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IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
(Letica, P.J., Fort Hood and Gleicher, JJ.)

ALISA A. PESKIN-SHEPHERD, PLLC,

Plaintiff-Appellee,

v.

NICOLE BLUME f/k/a NICOLE KNUFF and SEAN BLUME

Defendant-Appellants.

Supreme Court No. 162375
COA No. 348023

Oakland County Circuit Court
Lower Court No.: 16-154544-CK
Hon. Michael D. Warren

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DEFENDANT-APPELLANTS' REPLY TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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RESPONSE TO APPELLEE'S INTRODUCTION

There are a few facts stated in Plaintiff-Appellee's introductory section that require clarification or correction. First, Plaintiff-Appellee states that "Blume had already given Peskin-Shepherd a lien in her retainer agreement . . . ." (Appellee's Supplemental Brief, p. 2). Although this is true, that lien could not attach to Defendant-Appellant's real property without an express agreement that it would do so. *George v Sandor M. Gelman, PC*, 201 Mich App 474, 478; 506 NW2d 583 (1993). Thus, the retainer agreement alone did not provide Peskin-Shepherd with a lien on Defendant-Appellant's real property. It was only once the Judgment of Divorce was signed that there was an express provision providing a lien on the Escanaba property.

Second, Plaintiff-Appellee states that "Blume understood enough about the import of the lien to notify two (2) divorce attorneys about Peskin-Shepherd's lien days prior to the Escanaba Property sale closing." (Appellee's Supplemental Brief, p. 4 (emphasis in original)). This is simply not an accurate portrayal of what happened. On the pages cited by Plaintiff-Appellee, Defendant-Appellant testified that she informed her attorney of the *Evelyn Redmond lien*. (Appellant's Appendix, pp. 707-709). She then testified that she received an email from Plaintiff-Appellee asking her to sign a lien for Plaintiff-Appellee. (Appellant's Appendix, pp. 709-712). She forwarded that email to her attorney. (Appellant's Appendix, pp. 712-716). But the email was asking her to *sign* a lien. (Appellant's Appendix, pp. 709-712). It was not telling her there was a lien already in place.

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ARGUMENT

I. None of the cases cited by Plaintiff-Appellee support that a lien itself is a property interest capable of being converted, and the proceeds from the sale of the Escanaba property could not be the subject of conversion when there was no specific, identifiable sum to which Plaintiff-Appellee was entitled.

A. The cases cited by Plaintiff-Appellee do not hold that a lien is a property interest capable of being converted.

Plaintiff-Appellee, in her Supplemental Brief, focuses primarily on whether conversion may apply to something "intangible." (Appellee's Supplemental Brief, pp. 5-10). In her Application for Leave to Appeal, however, Defendant-Appellant did not argue that no "intangible" property could be converted. Rather, she argued that a lien is not itself property capable of being converted, nor is an amorphous, unidentifiable sum of money owed from the proceeds of a sale. (Application for Leave to Appeal, pp. 21-29). This Court asked the parties to brief the issue of whether "an attorney's lien and/or the proceeds obtained from the sale of a property subject to an attorney's lien is a property interest capable of being converted." (10/22/21 S. Ct. Order).

Many of the cases cited by Plaintiff-Appellee in her Supplemental Brief are inapposite. *Tuuk v Andersen*, 21 Mich App 1; 175 NW2d 322 (1969), involved the conversion of a right to lease and eventually purchase a machine. *Miracle Boot Puller Co v Plastray Corp*, 57 Mich App 443; 225 NW2d 800 (1975), involved the conversion of a patent right. *Smith v Thompson*, 94 Mich 381; 54 NW 168 (1892), concerned the conversion of shares of stock. And *Warren Tool Co v Stephenson*, 11 Mich App 274; 161 NW2d 133 (1968), dealt with the conversion of a negotiable instrument. None of these cases sheds any light on the issue of whether a lien is a property interest capable of being converted.

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There are three cases cited by Plaintiff-Appellee dealing with common law conversion which require further examination. The first is *Michigan Nat'l Bank v Michigan Livestock Exchange*, 432 Mich 277, 280; 439 NW2d 884 (1989), which concerned cattle that were subject to a security interest held by a bank for loans made to the cattle's owners. The bank had recorded its security interest, and an auctioneer was sued for conversion for selling the cattle for its owners in spite of the security interest held by the bank. *Id.* The appeal solely concerned whether the auctioneer was protected from liability by UCC 7-404 or UCC 9-307, so there is no discussion of any issue relevant to the present appeal. *Id.* at 279. To the extent the case discusses conversion, it speaks of "conversion of the *collateral*":

> When an auctioneer sells property in which a creditor has a perfected security interest without the permission of the creditor, the auctioneer is liable for *conversion of the collateral* even though he had acted in good faith and without knowledge of the existence of the security interest.

