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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.____
COA No. 348023

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

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DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on November 5, 2020. (11/05/20 COA Opinion). Nicole timely files this application for leave to appeal within 42 days. MCR 7.305(C)(2)(a). This Court has jurisdiction pursuant to MCR 7.303(B)(1).

DATE AND NATURE OF ORDER APPEALED, AND RELIEF SOUGHT

The Trial Court entered an order on October 10, 2018 granting summary disposition in favor of Peskin-Shepherd on her claims for common-law and statutory conversion against Appellant Nicole, based on Nicole's use of the proceeds of the sale of a real property that was subject to Peskin-Shepherd's lien. (10/10/18 Order). On January 7, 2019, the Trial Court further awarded treble damages and attorney fees for statutory conversion under MCL 600.2919a. (01/07/19 Order). Finally, on February 25, 2019, the Trial Court referenced damages for common-law and statutory conversion and imposed a constructive trust upon Appellant's current home in Rochester Hills to the extent of the damages for common-law and statutory conversion. (02/25/19 Order). Nicole asks that this Court vacate all three orders.

STATEMENT AS TO WHY THIS COURT SHOULD GRANT LEAVE TO APPEAL

The instant case resulted in an award of $367,482.21 to a divorce attorney, Peskin-Shepherd. The genesis of this award was a simple collection case against a former client, Nicole Blume, for an unpaid legal bill in the amount of $51,098.68. The dramatic difference between these two amounts demonstrates why statutory conversion is an action that only applies in limited circumstances, and not to all breaches of contract. Judge Gleicher indicated in her dissenting opinion that the majority's opinion is not consistent with current Michigan precedent, and any

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decision to depart from such precedent must be left solely to this Court. But the majority chose to disregard controlling precedent and impose treble damages for statutory conversion on the basis of a mere breach of contract.

There is no dispute that Nicole owes Peskin-Shepherd for attorney fees. The question posed by this appeal is whether a lien, or proceeds of a sale that are subject to a lien, may be converted by the owner of the property subject to the lien if the owner uses those proceeds without first paying the lienholder. More specifically, this case challenges whether such proceeds may be converted where the amount of the debt—and, thus, the portion of the proceeds to which the lienholder is entitled—has not even yet been ascertained.

The Court of Appeals concluded, contrary to Michigan precedent, that the *lien* was the personal property that was converted in this case. It would have been more appropriate, however, for the Court to analyze whether the *proceeds* of the sale were converted, as those were the only thing arguably converted to Nicole's own use.

With regards to those proceeds, Judge Gleicher in her dissenting opinion, nonetheless, would have held that such proceeds could not be the subject of a conversion action where Peskin-Shepherd was not entitled to specifically identifiable monies. This is consistent with numerous Michigan authorities. Michigan precedent, likewise, suggests that a lienholder has no ownership interest in proceeds of a sale such that they may be converted. Due to the significant disagreement and lack of clarity as to how conversion may apply to a situation involving a lien, this Court should grant leave to appeal to clarify the subject. MCR 7.305(B)(3).

This case is jurisprudentially significant because it opens the door for statutory conversion claims and treble damages and attorney fees in a wide variety of contexts. The Trial Court and Court of Appeals' decisions essentially make lien language in a judgment of divorce a "super

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lien"—allowing it to trump other mechanisms of security even when the lien amount has not even been set, and even when the lienholder has not recorded the lien. In fact, because the divorce judgment lien in this case was against the Escanaba property and other assets, it appears that the Trial Court could hold Nicole (and other similarly situated debtors) liable for conversion for selling a car, clothes, or furniture, or doing any of the things that normally occur in a family's life when a party to a divorce must establish a new household and life. And this "superlien" can, according to this decision, form the basis for statutory conversion even though it was never recorded with the register of deeds, and in the case of certain personal property, even though a UCC Financing Statement was never filed. The "superlien" enforced by these courts allows the judgment creditor to avoid all the normal steps to reduce the debt to a sum certain and then secure that debt, including collecting against personal property before resorting to real property, simply because the "superlien" was included in the divorce judgment, which judgment also was not filed with the register of deeds. Then the courts amplify this "superlien" problem by allowing treble damages and attorney fees against the debtor. All of this occurs from a simple breach of contract.

Moreover, even if conversion applies in this case, the Court of Appeals set a dangerous precedent when it affirmed the Trial Court's miscalculation of damages. The Court of Appeals allowed an award of triple the underlying debt, rather than triple the proceeds that were allegedly converted. Such a damage calculation could lead to absurd results in a situation where there is an even greater disparity between the amount of debt and the value of the proceeds. This Court should grant leave to clarify this confusing area of law and correct this egregious miscalculation, MCR 7.305(B)(5)(a).

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STATEMENT OF QUESTIONS PRESENTED

I. Should this Court grant leave to appeal where the Court of Appeals significantly expanded the definition of "personal property" in the context of conversion, contrary to Michigan precedent, because (1) a lien is not personal property and cannot be converted to another's use; (2) the proceeds from a sale that were not specifically identified cannot be the subject of conversion; and (3) a lienholder has no ownership interest in the proceeds of a sale of the property?

Defendant-Appellants answer:	Yes
Plaintiff-Appellee answers:	No
The Trial Court answers:	No

II. Should this Court grant leave to appeal where the Trial Court egregiously miscalculated damages for Peskin-Shepherd's conversion claims (statutory and common-law) by trebling the amount of the underlying debt between Nicole and Peskin-Shepherd rather than the amount of the proceeds from the sale of the Escanaba property?

Defendant-Appellants answer:	Yes
Plaintiff-Appellee answers:	No
The Trial Court answers:	No

STATEMENT OF FACTS

Background

This appeal concerns the common law and statutory conversion claims brought against Appellant Nicole Blume by her former attorney Alisa Peskin-Shepherd. Nicole and Peskin-Shepherd entered into a retainer agreement on September 23, 2009, under which Peskin-Shepherd would represent Nicole in her divorce proceedings. Pursuant to the agreement, Nicole was to provide Peskin-Shepherd with a lien on any sum recovered by way of settlement, judgment, or otherwise as security for the payment of any fees, costs, or expenses unpaid at the time of receipt of such settlement, judgment, or other recovery.[1]

[1] 9/23/09 Retainer Agreement, p. 2; 12/10/18 T, p. 34.

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The divorce proceedings ended on September 23, 2010. As part of the Judgment, Nicole was awarded the Escanaba property, among other things.[2] Nicole's Consent Judgment of Divorce also contained language allowing Peskin-Shepherd to retain her lien on assets awarded to Nicole:

> [T]hat except as noted above each party shall assume and pay his/her attorney fees and costs in this matter and each party shall indemnify and hold the other party harmless from them. Plaintiff's attorney, ALISA A. PESKIN-SHEPHERD, shall retain a lien on the assets awarded to Plaintiff, NICOLE M. KNUFF, including Plaintiff's interest in the Escanaba property, to insure (sic) payment of attorney fees.[3]

It is that lien that ultimately led to the conversion claims at issue in this appeal.

