

This Court recently again affirmed this principle in a case in which a city was found not to be entitled to the additional remedy of restitution where a county violated a statutory duty that includes a statutory remedy:

"Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." Accordingly, this Court has previously declined to establish a remedy that the Legislature has not provided.

In this case, MCL 224.20b does not provide a remedy of restitution if a board of county commissioners violates its statutory obligations. The Legislature's decision not to specify such a remedy suggests that the Legislature did not intend to allow plaintiff to seek restitution for a violation of MCL 224.20b.

*South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 529; 734 NW2d 533 (2007).

The Appellants argue that the statutory remedies included in the Act preclude only common law remedies, and not other statutory remedies. Appellants' Brief at p 12. But *South Haven* makes it clear that where a statute provides new remedies, these remedies are

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<sup>20</sup> *Holland v Eaton*, 373 Mich 34; 127 NW2d 892 (1964), overruled on other grounds, 394 Mich 179; 229 NW2d 332 (1975).

exclusive, and preclude both common law remedies and other statutory remedies as well...  
*Monroe, supra, South Haven, supra.*

There is no provision in the Act authorizing conversion remedies, treble damages or personal liability. The Act specifically provides for the award of attorney fees, thereby abrogating the common law ("American") rule under which parties are responsible for their own attorney fees. It also includes certain criminal sanctions for non-compliance, as the Opinion states at p 642. *See* MCL 290.673. If the Legislature intended to include treble damages or personal liability as extreme remedies for the failure to pay sums to the marketing program, it would have so stated in the Act. There is no evidence of legislative intent demonstrating that either of the remedies claimed by the Appellants is appropriate for Appletree's simple nonpayment of assessments to the Apple Committee.

The Legislature has, however, provided for corporate officers or company members to be liable in other circumstances. For instance, under Michigan tax laws, limited liability company members are statutorily liable for not paying certain "trust fund" taxes. MCL 205.27(a) provides that:

If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its **officers, members, managers, or partners** who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is **personally liable for the failure . . .**

(Emphasis added). These taxes are "trust funds" to be "held in trust in a separate account . . . until paid over . . ." <sup>21</sup> This provision is similar to IRC Sec. 6672(a), which imposes personal

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<sup>21</sup> MCL 205.19(4).

liability on individuals reasonable for paying an employee's share of taxes for an entity who fail to do so:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The Apple Committee tries to analogize the Act to these types of statutes, emphasizing that Kropf decided whether or not to pay the assessments. However, unlike the statutes discussed above, the Act does not contain language imposing personal liability on corporate officers or company members. "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . ." <sup>22</sup> Because the Legislature omitted treble damages and personal liability from the Act, the Court should not allow the MDA and the Apple Committee to create legislative intent where it does not exist.

The Appellants rely on *Cork v Applebee's of Michigan, Inc*<sup>23</sup> for their assertion that a common law conversion claim is a complementary remedy for a violation of the Act. See p 22 of Appellants' Brief. In *Cork*, the court held that the plaintiff's failure to exhaust the administrative remedies stated in the Wages and Fringe Benefits Act ("WFBA") did not preclude their common law claims.<sup>24</sup> *Cork* is distinguishable from this case because it deals with a statutory requirement to seek all administrative forms of redress before pursuing other claims.<sup>25</sup> The court addressed the issue of whether the WFBA stated a particular requirement that must be

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<sup>22</sup> *Farrington v Total Petroleum Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

<sup>23</sup> *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311; 608 NW2d 62 (2000).

<sup>24</sup> *Cork*, 239 Mich App at 318.

<sup>25</sup> *Id.* at 316.

met before a claimant could make a common law claim. Because the court found that the WFBA was not intended to force a claimant to exhaust all administrative remedies, it held that the claims should not be barred, which is a different issue than the one presented in this case.<sup>26</sup> This case is not about failure to exhaust administrative remedies. The Michigan Agricultural Commodities Act provides specific remedies for failure to comply with the Act. Further remedies should not be implied. As the Opinion demonstrates, the Act includes new rights and remedies, and therefore the Appellants are limited to the remedies in the Act, under this Court's holding in *Monroe Beverage, supra*.

