

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STONE COMPUTER, INC.,

Plaintiff-Appellant,

v

UAW-CHRYSLER NATIONAL TRAINING  
CENTER,

Defendant-Appellee.

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UNPUBLISHED

May 11, 2010

No. 286864

Oakland Circuit Court

LC No. 2006-072349-CZ

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this suit involving claims of conversion and unjust enrichment, plaintiff Stone Computer, Inc. (Stone Computer) appeals as of right the judgment entered in favor of defendant UAW-Chrysler National Training Center (the Training Center) after a jury returned a verdict of no cause for action. On appeal, Stone Computer primarily argues that the trial court erred when it permitted the Training Center's trial counsel to present testimony that Stone Computer had settled with its third-party buyer and received \$2.2 million of the balance of \$2.8 million that it was owed for the property at issue. We conclude that Stone Computer failed to present sufficient evidence at trial to establish either of its claims. Thus, any error in the admission of evidence concerning the settlement agreement was necessarily harmless. We also conclude that there were no other errors that would warrant reversing the jury's verdict. For these reasons, we affirm.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

**A. THE E-CONNECT PROGRAM**

Frank Slaughter testified that he was formerly a co-director for the Training Center and was responsible for the day-to-day operations associated with administering the Training Center's programs. The Training Center was a "co-partnership" between the UAW and Chrysler. For that reason, half the Training Center's board members were from the UAW and the other half were from Chrysler. The remaining positions were also equally divided between UAW and Chrysler.

Slaughter stated that the Training Center was funded through contributions from Chrysler's union workers. The funding paid for projects that the Training Center administered on behalf of the workers. The projects included training programs, tuition assistance, counseling, and child and elder care. He stated that some programs were continuing and others had a defined beginning and end.

At some point the Training Center initiated the "Employee Connect" program, which was often referred to as e-connect. The goal of the program was to encourage the union members to purchase computers, which could then be used for on-line training and work related tasks and to meet the members' personal computing needs.

Under the e-connect program, the members could purchase one of four computer package deals: basic, bronze, silver, or gold. The Training Center covered the full cost of the basic package. However, if a union member wanted one of the premium packages, the member would have to pay for the package upgrade. In addition, each package had specific upgrades, which the member could also purchase. Finally, the member had to pay the cost of shipping and handling the computer package.

In December 2000, the Training Center entered into an agreement with Union Friendly Systems, Inc. (Union) for the supply of the computers that would be offered to the members. Union agreed to supply the necessary hardware, software and support for the computer packages and agreed to ship the packages to the union members who placed orders. In exchange, the Training Center committed to the purchase of a minimum of 10,000 computer packages with an initial payment of \$6,980,000. The Training Center paid Union the minimum purchase price of \$6,980,000 in December 2000. Based on the volume of orders by the union members, the Training Center paid an additional \$3,490,000 in June 2001. At some point after the first shipment of computers, Union ceased meeting its obligations under the agreement with the Training Center. Indeed, Union was approximately \$3 million behind on its shipments. At the same time that Union was experiencing its difficulties, Union's parent company, Big Net Holdings, Inc. (Big Net), was in bankruptcy.

Frank Scaramuzzino testified that he owned Premier Autoworkers, Inc. (Premier), which had served as a vendor for the Training Center in the past. Scaramuzzino, who was one of Big Net's creditors, said he became aware of the Training Center's problems with Union and offered to take over Union's obligations with regard to the e-connect program. Scaramuzzino testified that he hoped to recoup any potential losses through future business deals with the Training Center.

In July 2001, the Training Center entered into an agreement with Scaramuzzino concerning the e-connect program. The Training Center agreed to advance Scaramuzzino \$3.49 million for the third order of computers and related equipment under the agreement between the Training Center and Union. The Training Center made the advance on the assumption that Scaramuzzino would be able to acquire Union from its current lien holders and required the return of the advance in the event that Scaramuzzino or one of his companies were unable to acquire Union. The agreement also provided that, if Scaramuzzino or one of his companies acquired Union, he or his company would honor the commitment for 20,000 total computer packages with "no additional dollar investment" by the Training Center.