During the divorce proceedings, Nicole purchased a property in Rochester Hills, where she then began residing. Nicole married Sean Blume, her co-defendant-appellant on August 2, 2014.

Nicole's Outstanding Attorney Fees

During the course of the litigation, Peskin-Shepherd claimed attorney fees of $67,509.68.[4] According to Peskin-Shepherd's records, Nicole made payments of $15,911 toward this amount.[5] Nicole's ex-husband was responsible, under the terms of the Judgment of Divorce, for an additional $500 of Peskin-Shepherd's attorney fees.[6] Peskin-Shepherd testified that the payment of fees was an ongoing discussion throughout the case and there were times that she was going to withdraw because she knew that Nicole could not afford to pay her.[7] However, Nicole and Peskin-

[2] 9/23/10 Consent Judgment of Divorce.
[3] 9/23/10 Consent Judgment of Divorce, pp. 24-25.
[4] Detail Transaction File List; 8/3/18 Pl's Rev 2nd MSD, Peskin-Shepherd Affidavit.
[5] Detail Transaction File List; 8/3/18 Pl's Rev 2nd MSD, Peskin-Shepherd Affidavit. $10,000 of this amount was paid by Nicole and her former spouse during the pendency of the divorce action and another $5,911 was paid by Nicole post-divorce. *Id.*
[6] 9/23/10 Consent Judgment of Divorce.
[7] 12/10/18 T, p. 45.

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Shepherd believed a significant amount of the fees might ultimately be paid by Nicole's ex-husband under the divorce statute and court rules, MCL 552.13 and MCR 3.206(D).

Nicole is independently employed as a hairstylist and typically makes between $15,000 and $25,000 annually.[8] Peskin-Shepherd allowed Nicole to make monthly payments of $100.00 toward her balance.[9] Peskin-Shepherd's billing records confirm that she routinely made these payments until March 2013.[10] On February 14, 2011, Nicole expressed her appreciation for Peskin-Shepherd's services and lamented that she could not afford to pay her:

> . . . I appreciate, so much, all you have done and still do, to help Julia and I. . . . I really am so grateful to you . . . I really do wish I could just write you one check and pay my balance in full . . . I know that you could have dropped my case anytime, knowing it was costing more than I could afford. . . .

Peskin-Shepherd's records show that Nicole stopped making payments in March 2013 and, at that time, Nicole's claimed outstanding balance owed to Peskin-Shepherd was $51,098.68.[11] In an email from Ana, Peskin-Shepherd's assistant, to Nicole on June 28, 2011, Ana told Nicole that she could keep paying the $100 per month, and they would not charge her interest:

> Then [Peskin-Shepherd's] note to me said: Just tell her to keep paying the $100.00 – but when she wins the lottery . . . or marries rich . . . HaHa . . . you know the rest. So all is okay with the $100.00 per month and no accrual of interest. (that's between you and me). I'm deleting this email as you should too! Later![12]

[8] 9/1/16 Def's Answer, affidavit of Nicole Blume, p. 1.
[9] 8/3/18 Pl's Rev 2nd MSD, Peskin-Shepherd Affidavit.
[10] Peskin-Shepherd's Statements; Detail Transaction File List.
[11] 8/3/18 Pl's Rev 2nd MSD, p. 5. This total takes into account the $500 owed by Nicole's former spouse for Peskin-Shepherd's fees per the JOD.
[12] 6/28/11 Email from Peskin-Shepherd's Office.

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Nicole testified that she expected to have to pay a reasonable amount for Peskin-Shepherd's legal services but she did not agree with the balance.[13] Regardless, Nicole sold off her jewelry, remitted her tax refunds, and maxed out her credit cards to pay Peskin-Shepherd.[14]

Nicole stops making payments, and execution of a lien is mentioned

Nicole stopped making payments to Peskin-Shepherd because Peskin-Shepherd had emailed her about a potential settlement, she was still involved in post-judgment litigation and had to pay current attorneys, and she had a lot of bills that needed to be taken care of.[15] On April 30, 2013, Peskin-Shepherd sent the following email to Nicole, attaching a draft recordable lien for the Escanaba property:

> I appreciate your efforts to pay your outstanding bill. I would like to discuss with you a significant compromise to the amount owed if you are able to make lump sum payments . . . . In the meantime, I am attaching an attorney lien for the property in Escanaba. I ask that you please execute it in front of a notary who can witness your signature and send it back to me for filing. I will discharge the lien upon settlement of your bill.[16] [4/30/13 Peskin-Shepherd Email.]

Nicole responded that she was interested in settlement and Peskin-Shepherd never got back to her with further negotiations.[17] Nicole understood the attorney fee provision of her Judgment of Divorce not to grant Peskin-Shepherd a lien but to allow Peskin-Shepherd to get a lien if Nicole defaulted on her payment obligations.[18] Nicole did not understand why she would sign a lien if the parties were talking about settlement and never actually opened the lien attachment to the email.[19]

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[13] 2/9/17 Nicole Blume Dep T, pp. 33, 52, 64, 98.
[14] 2/9/17 Nicole Blume Dep T, pp. 64, 65.
[15] 2/9/17 Nicole Blume Dep T, pp. 74, 76.
[16] 4/30/13 Peskin-Shepherd Email.
[17] 2/9/17 Nicole Blume Dep T, p. 134.
[18] 2/9/17 Nicole Blume Dep T, pp. 96, 106.
[19] 2/9/17 Nicole Blume Dep T, pp. 130, 140.

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The sale of the Escanaba property

In May 2014, Nicole sold the Escanaba property to a third party and obtained proceeds of $39,109.08, which were deposited in her bank.[20] She did not tell Peskin-Shepherd about the sale and did not disclose the lien to the title company.[21] Nicole testified that she did not have knowledge of Peskin-Shepherd's lien at the time of the sale, only that Peskin-Shepherd had the ability to obtain a lien if she went through the right steps, and that no lien was discovered by the title company.[22] Nicole used these funds to pay off her automobile loan on her Jeep[23] through the same bank and used the remainder to pay off credit cards.[24] She did admit that some of her other lawyers' fees may have been part of the overall credit card debt.[25]

On October 13, 2015, Peskin-Shepherd, through counsel, sent a demand letter to Nicole attempting to collect a purported $56,566.25 debt.[26] Nicole's counsel, Loren Mannino, sent a response to Peskin-Shepherd's demand letter indicating that Nicole had several objections to the amount sought in attorney fees and that the fees were subject to an assessment for appropriateness.[27] On October 29, 2015, Nicole quitclaimed the Rochester Hills property from herself to her and Sean, as husband and wife.