What the Appellants are really trying to do in this case is elevate the Apple Committee to a new "super creditor" status that is far better than that of even the IRS or the State of Michigan as to the unpaid "trust fund" component of federal and state taxes. Under the statutes discussed above, the IRS and the State can impose personal liability on individuals responsible for the payment of such taxes for entities that fail to do so. Under the Appellant's arguments, a corporate officer or limited liability company member of an entity that fails to pay apple marketing assessments, not only has personal liability for damages and attorney fees, but is also automatically liable for treble damages! If the failure to pay "trust funds" constitutes conversion of such funds, as alleged by the Appellants, then why is there no conversion liability in the myriad cases involving failure to pay the trust fund component of state and federal taxes? The lack of any such holdings demonstrates the validity of the arguments against such conversion claims: there is no statutory authorization for treble damages or a conversion claim, the new remedies in the Act preclude treble damages for conversion, and the requirements for a conversion claim are not met.

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<sup>26</sup> *Id.* at 318.

E. **The rules of statutory construction do not support the Appellants' attempt to graft the RJA conversion remedies into the ACMA.**

The Appellants argue at p. 14 of their Brief that the principle that a "later enacted specific statute operates as an exception or qualification to a more general prior statute" supports grafting the conversion remedy provisions of the RJA into the ACMA, even though the ACMA contains a complete set of remedies, including criminal sanctions and provisions for the recovery of attorneys' fees. This argument is misplaced. First, the Appellants acknowledge the general principle that more specific statutes control over more general statutes. See Appellants' Brief at p. 15. In this matter, the ACMA contains a comprehensive and specific set of remedies for failure to pay marketing funds collected by Apple Distributors to the Apple Committee. The RJA contains nothing regarding the ACMA or the collection of marketing funds by commodity distributors for commodity marketing. Clearly, the ACMA is the more specific set of statutes as to the subject matter of the collection of marketing funds, and its terms therefore control over the general conversion provisions of the RJA.

As to chronology as well, the Appellants are in error. The ACMA was enacted in 1965, The conversion provisions of the RJA were enacted in 1961. While both sets of statutes have been amended (the ACMA in 2002, the RJA in 2005), the ACMA is both the more recent and the more specific statute, and therefore its provisions should control.

F. **The relationship between the Apple Committee and the Defendants was not a bailment.**

The Appellants state, at page 28 of their Brief: "Defendants' possession of the trust fund was a form of bailment in which they received the ACMA assessments for delivery to the Michigan Apple Committee." This is incorrect, and illustrates the flaws in the Appellants' attempt to impose conversion liability. As noted in the authorities cited on pages 28 and 29 of the Appellants' Brief, a bailment is a delivery of goods under an agreement for later disposition

of the goods. However, a bailment applies only to specific personal property “other than money.” *Goldman v Phantom Freight, Inc.*, 162 Mich App 472, 480; 413 NW2d 433 (1987). See also *Godfrey v City of Flint*, 284 Mich 291, 295-296; 279 NW 516 (1938). Also through a bailment, property is turned over by one party to another to hold and dispose of for the agreed purpose. In this matter, Appletree was to purchase apples from growers, resell them, and then pay the growers for their apples, deducting from those payments the small portion of those payments to be used for apple marketing purposes. The funds never came from the Apple Committee. Appletree’s obligations were purely statutory, as detailed in the Opinion, and wouldn’t exist absent the provisions of the ACMA.

**II. AN INDIVIDUAL MEMBER OF A LIMITED LIABILITY COMPANY IS NOT PERSONALLY LIABLE FOR THAT COMPANY’S NON-COMPLIANCE WITH THE MICHIGAN AGRICULTURAL COMMODITIES MARKETING ACT.**

**A. Standard of Review.**

The trial court and the Opinion do not address this issue, but it may be considered on appeal as the lower court record provides the facts necessary for its consideration. See *Hines v Volkswagen of America, Inc.*, 265 Mich App 432, 443-444; 694 NW2d 84 (2005), citing *Peterman v DNR*, 446 Mich 177, 183; 521 NW 2d 499 (1994).