Shortly after the Training Center advanced the \$3.49 million to Scaramuzzino, Premier secured an assignment of Big Net's assets from Big Net's remaining creditor for more than \$2.8 million. After this, Premier took over Union's operations. According to a letter dated August 2001, Premier had completed shipping all but 502 of the initial order for 20,000 computer packages. Scaramuzzino also noted that there had been 24,000 additional orders and asked that the Training Center pay another \$6,980,000 for the next 10,000 packages.

#### B. STONE COMPUTER SUPPLIES COMPUTERS FOR THE E-CONNECT PROGRAM

Scaramuzzino testified that Union purchased computer equipment for the orders from a variety of sources. As of September 2001, Stone Computer began to supply some of the computer equipment. By the end of 2001, Union had fallen behind on some payments to Stone Computer. Nevertheless, in December 2001, Union ordered an additional 5,570 computers and 5,600 monitors from Stone Computer.

Around the same time, Union also fell behind on its payments to UPS. As a result, UPS refused to make further shipments. In order to ensure that the orders continued to be shipped to its members, the Training Center allowed Union to ship orders using the Training Center's account. The Training Center paid \$350,000 in shipping costs in 2001, which included approximately \$200,000 already owed to UPS. There was evidence from which one could also infer that the Training Center continued to pay Union's shipping costs through the end of the e-connect program in March 2002.

Stone Computer began delivery of the final 5,570 computers and 5,600 monitors to Union in January 2002. Up to this point, Stone Computer and Union did not have a formal agreement governing the sale of the computer equipment. Instead, the parties' agreement was largely defined by the terms on purchase orders and receipts. A typical purchase order provided that Stone Computer would provide the ordered hardware with appropriate software and recovery media, peripheral items, and a one year technical support and parts replacement warranty. Stone Computer's receipts also stated that the items delivered to Union remained the property of Stone Computer until full payment was made. Stone Computer shipped more than 3500 computers and 2200 monitors of this order to Union by January 18, 2002.

Bing Li testified that he owned Stone Computer and, by mid January 2002 he was concerned that Union might be unable to pay its obligations. For that reason, he sought assurances from Scaramuzzino that Union would be able to pay for the 5,570 computers and 5,600 monitors that it had ordered. On January 18, 2002, Scaramuzzino agreed that Union would immediately pay \$250,000 to Stone Computer. He also agreed that Union would pay Stone Computer another \$1 million within 14 days of Stone Computer's final delivery with the balance paid within 30 days. Scaramuzzino also personally guaranteed Union's payment in a separate agreement signed on the same day.

#### C. THE STONE COMPUTER SUIT AGAINST UNION

Stone Computer delivered the final items from this order by January 24, 2002. However, Union failed to pay the required \$1 million payment within 14 days of that date. On February 8, 2002, Stone Computer sued Union.

In its complaint, Stone Computer alleged that it still owned the computer equipment at issue because it had not been paid. For that reason, it asked the trial court to issue an injunction barring Union from disposing of the computer items and ordering that possession of the items be given to Stone Computer pending resolution of the litigation. On February 11, 2002, the trial court entered an order to show cause that prohibited Union from taking certain actions with regard to the computer equipment at issue, including disposing of the equipment. The trial court also ordered Union to show cause why possession of the items should not be returned to Stone Computer. The order indicated that it remained in effect until the date of the hearing, which was set for February 20, 2002. However, Stone Computer adjourned the show-cause hearing and ultimately the hearing was not held.

According to Li, he and one of his employees met with executives from the Training Center on February 13, 2002. Li said that, at the meeting, he informed the executives about his suit against Union and asked them to put pressure on Union to pay for the computer equipment. The Training Center executives denied that they met with Li in February 2002; instead, they indicated that the meeting occurred in February 2003.