[20] 12/11/18 T, pp. 40-41; 2/9/17 Nicole Blume Dep T, p. 128; 5/22/14 Check.
[21] 12/11/18 T, pp. 32, 34, 37.
[22] 2/9/17 Nicole Blume Dep T, pp. 107, 109, 112.
[23] Nicole's Jeep is a 2005 model year and she considers it a "beater" car that was bought for her by a women's organization for poor people. 2/9/17 Nicole Blume's Dep T, p. 206.
[24] 12/11/18 T, pp. 41-42; 2/9/17 Nicole Blume Dep T, pp. 125-26.
[25] 12/11/18 T, p. 42.
[26] 10/13/15 Demand Letter.
[27] 10/28/15 Response to Demand Letter.

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Peskin-Shepherd files suit and the Blumes declare bankruptcy

Peskin-Shepherd filed suit against Nicole on August 15, 2016 for claims of account stated, breach of contract, breach of implied contract, quantum meruit and unjust enrichment, and promissory estoppel.[28] The case was stayed on July 3, 2017 after Nicole and her husband, Sean Blume, filed for Chapter 13 bankruptcy protection in June 2017.[29] That stay was then lifted on November 21, 2017 after the bankruptcy court modified its automatic stay to permit the continuation of the instant case, including any appeals.[30] However, the instant case remained stayed in the trial court until July 18, 2018 under the trial court's order.[31]

Peskin-Shepherd was granted leave to amend her complaint on three occasions, culminating in Peskin-Shepherd's third amended complaint on July 23, 2018.[32] The complaint asserted claims against Nicole, solely, for account stated and breach of contract; against Nicole and Sean for fraudulent transfer (MCL 566.34), constructive fraud (MCL 566.35), conspiracy/aiding and abetting creditor fraud, common-law conversion, and statutory conversion (MCL 600.2919a); and against Sean, solely, for tortious interference with a contract or expectancy.[33]

On January 6, 2017, Peskin-Shepherd also initiated a motion to show cause in the divorce action for Nicole transferring assets in avoidance of, and subject to, an attorney's lien in violation

[28] The trial court's November 10, 2016 order dismissed Peskin-Shepherd's claims for implied contract, quantum meruit, and unjust enrichment. 11/10/16 TCT Opinion and Order.
[29] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion); ROA.
[30] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion).
[31] The stay order was entered on November 22, 2017 and continued by orders dated November 29, 2017; December 20, 2017; and April 17, 2018. The facilitator assigned to the case continued to work toward settlement with the parties, but ultimately, those efforts were unsuccessful.
[32] 7/23/18 Third Amended Complaint.
[33] 7/23/18 Third Amended Complaint.

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of the Judgment of Divorce.[34] Oral argument was presented on January 18, 2017 to discuss the validity of the lien. The divorce court found that Peskin-Shepherd's lien attached to the Escanaba property and there was no case law dictating that the lien must be recorded with the register of deeds in order for it to attach.[35] The divorce court also held that Nicole violated the Judgment of Divorce by selling the Escanaba property, to which Peskin-Shepherd's lien attached, but that there was a question of fact as to whether Nicole obtained any proceeds from the sale and the reasonableness and appropriateness of Peskin-Shepherd's bill.[36]

On August 3, 2018, Peskin-Shepherd moved for summary disposition on her claims for breach of contract and conversion.[37] Peskin-Shepherd sought $79,214.88 against Nicole for the breach of contract claim ($51,098.68 in principal and $28,116.20 in interest through 8/3/18); and treble damages for the conversion of the Escanaba property's proceeds in the amount of $117,327.24, amongst other relief.[38] Peskin-Shepherd argued that Nicole sold the Escanaba property on May 23, 2014, received $39,109.08 - the full amount of the proceeds, and used the proceeds to pay off personal debt.[39] Specifically, Peskin-Shepherd argued:

> As a matter of law, Nicole is liable for common law, as well as statutory conversion of those proceeds. Pursuant to MCL §600.2919a, Peskin-Shepherd is entitled to "3 times the amount of actual damages sustained" – 3 times the $39,109.08 proceeds converted by Nicole – totaling **$117,327.24** - - plus costs and reasonable attorney fees. (Emphasis in original). [8/3/18 Pl's Rev 2nd MSD, p. 20.]

[34] 3/9/17 McDonald Opinion and Order.
[35] 3/9/17 McDonald Opinion and Order.
[36] 3/9/17 McDonald Opinion and Order. The divorce court contemplated that after the resolution of the instant case, the reasonableness and appropriateness of Peskin-Shepherd's fees would no longer be at issue. *Id*. at 7.
[37] 8/3/18 Pl's Rev 2nd MSD.
[38] 8/3/18 Pl's Rev 2nd MSD, p. 20.
[39] 8/3/18 Pl's Rev 2nd MSD, pp. 5-6.

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Nicole responded by arguing that Peskin-Shepherd was using alternative breach of contract theories on summary disposition to avoid a hearing on the reasonableness of Peskin-Shepherd's fees.[40] Nicole argued that she had presented testimonial evidence through affidavit and depositions that she did not receive regular invoices from Peskin-Shepherd during the divorce case and that she believes she was overcharged and wished to have the trial court determine the reasonableness of Peskin-Shepherd's fees.[41] In terms of the conversion claims, Nicole argued that conversion is inapplicable to the lien on the Escanaba property because it is real property, not personal property, and, even if the proceeds are personal property, there is no conversion because Nicole was not entrusted with a specific sum of money with a corresponding obligation to deliver that specific money to Peskin-Shepherd.[42] Nicole also argued that Peskin-Shepherd never reduced her claim to a sum certain by obtaining a timely judgment for her fees or by claiming entitlement to a specific amount in a lien filed with the Register of Deeds.[43]

The trial court's orders

On October 10, 2018, the trial court issued an opinion and order regarding Peskin-Shepherd's motion for summary disposition for her breach of contract and conversion claims.[44] The trial court dispensed with oral argument under MCR 2.119(E)(3).[45]

The trial court held that summary disposition under MCR 2.116(C)(10) was proper as to Peskin-Shepherd's claim for breach of contract against Nicole.[46] The trial court also held that

[40] 9/7/18 Def's Resp to Pl's Rev 2nd MSD, p. 13.
[41] 9/7/18 Def's Resp to Pl's Rev 2nd MSD, p. 7.
[42] 9/7/18 Def's Resp to Pl's Rev 2nd MSD, pp. 15-16.
[43] 9/7/18 Def's Resp to Pl's Rev 2nd MSD, p. 17.
[44] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion).
[45] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 5.
[46] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 4.