Id. at 293 (emphasis added). The case was remanded for further proceedings with this Court only holding that the auctioneer was not shielded from liability by UCC 7-404 or UCC 9-307.

Schmittdiel v Moore, 120 Mich 199; 79 NW 195 (1899), likewise, contains very little analysis of the issue. However, to the extent it discusses conversion, it refers to the conversion of personal property that served as collateral: "The plaintiff claims damages for the conversion of certain personal property, to the possession and proceeds of which he asserts that he was entitled by virtue of a chattel mortgage." *Schmittdiel v Moore*, 101 Mich 590, 591; 60 NW 279 (1894). It never holds that a lien itself may be converted.

Lastly, *Sleeper v Wilson*, 266 Mich 218, 219; 253 NW 274 (1934), concerned personal property that was used as collateral for a loan, as well. The lawsuit for conversion was described as the conversion of chattels: "Plaintiffs allege that defendant by seizing the property covered by

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their chattel mortgage, retaining possession of the same for more than 16 months, and finally disposing of it on execution sale, he knowing that the property was subject to the chattel mortgage, thereby unlawfully **converted and disposed of said goods and chattels** and thereby injured and destroyed plaintiffs' security." *Id.* at 220 (emphasis added).

In short, none of these cases holds that a lien itself may be converted. Likewise, none of the cases concerns the conversion of the proceeds from a sale. This is significant because the cases all concerned personal property, which may be the subject of a conversion lawsuit. The collateral in the present case, by contrast, is a real property, which cannot be the subject of a conversion lawsuit. *Embrey v Weissman*, 74 Mich App 138, 143; 253 NW2d 687 (1977). That is why the question arises as to whether the lien itself was property subject to conversion, or whether the proceeds of the sale were such. The cases cited by Plaintiff-Appellee are inapposite on this issue.

B. Only a single case cited by Plaintiff-Appellee involves statutory conversion, and the case provides no analysis as to whether statutory conversion could apply in a case such as this one, since it was not the issue on appeal.

Significantly, all of the above cited cases concern only common law conversion. As discussed in Defendant-Appellant's Application for Leave to Appeal, when determining whether *statutory* conversion applies, it is also important to consider the additional element that must be satisfied for statutory conversion claims: that the property be converted to the converter's "own use." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 354-357; 871 NW2d 136 (2015). (Application for Leave to Appeal, pp. 21-24). Plaintiff-Appellee does not explain how a lien is converted to someone else's own use. That alone makes it impossible for the lien to be the subject of statutory conversion, and without statutory conversion, there can be no treble damages.

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Plaintiff-Appellee cites only a single case in which she contends statutory conversion was applied to a security interest: *Dep't of Agric v Appletree Mktg, LLC*, 485 Mich 1; 779 NW2d 237 (2010). (Appellee's Supplemental Brief, p. 7). *Appletree*, however, contains no analysis or conclusion as to whether a lien may be the subject of statutory conversion. The only issue on appeal was whether the Agricultural Commodities Marketing Act superseded any possible conversion claims. *Id.* at 3-4. This Court concluded that it did not, and remanded the case for further proceedings. *Id.* at 19. Thus, *Appletree* does not hold that a lien may be the subject of a statutory conversion lawsuit.

Even the Court of Appeals majority concluded that neither this Court nor the Court of Appeals had ever held that a lien was "personal property" that could be converted. (11/05/20 COA Opinion, p. 4). But the Court of Appeals majority held in the present case that the lien was, in fact, personal property and was converted. (11/05/20 COA Opinion, pp. 4, 6). It never explains how the lien was converted to Defendant-Appellant's "own use."

C. If it was the proceeds from the sale that were converted, rather than the lien, then certain requirements that exist when money is the alleged object of conversion apply.

Defendant-Appellant does not dispute that a check or money may be the subject of a conversion action. But it is well established that conversion is only actionable as to money if the plaintiff is entitled to "the specific or identical moneys" collected by the defendant. *Garras v Bekiares*, 315 Mich 141, 147; 23 NW2d 239 (1946); *Warren Tool Co v Stephenson*, 11 Mich App 274, 299; 161 NW2d 133 (1968). In the present case, as Judge Gleicher noted, "[t]he lien amount was undefined, unmentioned, and amorphous rather than tangible." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 7). The divorce judgment did not mention the amount of money

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Defendant-Appellant owed in attorney fees, nor did anyone know what the sale value of the Escanaba property would be. (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 6). "No 'specific' sum of money was identified at all." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 6). Even a person who was aware of the lien would have no idea to what sum the lienholder would even be entitled. Under these circumstances, Michigan law holds that the unidentifiable sum to which the lienholder is entitled is not property that can be subject to conversion.