By March 2002, Union completed the shipment of the last computer packages to union members under the e-connect project, which was then completed.

Even after Stone Computer sued Union, Union continued to make sporadic payments to Stone Computer. In response to Stone Computers complaint, Union alleged that Stone Computer sold Union defective hardware and installed software on the computers that did not meet Union's stated requirements. Union also asserted that Stone Computer failed to meet its warranty obligations. At trial, Scaramuzzino testified that Stone Computer's failure to provide proper equipment and meet its warranty obligations cost Union over \$1 million. Although Stone Computer claimed that Union and Scaramuzzino still owed \$2.8 million on the sales contract despite Union's claims, Stone Computer agreed to settle with Union and Scaramuzzino for \$2.2 million. Union and Scaramuzzino eventually paid the settlement in full.

#### D. THE PRESENT LITIGATION

In February 2006, after Stone Computer received the last payment on its settlement with Union and Scaramuzzino, Stone Computer sued the Training Center. In its complaint, Stone Computer alleged that the Training Center was unjustly enriched when it took possession of Stone Computer's computer equipment without paying for it. In July 2006, Stone Computer amended its complaint to also allege that the Training Center converted the computer equipment at issue.

The case proceeded to trial in April 2008. At trial, Stone Computer essentially argued that the Training Center conspired with Scaramuzzino to take over Union and make up for the lost funding for the e-connect program by purchasing computers from Stone Computer with the knowledge that Union would be unable to pay for them. Stone Computer emphasized the evidence that executives from the Training Center authorized the use of the Training Center's UPS account to pay for shipping and knew that Union was not authorized to ship the computers from Stone Computer after Stone Computer sued Union in February 2002. On the basis of this evidence, Stone Computer asked the jury to find that the Training Center had converted Stone Computer's hardware to its own use or was otherwise unjustly enriched.

The Training Center in turn emphasized that Stone Computer's agreements were with Union and Scaramuzzino and not the Training Center. The Training Center argued that its agreement to cover the shipping costs associated with the e-connect program did not amount to a conversion or unjust enrichment. Indeed, the Training Center noted that it had made its required payments under its agreement with Union. Finally, the Training Center argued that Stone Computer did not suffer any damages because, after its settlement with Union, it received the full value for all the property at issue.

After hearing the evidence, the jury returned a verdict of no cause of action and the trial court entered a judgment to that effect on July 9, 2008. In September 2008, the trial court ordered Stone Computer to pay more than \$170,000 in attorney fees and costs to the Training Center as case evaluation sanctions.

This appeal followed.

## II. STANDARDS OF REVIEW

Stone Computer first argues that the trial court erred when it denied its motion in limine to bar admission of any evidence concerning its \$2.2 million settlement with Scaramuzzino and his business entities. Specifically, Stone Computer states that evidence concerning the settlement agreement was inadmissible as a matter of public policy under our Supreme Court's decision in *Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982), and as a matter of law under MRE 408. Stone Computer further contends that, even if a settlement could be admissible under certain circumstances, the settlement at issue was irrelevant, see MRE 401 and, to the extent that it was relevant, its probative value was substantially outweighed by the danger of unfair prejudice, see MRE 403. For these reasons, Stone Computer argues, the trial court erred when it permitted the Training Center to present evidence concerning the settlement and to argue that Stone Computer was fully paid for the computers with this settlement. Finally, Stone Computer concludes that the trial court's errors concerning the admission of the evidence concerning the settlement warrants reversal and a new trial.