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Peskin-Shepherd was entitled to summary disposition, under MCR 2.116(C)(10), regarding her claims for common-law and statutory conversion against Nicole in connection with Nicole's use of the proceeds from the Escanaba property's sale in violation of Peskin-Shepherd's lien rights.[47] The trial court reserved the issue of treble damages under MCL 600.2919a for trial because it is a discretionary remedy and the parties had failed to muster sufficient evidence or authority to warrant dispositive relief, given that the remedy is a fact issue.[48]

Peskin-Shepherd's argument for summary disposition was limited to the attorney lien on the Escanaba property.[49] Peskin-Shepherd argued that there was no genuine issue of material fact that Nicole and Sean converted the attorney lien agreed to under the Judgment of Divorce.[50] The trial court found no genuine issue of material fact that Nicole's conduct constituted both common-law and statutory conversion.[51] The trial court held, using non-binding authority, that an attorney's lien is a property interest that can be converted when a client disburses proceeds subject to the lien inconsistent with the attorney's lien rights.[52] The trial court found that Nicole disbursed the proceeds she received from the sale of the Escanaba property in a manner inconsistent with Peskin-Shepherd's lien and that such conduct was for her own use.[53] The trial court, acknowledging that a factfinder has discretion to award treble damages for statutory conversion, reserved its ruling on the issue for after trial.[54]

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[47] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 4.
[48] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), pp. 4-5.
[49] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 18.
[50] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 18.
[51] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 20.
[52] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 20 citing *In re Stollman*, 404 BR 244, 263-65 (ED Mich, 2009).
[53] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 23.
[54] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 24.

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Despite finding liability for both common-law and statutory conversion against Nicole, the trial court declined to grant summary disposition on these claims to Peskin-Shepherd against Sean.[55] The trial court noted that the evidence did not support any inference that Sean received any of the proceeds from the sale of the Escanaba property.[56] The trial court found, viewing the evidence in the light most favorable to Sean, that he denied providing legal advice to Nicole regarding Peskin-Shepherd's attorney lien at the time of the Escanaba property's closing.[57]

The trial court's December 2018 hearing

The trial court conducted a 3-day hearing, primarily on the issue of treble damages. Sean testified that Peskin-Shepherd's debt of approximately $50,000 was more than the couple made in a year.[58] Peskin-Shepherd testified that Nicole agreed to give Peskin-Shepherd a lien on the Escanaba property because that was the only piece of property that Nicole owned.[59] Nicole assured Peskin-Shepherd that she was going to pay and started making payments of $100 per month.[60]

At the time of the Escanaba property's sale, Nicole was a single-mom earning $14,000 per year as a hairstylist and had sold everything she owned of value.[61] Nicole had sold off her jewelry

[55] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 25.
[56] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 26.
[57] 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 26. Rather, Sean testified that the discussion of attorney liens at the time of closing revolved around Evelyn Redmond's lien, which was dismissed by her attorney. The trial court noted that there was a genuine issue of material fact as to Sean's liability for statutory and common-law conversion. 10/10/18 TCT Opinion and Order (Breach of Contract & Conversion), p. 27.
[58] 12/13/18 T, p. 43. When Sean had first met Nicole, he had just gotten out of a relationship with a partner who ran up a substantial credit card debt and could afford to keep his car and business running but was living hand-to-mouth. 12/13/18 T, p. 63.
[59] 12/10/18 T, p. 47.
[60] 12/10/18 T, pp. 46, 63; 12/11/18 T, p. 13.
[61] 12/11/18 T, p. 34, 75. As a hairstylist, Nicole also had to pay for the cost of her products, rent the space she occupied in the salon, and the costs of her tools for work. 12/11/18 T, p. 105.

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and given up her tax returns in an effort to pay Peskin-Shepherd because that was always Nicole's intention.[62]

Around the time of the Escanaba property's sale, Nicole's former counsel, Evelyn Redmond, had filed a lien on the Escanaba property for payment of attorney fees.[63] Nicole had to file an action to remove Redmond's lien because Nicole was trying to sell the Escanaba property.[64] Nicole was aware that a recorded lien on the Escanaba property could have prevented the sale.[65] However, Nicole believed the language in her JUDGMENT OF DIVORCE to mean that Peskin-Shepherd could go to court to obtain a lien on the Escanaba property if Nicole was not making payments as agreed.[66] At the time of the Escanaba property's sale, Nicole was not making payments to Peskin-Shepherd.[67] She did not, however, think Peskin-Shepherd could put a lien on the Escanaba property without going to court.[68] Peskin-Shepherd testified that Nicole knew that when the Escanaba property sold, that the proceeds would go to Peskin-Shepherd.[69]

According to Peskin-Shepherd, Nicole's last payment was in March 2013.[70] On April 30, 2013, Peskin-Shepherd sent an email to Nicole expressing an interest in settling the debt, given

[62] 12/11/18 T, pp. 130-31.
[63] 12/11/18 T, p. 19. Nicole testified that she met Redmond at a Legal Aid Clinic and that Redmond agreed to represent her pro bono and, so learning of Redmond's lien was a surprise. 12/11/18 T, p. 21. By way of context, Redmond, in a post-judgment custody hearing transcribed an oral ruling from the court incorrectly and this error allowed Nicole's former spouse to manipulate parenting time so that she would never have a day off with her daughter. 12/11/18 T, p. 91. This resulted in the necessity of retaining legal counsel for the parenting time issues. 12/11/18 T, pp. 94-95.
[64] 12/11/18 T, p. 22.
[65] 12/11/18 T, p. 38.
[66] 12/11/18 T, pp. 7-8, 11.
[67] 12/11/18 T, p. 29.
[68] 12/11/18 T, p. 8.
[69] 12/10/18 T, p. 47.
[70] 12/10/18 T, p. 64.

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that Nicole had been pretty consistent in making her $100 per month payments from 2011-2012.[71] The April 30, 2013 email read, in pertinent part:

> I appreciate your efforts to pay your outstanding bill. I would like to discuss with you a significant compromise to the amount owed if you are able to make lump sum payments. Is there a possibility that you can do this? In the meant (sic) time, I am attaching an attorney lien for the property in Escanaba. I ask that you please execute it in front of a notary who can witness your signature and send it back to me for filing. I will discharge the lien upon settlement of your bill. [8/3/18 Pl's Rev 3rd MSD, Exhibit 5, 4/30/13 Email].