**B. Kropf should not be personally liable.**

The Appellants’ attempt to impose personal liability on Kropf is based solely on the statutory conversion statute which allows recovery for “[a]nother person’s stealing or embezzling property or converting property to the other person’s own use.”<sup>27</sup> The Appellants have not, and cannot, provide evidence that Kropf converted any of those funds individually to his own use. Presumably, if Kropf had improperly taken any funds out of Appletree for his own

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<sup>27</sup> MCL 600.2919a(1)(a).

use (let alone “millions”), the Appellants would have alleged fraudulent transfers and attempted to recover them. They haven’t.

The Appellants only offer evidence affirming that Kropf paid himself, his family and affiliated entities amounts that were due to them for products provided and services rendered to Appletree. The Appellants disingenuously imply that Kropf improperly took millions of dollars out of Appletree, but they well know from discovery that all of those funds represent payments by Appletree as a distributor to a sister company that owns orchards to pay for apples bought from it, or compensation for services rendered. Most importantly, there is no allegation in the Appellants’ pleadings of any fraudulent transfers or fraudulent conveyances by Appletree to Kropf individually, or to anyone else. Nor have the Appellants pursued any post-judgment proceedings against Kropf under the judgment they secured over three years ago against Appletree.

As noted above, under MCL 450.4501(2), members and managers of limited liability companies are “not liable for the acts, debts, or liabilities of a limited liability company.” The Appellants are trying to graft a personal liability provision to the Act through their conversion claims. That attempt should be denied. The Appellants try to use the trial court’s use of the phrase “distributors” in the plural to argue that Kropf should be considered a “distributor” individually, but the record reflects clearly that there was never any allegation that Kropf engaged individually in any of the acts listed in the “distributor” definition in the Act. *See*, MCL 292.652(1). If the Appellants’ argument is accepted, then any time an insolvent company fails to return a deposit, or proceeds from the sale of a consigned item, or any other funds it holds that would otherwise have been paid out, the shareholders or members would be liable for treble

damages for statutory conversion. That is not the law, and acceptance of such a position would eliminate the meaning of MCL 450.4501(2).

**III. A PARTY CANNOT CLAIM CONVERSION WHERE THE FUNDS CLAIMED TO HAVE BEEN CONVERTED WERE PAID TO THE PARTY ACCUSED OF CONVERSION WITH THE CONSENT OF THE PARTY CLAIMING CONVERSION.**

**A. Standard of Review.**

The trial court and the Opinion do not address this issue, but it may be considered on appeal as the lower court record provides the facts necessary for its consideration.

*See Hines, supra.*

**B. Conversion claims and the treble damage provisions of MCL 600.2919a are inapplicable because Appletree obtained the funds with the Appellants' consent.**

The definition of statutory and common law conversion is found at *24 Mich Law and Practice Encyclopedia, Personal Property*, Section 27, p 30: "the common law tort of conversion is any distinct act of dominion wrongfully exerted over another person's personal property in denial of or inconsistent with the owner's property rights. Statutory conversion, however, consists of knowingly buying, receiving, or aiding in the concealment of any stolen or embezzled or converted property." *See, Foremost Insurance Co v Allstate Ins Co*, 439 Mich 378; 486 NW2d 600 (1992). Only statutory conversion provides for a potential award of treble damages. *See*, MCL 600.2919a. Any common law conversion claim against Appletree is moot, because the Appellants already have a judgment against it for the amount claimed to have been converted. The Appellants seek treble damages under the statutory conversion provisions of the Revised Judicature Act.