This Court reviews de novo questions of law such as the proper interpretation of the Michigan Rules of Evidence, *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002), and the proper scope and application of the common law, *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 53; 709 NW2d 174 (2005), rev'd not in relevant part, 479 Mich 280 (2007). This Court reviews a trial court's discretionary decisions for abuse. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007). Although a trial court does not abuse its discretion when its decision falls within the range of principled outcomes, it necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.*

### III. HARMLESS ERROR

As the Training Center correctly notes on appeal,<sup>1</sup> this Court's ability to grant relief for errors in the admission of evidence is limited: "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103. Accordingly, even if we were to conclude that the trial court erred when it permitted the admission of this evidence, that error would not warrant relief if the error were harmless. As more fully explained below, we conclude that any error in the admission of the evidence concerning the settlement agreement was harmless. For that reason, we decline to address whether the trial court violated the policy stated in *Brewer* or the prohibitions stated in MRE 408 when it permitted the admission of evidence concerning the settlement agreement between Stone Computer, Union, and Scaramuzzino.

#### A. CONVERSION AND LIMITED INTERESTS IN PROPERTY

Conversion has been defined to be "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 275; 761 NW2d 694 (2008), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). In order to establish a claim for conversion, a plaintiff must first establish that he or she has an enforceable interest in the personal property at issue. See *Hance v Tittabawassee Boom Company*, 70 Mich 227, 231; 38 NW 228 (1888) (stating that to "authorize 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."). Further, where a plaintiff has only a partial or qualified interest in the property, it is necessary to determine whether the defendant also has some right or interest in the property. Where both the plaintiff and the defendant have some interest in the property, the plaintiff must demonstrate that the defendant's actions with regard to the personal property were in violation of the plaintiff's rights in the property—that is, the plaintiff must establish that the actions were wrongful as between the plaintiff and the defendant. If the defendant's rights to the property are superior to the plaintiff's rights or the defendant's actions are otherwise authorized given the

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<sup>1</sup> On appeal, the Training Center argued that any error was harmless under MCR 2.613(A) because Stone Computer failed to present sufficient evidence to support its conversion claim: "The [Training Center] never had control or possession of the computers at issue; nothing presented at trial supports any other conclusion. Moreover, even assuming that somehow such evidence exists—which it does not—there is no evidence that any of the 5,570 computers at issue were shipped to the employees after the alleged February 13, 2002 meeting. As a result, there is no causal connection between anything the [Training Center] did and Stone [Computer]'s alleged damages."

interests of both parties, the defendant's actions will be deemed privileged and the plaintiff will not be able to recover for conversion. See *Thoma v Tracy Motor Sales, Inc.*, 360 Mich 434, 438-439; 104 NW2d 360 (1960) (noting that the mechanic sold the car at issue in compliance with the relevant statutes to recover the value of the unpaid mechanic's lien and stating that, because the mechanic properly exercised his statutory right to sell the car, the sale did not constitute an act of wrongful dominion as to the plaintiffs); *Prime Financial*, 279 Mich App at 275 (stating that, as between two secured creditors, the junior creditor could not—as a matter of law—establish conversion of the collateral at issue because Article 9 of Michigan's Uniform Commercial Code authorized the senior creditor's actions with regard to the collateral); *Rohe Scientific Corp v National Bank of Detroit*, 133 Mich App 462; 350 NW2d 280 (1984) (“Liability for conversion does not arise if the actor is privileged to dispossess another of the chattel. . . . If defendant's right to possession was greater than that of plaintiff's, plaintiff could not maintain an action for conversion.”), reversed on other grounds on rehearing, 135 Mich App 777 (1984).

In this case, Stone Computer alleged that the Training Center converted its interests in the computer equipment sold to Union. However, there was no evidence that the Training Center took possession of the computer equipment, asserted control over it, or wrongfully refused to return possession to Stone Computer. See *Thoma*, 360 Mich at 438 (noting that conversion may be accomplished by intentionally dispossessing another of property, by selling the property of another, or wrongfully refusing to surrender property). Rather, the computer equipment remained in Union's possession until shipped to the ultimate consumers. At trial, Stone Computer relied on the fact that the Training Center aided and abetted Union in converting the computers by paying the costs associated with shipping the computers to individual union members. However, if Union could lawfully ship the computers to the members without violating any property interest in the computers that Stone Computer may have had, then Stone Computer's claim for conversion necessarily fails. Therefore, we shall first examine the nature of the interests held by Stone Computer and Union in the computers to determine whether Union could properly ship the computers to the consumers notwithstanding any interest held by Stone Computer in the same property.