Nicole did receive Peskin-Shepherd's April 30, 2013 email but did not open the attachment containing the draft lien for recording because Peskin-Shepherd indicated that she was willing to settle and Nicole thought that signing the lien would be something she would do if she was not in a place to settle.[72] Nicole hoped to negotiate a lower payment amount with Peskin-Shepherd and did not know, at the time she sold the Escanaba property, that she was converting a legal interest and would not have done so if she had known.[73] Nicole sent a response email on May 5, 2013 that expressed a desire to hear Peskin-Shepherd's ideas on the compromise, the proposed payment amount, and reiterating that Nicole would love to find a way to settle the debt.[74] Sean testified that he believed Nicole was waiting to hear from Peskin-Shepherd regarding a negotiated settlement to the debt because Nicole felt that there was some overcharging present.[75] Sean stated that, if Peskin-Shepherd had responded back to Nicole about her willingness to negotiate the debt down, Nicole would have negotiated with her.[76]

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[71] 12/10/18 T, pp. 64-65.
[72] 12/11/18 T, pp. 23-24, 34.
[73] 12/11/18 T, p. 85.
[74] 12/10/18 T, pp. 101-02.
[75] 12/13/18 T, p. 64.
[76] 12/13/18 T, p. 70.

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Nicole closed on the Escanaba property in May 2014 herself with some help from a real estate agent friend.[77] Sean did not help Nicole prepare for the closing nor did he receive any funds as a result of the sale.[78] Nicole decided to pay other bills with the proceeds from the sale given that she was still waiting to hear back from Peskin-Shepherd regarding settlement.[79] The proceeds were deposited in Nicole's bank account and totaled $39,109.08.[80] The proceeds were used to pay off Nicole's auto loan for her Jeep with the remainder being spent to pay down credit cards.[81] The credit cards were 23 or 26 percent interest rates and Nicole's intention was to relieve herself of higher interest debt to focus on Peskin-Shepherd's debt.[82] Peskin-Shepherd believes that Nicole avoided paying her debt by selling the Escanaba property without telling her and using the funds to pay others.[83]

The trial court's findings of fact, conclusions of law, and order

The trial court issued a written opinion and order memorializing its findings of fact and conclusions of law on January 7, 2019.[84] The trial court awarded treble damages to Peskin-Shepherd, finding that Nicole sold the Escanaba property without notice to Peskin-Shepherd, used

[77] 12/11/18 T, p. 27.
[78] 12/13/18 T, pp. 27-28.
[79] 12/11/18 T, p. 32. Nicole testified that she wanted to settle the debt but did not hear from Peskin-Shepherd regarding a settlement, so she paid off the other debt to put herself in a better financial position. 12/11/18 T, p. 43.
[80] 12/11/18 T, p. 40-41.
[81] 12/11/18 T, p. 42. Nicole did not give any proceeds to Sean, nor did he advise her regarding the property's sale. 12/11/18 T, pp. 42, 102, 109. Nicole estimated her Jeep's value to be between $5,000 and $6,000. 12/11/18 T, p. 63.
[82] 12/11/18 T, pp. 106, 115.
[83] 12/10/18 T, p. 74.
[84] 1/7/19 TCT Opinion and Order.

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the proceeds for her own purposes, and purposefully intended to deprive Peskin-Shepherd of her legal rights.[85]

The trial court found that Nicole purposefully sold the Escanaba property without informing Peskin-Shepherd or the title company with the hope that she would benefit directly from such conversion and deprive Peskin-Shepherd of the lien, leaving her with no recourse to secure the $51,098.68 debt still owed.[86] The trial court found that Nicole used the proceeds from the sale to pay down unsecured interest-bearing debt.[87] The trial court found that Nicole engaged in actual fraud, under MCL 566.34, when she transferred the Escanaba property as well.[88]

The trial court found that because the conversions were motivated by Nicole's actual and constructive fraud, treble damages were appropriate, and Nicole was also found liable for attorney fees and costs as a result.[89]

The trial court's aggregate February 25, 2019 judgment

The trial court, in accordance with its October 29, 2018 partial judgment against Nicole for breach of contract; its January 7, 2019 order holding Nicole liable for constructive and actual fraud, granting treble damages, voiding the fraudulent transfer of the Rochester Hills property (not relevant to this appeal), and granting an equitable lien against that property; and its February 5, 2019 order granting Peskin-Shepherd's costs and attorney fees, entered an aggregate judgment on February 25, 2019.[90] That judgment, in Peskin-Shepherd's favor, granted the following relief:

[85] 1/7/19 TCT Opinion and Order, p. 1.
[86] 1/7/19 TCT Opinion and Order, p. 4.
[87] 1/7/19 TCT Opinion and Order, pp. 4-5.
[88] 1/7/19 TCT Opinion and Order, p. 8.
[89] 1/7/19 TCT Opinion and Order, p. 13.
[90] 2/25/19 Judgment.

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- $81,098.38 for breach of contract award with interest accruing at the contractual rate of 7% until satisfied.

- $153,296.04 for treble damages under MCL 600.2919a which is the amount of the underlying debt trebled with interest accruing at the statutory rate under MCL 600.6013(8) until satisfied.

- $133,087.79 in attorney fees and costs with interest accruing at the statutory rate under MCL 600.6013(8) until satisfied.

- The transfer of the Rochester Hills property by quitclaim deed from Nicole to Nicole and Sean as husband and wife, dated 10/29/15, was voided.

- An equitable lien was imposed upon the Rochester Hills property for the full amount of the judgment, $367,482.21. [2/25/19 Judgment.]

The Court of Appeals' Decision

Nicole appealed the Trial Court's decision regarding conversion and contractual interest on the owed attorney fees. On November 5, 2020, the Court of Appeals reversed as to the contractual interest, but affirmed as to the conversion issues. (11/05/20 COA Opinion). The majority held that a lien is personal property that may be converted, and that the value of the lien (and thus the damages) was the amount of underlying debt, rather than the actual amount of proceeds that were used by Nicole for other purposes. (11/05/20 COA Opinion). Judge Gleicher dissented, disagreeing that the lien or the proceeds were personal property that could be subject to conversion, and also concluding that if conversion did occur, it was the amount of proceeds that should have been awarded as damages, not the full amount of the underlying debt. (11/05/20 COA Opinion, Gleicher, J., dissenting).

This application followed.

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ARGUMENT

I. The trial court erred in granting summary disposition on Peskin-Shepherd's claims for common-law and statutory conversion where (1) Peskin-Shepherd's lien was not personal property subject to conversion and was not converted to Nicole's use; (2) the proceeds from the sale to which Peskin-Shepherd was allegedly entitled were not specifically identified and thus could not be the subject of conversion; and (3) Peskin-Shepherd had no ownership interest in the proceeds.

Standard of Review. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits and other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to a judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016) citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A trial court's grant of summary disposition is reviewed de novo. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016).