Under Michigan law, a corporation's mere failure to repay money to a creditor that had fronted funds for a transaction does not constitute statutory conversion.<sup>28</sup> Additionally, "[t]he Michigan courts have held that simply retaining a particular item or sum does not amount to 'buying, receiving, or aiding in the concealment of stolen, embezzled or converted property.'"<sup>29</sup>

In *Olympic Forest Products, Ltd*, a corporate creditor sued a corporation's former principal, alleging conversion and fraud in connection with a failure to repay money the creditor had fronted for a specific transaction.<sup>30</sup> The plaintiff contended that it gave money to the defendants who, in turn, failed to pay it back in accordance with the terms of their contract.<sup>31</sup> The court held that these allegations were insufficient to constitute statutory conversion.<sup>32</sup> The court reasoned that the defendants' retention of the fronted money did not rise to the level of concealment or embezzlement of converted property as defined in MCL 600.2919a.<sup>33</sup> The Court also affirmed the trial court's conclusion that there was no basis to impose personal liability on the president and owner of the corporate defendant.

In *Lawsuit Financial, LLC v Curry*, a litigation funding company brought statutory and common law conversion claims against a client's law firm for failing to repay advanced funds and failure to pay a contractual fee from litigation proceeds.<sup>34</sup> The court noted that a common law conversion claim is only valid if the defendant obtained the money without the plaintiff's consent to the creation of a debtor-creditor relationship, and the defendant must

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<sup>28</sup> *Olympic Forest Products, Ltd v Cooper*, CA 6 (Mich) 2005, 148 Fed. Appx. 260, 2005 WL 1704334, unreported.

<sup>29</sup> *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004).

<sup>30</sup> *Olympic Forest Products, Ltd.*, 128 Fed. Appx. at 261-62.

<sup>31</sup> *Id.* at 265.

<sup>32</sup> *Id.* at 265.

<sup>33</sup> *Id.* at 265.

<sup>34</sup> *Lawsuit Financial, LLC*, 261 Mich App at 591.

have had an obligation to return the **specific** money in its possession.<sup>35</sup> The court held that the plaintiff also failed to state a statutory conversion claim because the law firm's retention of the money did not constitute "knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property" as proscribed by MCL 600.2919a.

As in *Olympic Forest Products* and *Lawsuit Financial*, Appletree came into possession of the funds at issue with the Apple Committee's consent. In fact, it was authorized by statute to handle the funds. The Appellants' conversion claim is invalid because neither Appletree nor Kropf exercised dominion over money that they did not have a right to possess. The failure to remit funds lawfully received simply does not constitute conversion under Michigan law.<sup>36</sup>

The Appellants rely upon *Citizens Ins Co of America v Delcamp Truck Center, Inc*<sup>37</sup> to support their conversion claim. In *Citizens*, the plaintiff sought to recover \$32,836 that was mistakenly overpaid for a truck repair. The court in *Citizens* found the defendant and its owner personally liable for conversion of the plaintiff's funds, but the court emphasized that "[t]he defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship."<sup>38</sup> The defendant in *Citizens* was not the intended recipient of the monies it failed to return - the funds came into its possession by mistaken overpayment. The other case on this topic cited by the Appellants, *Trail Clinic v Bloch*, 114 Mich App 700; 319 NW2d 638 (1982) 6), also involves the receipt by the defendant of funds which the defendant was not entitled or supposed to receive.

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<sup>35</sup> *Id.* at 591.

<sup>36</sup> *Olympic, supra*; *Lawsuit Financial, LLC v Curry*, 261 Mich App 579 (2004); *Hovanesian v Nam*, 213 Mich App 231; 539 NW2d 557 (1995).

<sup>37</sup> *Citizens Ins Co of America v Delcamp Truck Center, Inc*, 178 Mich App 570; 444 NW2d 210 (1989) (retention of tenant's security deposit does not constitute statutory conversion).

<sup>38</sup> *Citizens Ins Co*, 178 Mich App at 575; *Hogue v Wells*, 180 Mich 19; 146 N.W. 360 (1914); 89 CJS, *Trover and Conversion*, § 23, p. 541.

In this case, Appletree was supposed to receive the payments. Appletree's actions cannot be deemed an act of conversion because the Apple Committee consented to the relationship.<sup>39</sup> The funds at issue were paid to Appletree with the approval of the Apple Committee. The retention of funds by Appletree from its payments to apple producers is required under the Act. The essence of the Appellants' claim is that Appletree should have paid out those retained funds to the Apple Committee, rather than have applied them to its debts. The fact that the funds were obtained by Appletree pursuant to the Act distinguishes this case from *Citizens*, and means this is not a conversion case, but instead simply a breach of contract case for failure to remit the retained funds back to the Apple Committee. For this case to be analogous to *Citizens*, Appletree would have had to have been overpaid and be holding funds it should never have received in the first place. That is not the case here.