## B. TITLE, CONDITIONAL SALES, CHATTEL MORTGAGES, AND THE UCC

In this case, Stone Computer agreed to sell Union thousands of pieces of computer equipment in exchange for a fixed sum. Although the sales amounted to more than \$3 million in merchandise, there was no formal written agreement governing the sale between Stone Computer and Union. Instead, the parties' invoices and receipts provided the terms of the sales. On its invoices, Stone Computer purported to retain title to the merchandise until Union paid the amount due in full. During the litigation, Stone Computer operated on the assumption that this reservation gave it absolute title to the computer equipment at issue until Union paid in full and, for that reason, it also assumed that any sale of the equipment by Union prior to payment in full was necessarily wrongful. However, under modern law, this reservation only gave Stone Computer a security interest in the computer equipment.

Prior to the Legislature's adoption of Article 2 of the Uniform Commercial Code (UCC), there were frequent disputes between sellers, buyers, and interested third-persons concerning whether the seller retained title to the goods even after delivering them to the buyer or whether the seller merely had a security interest in the goods. See, e.g., *Thomas Spacing Machine Co v*

*Security Trust Co*, 223 Mich 164; 193 NW 790 (1923) (noting that the sales agreement retained rights in the seller that were consistent with a chattel mortgage rather than a conditional sale and, because the seller did not properly record its mortgage, it was invalid); *Burroughs Adding Machine Co v Wieselberg*, 230 Mich 15; 203 NW 160 (1925); *Federal Commercial & Savings Bank v Int'l Clay Machinery Co*, 230 Mich 33; 203 NW 166 (1925) (discussing whether sales agreement was a conditional sale that gave the seller superior rights to the property over the plaintiff who was the buyer's mortgagee); *Nelson v Viergiver*, 230 Mich 38; 203 NW 164 (1925). If the sale were structured as a conditional sale, the seller would retain title until the buyer paid for the goods. *Burroughs Adding Machine*, 230 Mich at 19 ("The pure conditional sale gives possession of chattels with the right to ownership upon payment of the agreed price, retaining title in the seller with right of reclamation in case of default or the alternative of passing the title by suit for the purchase price."). However, if the seller reserved the right to repossess the goods in the event that the seller failed to pay in full, the buyer obtained title on delivery and the seller merely retained a chattel mortgage on the goods. *Id.* ("The right to retake the property, retain payments made, estimate wear and tear, compute damage, and look to the buyer for deficiency in the agreed price, is consonant only with remedies under instruments providing for security in the nature of a chattel mortgage; for in such a case the security is but an incident of a debt absolutely due from the buyer to the seller."); *Nelson*, 230 Mich at 42 (holding that the agreement at issue was a chattel mortgage and resulted in the transfer of title to the purchaser). A seller who retained title could immediately recover his or her property on the buyer's breach of the conditions of the sale and, for that reason, could sue for conversion if the buyer refused to return the property. See, e.g., *Roach-Montgomery v Smith*, 263 Mich 153; 248 NW 579 (1933); *J.L. Hudson Co v Barnett*, 255 Mich 465; 238 NW 243 (1931). But, if the seller only had a security interest, the seller generally had to foreclose against the property after the buyer's default. See *Thomas Spacing Machine Co*, 223 Mich at 168-169 (stating that, with a chattel mortgage, the seller may foreclose against the collateral, sell the collateral and credit the amount of the sale against the debt still owed, and then seek a deficiency).