The trial court erred in granting Peskin-Shepherd's motion for summary disposition on her claims for common-law and statutory conversion and by subsequently awarding Peskin-Shepherd treble damages and attorney fees as a result. Although Nicole is liable for her debt to Peskin-Shepherd under a breach of contract theory, that does not mean she is liable for conversion. Rather, where a lien exists with respect to a property, the proceeds of the sale of that property at best may be converted only if the specific monies to which the lienholder is entitled are identified. This is well established under Michigan law, and the Court of Appeals departed from such precedent when it decided this case.

Treble damages as a remedy for statutory conversion are meant to have a deterrent effect, to prevent others from unlawfully taking another's property. But the context of a lien is very different from most circumstances in which conversion occurs. There is already a method by which

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lienholders may protect themselves—recording the lien. Nicole's use of the proceeds that were subject to a lien was wrong, and she owes Peskin-Shepherd for the attorney fees unpaid, but the entire situation could have been avoided if Peskin-Shepherd recorded the lien to protect herself, as Attorney Redmond had. This Court should not allow statutory conversion to be used for this purpose.

Conversion—whether common law or statutory—consists of "any distinct act of domain wrongfully exerted over *another's personal property* in denial of or inconsistent with the rights therein." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 351-352; 871 NW2d 136 (2015). Statutory conversion has the additional requirement that the property be converted to the converter's "own use." *Id.* at 354-357. Conversion is generally "viewed as an intentional tort in the sense that the converter's actions are willful, although the tort can be committed unwittingly if unaware of the plaintiff's outstanding property interest." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

There is some disagreement in the Court of Appeals' opinions in this case as to whether the "property" potentially subject to conversion is the lien itself or the proceeds of the sale of the Escanaba property. The majority appeared to hold it was the lien itself, while the dissent focused on whether the proceeds of the sale of the property were converted. Neither satisfies the law applicable to conversion actions.

Moreover, "a person can[not] 'convert' his own property." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Michigan case law establishes that Peskin-Shepherd had no ownership interest in the proceeds of the sale of the Escanaba property. Thus, no conversion could occur.

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A. The Court of Appeals defied decades of precedent when it determined that a lien could be subject to conversion—especially statutory conversion—and this Court must clarify the law.

The Court of Appeals majority concluded that it was the lien itself that was converted. For example, it begins by considering whether a lien is personal property. (11/05/20 COA Opinion, p. 4). The Court later confirms that, in its view, "the 'personal property' that was converted was plaintiff's lien." (11/05/20 COA Opinion, p. 6). This becomes especially important when the Court is calculating the amount of damages. The Court of Appeals determined that because it was the lien that was converted, the damages are the full amount of the debt, rather than the amount of the proceeds of the sale of the Escanaba property. (11/05/20 COA Opinion, pp. 9-10).

The authorities the Court of Appeals relies upon for its decision do not support that a lien may be converted, however. In *Stewart v Young*, 247 Mich 451, 455; 226 NW 222 (1929), this Court held that the **proceeds** of a sale of real estate are personal property. The case had nothing to do with a lien. *Garras v Bekiares*, 315 Mich 141; 23 NW2d 239 (1946), similarly concerned whether money could be the subject of an action for conversion. In *Warren Tool Co v Stephenson*, 11 Mich App 274, 298-300; 161 NW2d 133 (1968), the Court focused on whether a check had been converted, or a "fund," or "moneys." Although an equitable lien existed in the case, the Court indicated that it would be the fund on which the lien was asserted that would be converted. *Id.* at 299. *Dunn v Bennett*, 303 Mich App 767, 778; 846 NW2d 75 (2014), likewise, determined that the funds subject to a lien might be subject to a conversion action, noting that "[m]oney is treated as personal property, and an action may lie in conversion of money provided that 'there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified.'"

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The majority also cites a non-binding bankruptcy case, *In re Stollman*, 404 BR 244, 264-265 (Bankr ED Mich, 2009), in which a federal bankruptcy court concluded that a lien was a property interest and could be converted. The bankruptcy court acknowledged, however, that the proceeds were purely the debtor's property. *Id.* at 263. The bankruptcy court's non-binding decision is inconsistent with binding Michigan precedents.

Under Michigan law, "[a] lien is not a property right in, or right to, the thing itself, but constitutes a charge or security interest." *Aetna Cas & Surety Co v Starkey*, 116 Mich App 640, 645; 323 NW2d 325 (1982) overruled on other grounds, *Garcia v Farmers Ins Exchange, et al*, 226 Mich App 254; 573 NW2d 627 (1998). All of the controlling authority cited by the Court of Appeals analyzes whether the money that is subject to a lien has been converted, not whether the lien itself has been converted.

Indeed, in *Foremost*, a case in which real property subject to a lien was destroyed rather than sold, this Court held that there was no conversion. *Foremost Ins Co v Allstate Ins Co*, 439 Mich. 378; 486 NW2d 600 (1992). An individual in that case used his motor home to secure a note with the State Employees Credit Union. *Id.* at 381-382. He ultimately destroyed that motor home in an attempt to collect insurance benefits on it. *Id.* at 382. This Court held that the individual's intentional destruction of his motor home, on which the State Employees Credit Union had a lien, could not be considered conversion because "a person can[not] 'convert' his own property." *Id.* at 391.

Moreover, statutory conversion "requires a showing that the defendant employed the converted property for some purpose personal to the defendant's interests." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 340; 871 NW2d 136 (2015). Although the use need not be "the object's ordinarily intended purpose," the defendant still must use the property

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for some purpose. *Id.* For example, this Court and the Court of Appeals have held that using wine as leverage to force the plaintiff to pay, or moving the wine to use the storage area for some other benefit, may be considered converting the wine to the defendant's own use. *Aroma Wines & Equip, Inc v Columbia Distr Servs*, Inc, 303 Mich App 441, 448-449; 844 NW2d 727 (2013), aff'd by *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 360-361; 871 NW2d 136 (2015).

Here, however, the lien was never "used" by Nicole. In *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337; 871 NW2d 136 (2015), this Court explained how common law conversion evolved, which is relevant to whether a lien may be statutorily converted. For example, originally, conversion was called trover, and was actionable only when the property "was 'lost to the true owner' in perpetuity." *Id.* at 349. It required that the defendant convert the property "to his own use," which meant that the property needed to be disposed of such that "neither owner nor wrongdoer had any further possession of them." *Id.* Over time, conversion was expanded to include "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Id.* at 351-352. However, statutory conversion applies only to the subset of common law conversion in which the defendant converts the property to his or her own use. *Id.* at 354-355.