Even the cases from other states cited by Plaintiff-Appellee do not support Plaintiff-Appellee's position. In *Plummer v Day/Eisenberg, LLP*, 184 Cal App 4th 38, 50; 108 Cal Rptr 3d 455 (2010), the California Court recognized that to have conversion, the plaintiff needed to show there was a "specific sum capable of identification." This was not particularly difficult in that case, since the plaintiff attorney was entitled to 20% of the total recovery. *Id.* at 42, 43 n.2. In *Clark v Jones Gledhill Fuhrman Gourley, PA*, 163 Idaho 215, 223; 409 P3d 795 (2017), the Court required the attorney to foreclose on the lien and reduce it to a judgment after a determination of the reasonableness of the fees. These cases are consistent with the requirements of Michigan law, which were not met in the present case.

II. The "actual damages" sustained in this case were only the amount of proceeds to which Plaintiff-Appellee would have been entitled.

Defendant-Appellant does not dispute that the amount to be trebled in a statutory conversion case is the "actual damages" sustained. Plaintiff-Appellee, however, provides very little in the way of explanation as to how the full amount of Defendant-Appellant's debt to Plaintiff-Appellee is the "actual damages" sustained. If Defendant-Appellant had paid Plaintiff-

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Appellee in accordance with her lien, she would have received $39,109.08. Thus, $39,109.08 is the actual damages she sustained from not being paid out of the proceeds.

Plaintiff-Appellee does not explain how her determination of damages would avoid absurd results. Under her logic, if Defendant-Appellant had sold a couch she was awarded in the divorce for $100, she would have been liable for $153,296.04 because the lien arguably applied to the couch as well, and the amount the couch was worth is, according to Plaintiff-Appellee, irrelevant to the damages sustained. That would be ludicrous, however.

III. The mere fact that a tort differs from a contract claim does not mean that ethical limitations do not apply to bar Plaintiff-Appellee from using a lien with a client to obtain treble damages against that client.

Plaintiff-Appellee spends a significant portion of her third issue distinguishing between a tort claim and a contract claim. (Appellee's Supplemental Brief, pp. 18-22). Defendant-Appellant does not dispute that a tort claim and a contract claim are separate claims. But Plaintiff-Appellee does not cite a single case in which an attorney is allowed to use an attorney lien to obtain over three times the amount he or she is owed in attorney fees from a client.

The mere fact that a claim may exist against a client by law does not mean that the claim may be pursued ethically. Ordinarily, a person would be able to sue another person to collect an amount owed on a contract, but ethical limitations prevent attorneys from doing so even when a client has not paid. From the Michigan Bar Journal, "[a] lawyer should not sue a client to recover a fee unless necessary to prevent fraud or gross imposition by the client," and "[a] suit to recover fees in one matter does not lie while the lawyer still represents the client in unrelated matters." Proctor, *When the Client Doesn't Pay the Bill*, 68 Mich B J 856, 858 (1989). Thus, even where

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treble damages for conversion do lie, an attorney may still have an ethical obligation not to pursue them.

Plaintiff-Appellee's comparison to an assault and battery action is not apposite. The damages for an assault and battery—hospital bills, lost wages, pain and suffering—differ entirely from the fees owed to the attorney by the client. The damages for conversion, by contrast, stem directly from the amount owed in fees. If the fees were all paid, there would be no damages for conversion, as the only harm suffered by the attorney is that some portion of the fees that should have been paid by the lien goes unpaid. An attorney seeking a significantly greater amount of money from a client than the amount owed, based solely on the client's failure to pay that fee via a lien the attorney contracted with the client to obtain is unethical.

As explained in Defendant-Appellant's Supplemental Brief, there are ethical limitations both in regards to contracting with a client in a way that unfairly benefits the attorney and in collecting an unreasonable fee. Both are applicable here, where an attorney seeks to obtain over three times the amount of fees owed through a conversion lawsuit.

Plaintiff-Appellee argues that trebling of the fees owed is not unethical because there is a court rule that allows an award of double attorney fees for vexatious proceedings. (Appellee's Supplemental Brief, p. 22). Attorney ethics are not relevant to MCR 7.216(C) because the damages awarded by that rule are not awarded to an attorney and against a client. That court rule allows the other party to obtain double their attorney fees in damages from the party who initiated vexatious litigation. There is no ethical issue that arises in such a context.

Lastly, Plaintiff-Appellee claims that Defendant-Appellant raises an unpreserved issue through Defendant-Appellant's citation to MRPC 1.8. (Appellee's Supplemental Brief, p. 24). But

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Defendant-Appellant did not argue in her Supplemental Brief that the lien was invalid as a whole. Rather, she argued that if an attorney is going to seek treble damages from a client on the basis of a lien, that attorney has an ethical obligation to ensure the client understands that when the client agrees to the lien. If the attorney does not, then treble damages should not be permitted, regardless whether the lien was valid.

REQUEST FOR RELIEF

Defendant-Appellant Nicole Blume respectfully requests that this Court reverse the Court of Appeals.

February 25, 2022

Respectfully submitted,

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