**C. Because the Apple Committee was not entitled to be paid any specific or identifiable monies collected by Appletree from its customers, the Appellants' conversion claims are invalid.**

As noted above, the statutory scheme under the Act is for a distributor to obtain apples from producers, sell those apples, collect the proceeds from the sale, and then remit the amounts owed to the producers to them, minus a portion to be paid to the Apple Committee for marketing purposes. Funds collected from buyers are commingled, as are the funds to be paid to the producers. The statute requires a separate escrow account without commingling sale proceeds that is joint with the Apple Committee only if assessments have not been paid for over 92 days. *See* MCL 290.655(d). For the three month period prior to any such delinquency, the funds do not have to be held in escrow and can be commingled.

A conversion claim requires an obligation to return specific or identical monies taken from the party claiming conversion:

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<sup>39</sup> *Id.* at 575.

The general rule is that monies are intangible and, therefore, not subject to a claim for conversion; however, an exception exists when a plaintiff can allege that the defendant converted specific segregated or identifiable funds...

18 Am Jur 2d, *Conversion*, Sec. 7, p 160. See also *Garras v Bekiares*, 315 Mich 141, 147; 23 NW2d 239 (1946).

In *Garras*, the plaintiff brought a suit alleging conversion based on amounts not paid under a consignment agreement under which goods were delivered to the defendant for sale by the defendant. The parties' agreement provided that "proceeds . . . shall be and remain the property of the party of the first part," which was the plaintiff. *Garras, supra*, at 143. This Court held against the conversion claim and found that because the "plaintiff was not entitled to the specific or identical monies collected by defendant from his customers, he was not entitled to a judgment in tort for conversion." See also *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), citing *Check Reporting Services, Inc v Michigan National Bank – Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991): "To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care." As this Court noted in *Foremost Insurance Co v Allstate Insurance Company*, 439 Mich 378, 391; 486 NW2d 600 (1992), a person cannot convert his own property. See also, *Head, supra*, in which this Court held that a dealer's failure to return the purchase price for a defective camper did not constitute conversion because the dealer initially obtained the funds with the owner's consent, and the dealer had no obligation to return the specific money entrusted to it.

Unlike the defendants in *Citizens, supra*, the funds collected by Appletree came into its possession as authorized under the Act. A judgment has been entered for that amount, plus other amounts for "new remedies" that include attorney fees as authorized under the Act.

Labeling the unpaid amounts as “trust funds” does not transform a restitution claim into a conversion claim, under each of the authorities discussed above.

**D. Any statutory conversion claims are governed primarily by Michigan’s prior statutory conversion statute.**

Even if found to have any validity, Appellant’s statutory conversion claims as to the 2004 assessments and the 2005 assessments through June 16, 2005, the date of the conversion statute’s amendment, would be governed by the previous statutory conversion statute, because the new statutory conversion statute became effective on that date. Under the prior statute, statutory conversion was not a remedy against one who has actually stolen, embezzled, or converted the property, only against aiders and abettors.<sup>40</sup> See *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002), holding that statutory conversion applies only to a defendant’s knowing assistance of a third party’s act of conversion and not the defendant’s own acts of direct conversion. See also *Campbell v Sullins*, 257 Mich App 179, 667 NW2d 887 (2003); appeal denied 469 Mich 971, 671 NW2d 877 (2003). Merely keeping funds that should have been paid out does not amount to “buying, receiving or aiding in the concealment of stolen, embezzled or converted property.”<sup>41</sup> Appletree’s retention of the assessments owed to the Committee is not sufficient to establish a conversion claim under this prior version of MCL 600.2919a. Therefore, Appellants are not entitled to treble damages against either Appletree or Kropf in this matter for most of their claim, even if the statutory conversion claim could be found to have had any validity.