Nicole has not converted the lien to her own use. The lien was not tied solely to the Escanaba property, but to "the assets awarded to Plaintiff, NICOLE M. KNUFF, including Plaintiff's interest in the Escanaba property." (09/22/10 Consent JOD, pp. 24-25). The lien continues to exist, and exists solely for Peskin-Shepherd's benefit. It attaches to all assets awarded to Nicole in her divorce, not simply the Escanaba property. Notably, even *Stollman,* the bankruptcy case described above, did not find a *statutory* conversion of a lien. It found conversion of a lien

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under the broader common law rule. Pursuant to overwhelming Michigan authority, there was no statutory conversion of the lien in this case.

As Judge Gleicher explained in her dissenting opinion, even if conversion occurred in this case, "the majority has misperceived the nature of the 'property' converted." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 1). Judge Gleicher argued that an unrecorded lien that has not been reduced to actual numbers cannot be converted under Michigan law: "Michigan law simply does not support the majority's conversion analysis. To the contrary, the caselaw—including *Aroma Wines*—supports that an intangible interest, such as a lien that has not been recorded or reduced to actual numbers, cannot be converted." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 7). Moreover, if conversion did occur in this case, "the 'property' converted by Nicole was the cash value of the land in Escanaba, not the lien itself." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 9). Judge Gleicher noted that even the majority conceded that this Court has never held a lien is a property interest capable of being converted. (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 3).

B. Even the proceeds of a sale may only be converted when the specific proceeds to which the lienholder is entitled are identified.

Judge Gleicher's dissent, unlike the Court of Appeals' majority opinion, analyzes this case from the perspective of whether Nicole may have converted the **proceeds** of the sale of the Escanaba property. (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 4). Although Michigan law does allow for the conversion of money, such as the proceeds of a sale, 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). (11/05/20 COA

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Opinion, Gleicher, J., dissenting, p. 5). Failure to pay an unidentified sum of money from a greater pot of money is not conversion. (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 5).

In *Garras*, 315 Mich at 142, the plaintiff agreed to deliver hams to the defendant on consignment, which the defendant would sell. The parties also entered an assignment agreement whereby the defendant assigned all of his outstanding accounts receivable to the plaintiff. *Id.* at 143-144. A few years later, the plaintiff discovered that the defendant had not properly accounted for goods sold and money collected and sued him. *Id.* at 144. This Court noted that "defendant was not required to deliver to plaintiff the specific or identical moneys which he collected for merchandise sold or on accounts receivable, but was only required to pay plaintiff the invoiced price for merchandise delivered to him." *Id.* at 147. "Therefore, as plaintiff was not entitled to the specific or identical moneys collected by defendant from his customers, he was not entitled to a judgment in tort for conversion." *Id.*

In *Warren Tool Co*, 11 Mich App at 299, the Court of Appeals reiterated that "where there is no duty to pay the plaintiff the specific moneys collected, a suit for conversion may not be maintained." The specific sum of $16,820 was referenced and allocated in specific amounts in a letter. *Id.* at 277, 300. Thus, what was converted was a specific check for a known sum of money, to pay a known amount of debt, as set out in the letter. (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 7).

Here, the proceeds of the sale of the Escanaba property cannot be said to have been converted. The lien on the property was never reduced to writing with an agreed upon sum of debt to be paid, nor was the sale price of the property known at the time the lien was provided in the Consent Judgment of Divorce. As Judge Gleicher wrote, "The lien amount was undefined,

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unmentioned, and amorphous rather than tangible." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 7). As Judge Gleicher explained,

> [T]he divorce judgement does not mention the amount of money that Nicole owed in attorney fees. At the time Peskin-Shepherd's lien was incorporated into the divorce judgment, no one knew the sale value of the Escanaba property, either. No "specific" sum of money was identified at all, placing this case in precisely the same factual frame as *Garras*. The lien represented a simple debt (like the overdue account in *Garras*), rather than "specific" money.

(11/05/20 COA Opinion, Gleicher, J., dissenting, p. 6). Moreover, with regards to *Warren Tool*, Judge Gleicher argued,

> No specific check is at issue in this case and therefore, *Warren Tool* is readily distinguishable. There, the defendants had in their possession a tangible object—a check made out to their company—representing a known sum as payment for an agreed-upon debt. Unlike in *Warren Tool*, the parties in this case never reached a meeting of the minds regarding Nicole's debt, there was no mutual understanding as to the value of the lien, and no specific check was ever issued (that we know of).

(11/05/20 COA Opinion, Gleicher, J., dissenting, p. 7).

In the instant case, we know the lienholder, Peskin-Shepherd; and the identity of the property, the Escanaba property; but the amount of the debt was unknown at the time Nicole allegedly converted the proceeds. Nicole disputed the reasonableness of the fee, for example, and the appropriate amount of the fee had not been judicially determined. The majority of the Court of the Appeals misunderstood this issue, finding that the Trial Court determined the amount of the debt in the conversion proceedings. (11/05/20 COA Opinion, pp. 7-8). But the time at which the amount of the debt needed to be known was the time of the sale of the Escanaba property. At that time, if a specific number was included in the lien, then the case might arguably be more akin to *Warren Tool*. Without any amount determined, however, it was unclear which portion of the

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proceeds was even meant to be delivered to Peskin-Shepherd. The allegedly converted asset was not identifiable.

There are procedures through which Peskin-Shepherd could have both enforced her lien, and reduced it to an identifiable sum. In *George v Sandor M Gelman, PC*, 201 Mich App 474, 477; 506 NW2d 583 (1993), the Court of Appeals described the ordinary procedure for obtaining a lien on real estate to secure payment of a debt:

> In Michigan, direct attachment of a debtor's real estate is disfavored. Chapter 60 of the Revised Judicature Act (RJA), MCL 600.6001 *et seq.*; MSA 27A.6001 *et seq.*, ordinarily governs collection of judgments and execution against real estate for monies owed. A judgment, by itself, does not create a lien against a debtor's property. Under the scheme provided in chapter 60, the creditor must first obtain **a judgment for the amount owed**, then execute that judgment against the debtor's property. A creditor may execute against real property owned by a debtor only after attempting to execute against the debtor's personalty and determining that the personal property is insufficient to meet the judgment amount. MCL 600.6004; MSA 27A.6004. **To place a lien against a debtor's real property, the creditor must deliver the writ of execution and a notice of levy against the property to the sheriff, who then records the notice of levy with the register of deeds to perfect the lien**.

(emphasis added). The Court did allow for a lien against real estate when the attorney and client have an express agreement for such, as well. *Id.* at 478. No court has clarified, however, whether the lien must be recorded, or reduced to an identifiable sum in order to be enforceable. But Michigan law may (and does) certainly require that the lien be for an identifiable sum, in order to be the subject of conversion. A holding that unrecorded liens may be the basis for a conversion action could significantly impact many individuals who simply do not know that a lien exists at all.