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<sup>40</sup> *Campbell v Sullins*, 257 Mich App 179 (2003), appeal den. 469 Mich 971.

<sup>41</sup> *Lawsuit Financial*, 261 Mich App at 593.

**IV. APPELLANTS HAVE NEITHER PLED NOR MET THE REQUIREMENTS FOR “PIERCING THE LIMITED LIABILITY COMPANY VEIL” SO AS TO IMPOSE PERSONAL LIABILITY ON KROPF AS THE SOLE MEMBER OF APPLETREE.**

**A. Standard of Review.**

The trial court and the Opinion do not address this issue, but it may be considered on appeal as the lower court record provides the facts necessary for its consideration.

*See Hines, supra.*

**B. There is no basis for imposing personal liability on Kropf.**

As a general rule, shareholders, directors and officers of a corporation cannot be held personally liable for the corporation’s acts or debts, unless unusual circumstances are present which require ignoring the corporate entity and targeting its owners.<sup>42</sup> An exception to this rule applies when an entity is wrongfully used in an attempt to avoid legal obligations. This is commonly referred to as “piercing the corporate veil.”<sup>43</sup> Under Michigan law, the following elements must be satisfied in order to pierce the corporate veil: (1) the corporate entity must be a mere instrumentality of another individual or entity; (2) the corporate entity must be used to commit fraud or other wrong; and (3) the plaintiff must have suffered an unjust loss or injury.<sup>44</sup>

*Olympic Forest Products*, referenced above, is closely analogous on its facts to this matter. There, as here, the plaintiff alleged conversion against an individual after advancing funds to that individual’s entity. The court held that the plaintiff failed to demonstrate that the defendant had used that entity as a mere instrumentality for his own illegal purposes.<sup>45</sup> Additionally, there was a lack of evidence showing that the defendant blurred the distinction

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<sup>42</sup> *Olympic Forest Products, Ltd.*, 148 Fed.Appx. at 263.

<sup>43</sup> *Id.* at 263.

<sup>44</sup> *Id.* at 263.

<sup>45</sup> *Id.* at 263.

between the corporate entity and himself or ignored corporate formalities.<sup>46</sup> In that case, the evidence also failed to demonstrate that the defendant engaged in any illegal or wrongful activity; rather, the defendant acknowledged that there was a debt owed to the plaintiff, but that there were insufficient funds to settle it.<sup>47</sup> That is just what is present here. Simply not paying a debt does not constitute concealment nor does it indicate that an entity has been used as an instrumentality for fraudulent purposes.<sup>48</sup>

The MDA and the Apple Committee have neither pled nor met the required elements of piercing the corporate veil so as to impose personal liability on Kropf. Despite exhaustive discovery and review of Appletree's records, the Appellants have provided no evidence showing that Kropf used Appletree as a mere instrumentality to avoid any legal obligations or to commit fraud. As did the defendant in *Olympic Forest Products*, Kropf conceded that Appletree was unable to pay the 2004 and 2005 assessments and that those were owed by Appletree to the Apple Committee. Appletree's simple nonpayment does not meet the requirements for "piercing the corporate veil."

### CONCLUSION

The Act provides new and therefore exclusive remedies available to the Apple Committee if the funds are not delivered to it by distributors, which precludes claims for treble damages for conversion and personal liability. In seeking treble damages and personal liability, the Apple Committee is improperly trying to create extraordinary remedies outside the Act, and pierce the company veil without meeting the requirements for doing so. In any event, because Appletree lawfully came into possession of the funds at issue as provided in the Act, there is no basis for any conversion claims. Appletree only owes past due assessments and the costs for

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<sup>46</sup> *Id.* at 263.

<sup>47</sup> *Id.* at 263.

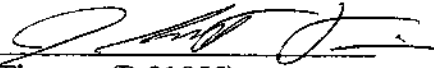
<sup>48</sup> *Id.* at 263.

their collection to the Apple Committee and nothing else. Conversion claims as to money require that the defendant improperly came into possession of the funds, and that the funds can be specifically and separately identified. These requirements are not met here. This Court should therefore affirm the Court of Appeals Opinion.

Respectfully submitted,

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