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C. Published Michigan case law indicates, contrary to the Court of Appeals' opinion, that a lienholder has no ownership interest in the proceeds of the sale of a property that is subject to a lien.

In addition to the lien amount being not specifically identified, conversion could not be had with regards to the proceeds of the sale of the Escanaba property because Peskin-Shepherd had no ownership interest in those proceeds. In *Foremost*, this Court held that there was no conversion where an individual destroyed his own motor home, which was subject to a lien, because "a person can[not] 'convert' his own property." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

To sustain an action for conversion, it must be demonstrated that the defendant "obtained the [personal property] *without the owner's consent* to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific [personal property] entrusted to his care." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004). (emphasis added); *see also Hance v Tittabawassee Boom Co*, 70 Mich 227, 231; 38 NW 228 (1888) ("To authorize a recovery in an action of trover, the plaintiff must prove his ownership, absolute or qualified, of the property described in his declaration, the conversion thereof by defendant, and the value of such property at the time of conversion."); *Thomas v Watt*, 104 Mich 201, 207; 62 NW 345 (1895) ("To entitle the plaintiff to recover two points were essential to be proved: (1) Property in herself, and a right of possession at the time of the conversion. (2) A conversion of the property by the defendant to his own use.").

In *Lawsuit Financial*, the plaintiff advanced the defendant funds for a lawsuit and obtained a lien on any recovery in that lawsuit, for the payment of $887,500 or 10% of the proceeds of the lawsuit, whichever was greater. 261 Mich App at 582-583. The Court of Appeals held that the defendant's attorney could not have converted the funds recovered from the lawsuit because the

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defendant (the owner of the proceeds) consented to the attorney's control of the proceeds. *Id.* at 591-592. That is, despite the proceeds being subject to a lien, the defendant owned the proceeds, not the lienholder. *Id.* Indeed, Black's Law Dictionary defines "lien" as a "legal right or interest that a creditor has in *another's property*, lasting usually until a debt or duty that it secured is satisfied." Black's Law Dictionary (9th Ed). Black's Law Dictionary further makes clear that such an interest differs from an ownership interest. Black's Law Dictionary (9th Ed.) (defining "encumbrance" as a "claim or liability that is attached to property . . . and that may lessen its value, **such as a lien** or mortgage; **any property right that is not an ownership interest**." (emphasis added)). Since conversion may only be done with regards to property belonging to another, Nicole could not convert proceeds that she owned, even if they were subject to a lien.

For all of these reasons, the Court of Appeals erred when it held that conversion occurred in this case. This Court should grant leave to clarify the law regarding conversion of liens.

II. The trial court clearly erred in calculating damages for Peskin-Shepherd's conversion claims (statutory and common-law), specifically its award of treble damages, given that the trial court trebled the amount of the underlying debt between Nicole and Peskin-Shepherd rather than the amount of the proceeds from the sale of the Escanaba property.

Standard of Review. The trial court's determination of damages following a bench trial is reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 512.

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Even if statutory conversion applies here, the trial court awarded Peskin-Shepherd $153,296.04 which represented triple the amount of the underlying principal debt of $51,098.68.[91] This was error. Statutory conversion is codified at MCL 600.2919a and provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of ***actual damages sustained***, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's use.

As discussed in argument part I.A, the Court of Appeals majority erroneously concluded that it was the lien itself being converted, rather than the proceeds of the sale of the Escanaba property. The Court of Appeals affirmed the Trial Court's award of three times the underlying debt, rather than three times the amount of proceeds. It is simple to see how following the Court of Appeals' reasoning would lead to absurd results. For example, a charging lien attaches to any property obtained through the Judgment of Divorce. If the value of the converted property is equal to the underlying debt, then Nicole could sell a couch awarded to her in the divorce for $100, and spend that $100 for her own purposes, and be held liable for $153,296.04—triple the underlying debt. The notion that the value of the converted property is the amount of underlying debt is absurd.

"Nicole applied the proceeds of the sale to her own use, not the lien itself." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 9). The lien, in fact, still exists as to any other property awarded to Nicole in the Judgment of Divorce. "When she used the sale proceeds to pay other debts, she deprived Peskin-Shepherd of a specific sum, not an inchoate, intangible lien interest in real property." (11/05/20 COA Opinion, Gleicher, J., dissenting, p. 9).

[91] 2/25/19 TCT Judgment.

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The actual damages sustained from Nicole's purported conversion are the amount of the proceeds Nicole received as a result: $39,109.08.[92] Trebling $39,109.08 equals $117,327.24; a figure that Peskin-Shepherd agreed was the proper amount of treble damages in her August 3, 2018 Revised Second Motion for Summary Disposition.[93] Specifically, Peskin-Shepherd argued:

> As a matter of law, Nicole is liable for common law, as well as statutory conversion of those proceeds. Pursuant to MCL §600.2919a, Peskin-Shepherd is entitled to "3 times the amount of actual damages sustained" – 3 times the $39,109.08 proceeds converted by Nicole – totaling **$117,327.24** - - plus costs and reasonable attorney fees. (Emphasis in original). [8/3/18 Pl's Revised Second MSD, p. 20.]

The trial court clearly erred in trebling the amount of the alleged underlying principal debt rather than the value of the proceeds purportedly converted by Nicole through her sale of the Escanaba property and subsequent use of the proceeds. *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 349; 311 NW2d 776 (1981) citing *Hudson v Enichen*, 308 Mich 79, 85; 13 NW2d 215 (1944) (Generally, the measure of damages for conversion of personal property is the value of the property at the time of the conversion.); see also *Ehman v Libralter Plastics, Inc*, 207 Mich App 43, 45; 523 NW2d 639 (1994) (the measure of damages is the value of the property at the time of the conversion.) The trial court clearly erred in its calculation of damages and this Court should correct that error and, if it concludes that a lien may be converted, clarify how damages must be calculated in such a situation.

[92] 5/22/14 Check.
[93] 8/3/18 Pl's Rev 2nd MSD, p. 20.

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CONCLUSION

The instant case resulted in damages to a divorce attorney, Peskin-Shepherd, in the amount of $367,482.21. The genesis of this award was a simple collection case against a former client, Nicole Blume, for an unpaid legal bill in the amount of $51,098.68. The Court of Appeals misapplied Michigan law, and this Court should grant leave to clarify the law regarding conversion and liens, and at the very least to correct the miscalculation of damages which, if followed in future cases, could lead to absurd results.

REQUEST FOR RELIEF

Defendant-Appellants respectfully request that this Court grant their application for leave to appeal.

December 17, 2020

Respectfully submitted,

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