The Legislature simplified this area of the law with the enactment of Article 2 of the UCC. See MCL 440.2101 *et seq.* Article 2 of the UCC regulates all sales of goods, see MCL 440.2102, and provides that title to goods passes to the buyer when the seller completes performance by physical delivery of the goods to the buyer unless otherwise explicitly agreed. See MCL 440.2401(2). Moreover, the Legislature provided that a seller's attempt to reserve title to the goods that the seller has actually shipped or delivered to the buyer is ineffective: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." MCL 440.2401(1); see also MCL 440.1201(37) (defining security interest and specifically stating that the "retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2401) is limited in effect to a reservation of a 'security interest.'"); MCL 440.9109(1)(e); MCL 440.9110 (noting that Article 9 of the UCC governs a security interest that arises under MCL 440.2401).<sup>2</sup> Thus, under the undisputed facts of this case, Stone Computer did

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<sup>2</sup> The purpose of these provisions was to promote efficiency and certainty in secured transactions by, in relevant part, eliminating the "hidden-title" subterfuges that might interfere with otherwise valid security interests. See *Trust Co Bank v Gloucester Corp*, 419 Mass 48, 52-53; 643 NE2d (continued...)

not have absolute title to the computer equipment at issue. MCL 440.2401(2). Rather, because Stone Computer delivered the computer equipment to Union, it retained only a security interest in the computer equipment, MCL 440.2401(1); and, accordingly, Article 9 governed the parties' rights and obligations with regard to Stone Computer's security interest in the collateral. MCL 440.9110; see also *AHCI, Inc v Short*, 878 SW2d 112, 115 (Tenn App, 1993) (stating that, regardless of the parties agreement concerning title, once the goods have been delivered to the buyer under a contract for sale, the most the seller can retain is a security interest).

### C. WRONGFUL DOMINION

As noted, after Stone Computer delivered the computer equipment, Union had title and Stone Computer retained a security interest. Thereafter, Union could use the equipment as long as its uses did not wrongfully interfere with Stone Computer's security interest. In a typical sale, the parties will have a security agreement that clearly governs the rights and obligations of the parties with regard to the collateral. The security agreement will generally be effective as between the parties, against subsequent purchasers of the collateral, and against creditors. MCL 440.9201(1). However, despite the substantial amounts involved in the sale at issue, the parties elected not to draft a formal security agreement that clearly stated their respective rights and obligations with regard to the collateral. For that reason, the default provisions of Article 9 governed the parties' relationship.

In the absence of an agreement to the contrary, until Union defaulted on the terms of its sales agreement, Stone Computer did not have the right to possess the computer equipment at issue. See *Wilson v Montague*, 57 Mich 638, 641-642; 24 NW 851 (1885) (stating that a chattel mortgagee did not own the chattel property, but had the right to sell it upon default in payment by the mortgagor, which had not yet occurred); *Thomas*, 104 Mich at 207 (noting that, in order to recover for conversion, the plaintiff must prove that he or she had the right to possess the property at issue at the time of the conversion); MCL 440.9601(1)(a) (stating that a secured party may foreclose against collateral after the debtor's default). There are also no provisions within Article 9 that prohibited Union from selling the computer equipment in its possession to third parties as part of its on-going business operations. Indeed, Article 9 specifically contemplates that debtors might permissibly sell collateral—especially where the collateral constitutes the debtor's inventory. See MCL 440.9205(1) (stating that a security interest is not invalid, in relevant part, because the debtor retains the right or ability to dispose of the collateral); MCL 440.9315(1)(a) (stating that a security interest in collateral continues in the collateral even after sale to a third party unless the secured party authorizes the transfer free of the security interest). Consequently, Union's actions in selling and shipping computer equipment prior to its default did not necessarily amount to an act of wrongful dominion in violation of Stone Computer's security interest.<sup>3</sup>

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(...continued)

16 (1994).

<sup>3</sup> We reiterate that there is no evidence that the parties had a formal security agreement governing their rights and obligations in the collateral. Therefore, we need not consider whether and to what extent a breach of a security agreement that limits a debtor's ability to sell collateral might give rise to a claim for conversion of the collateral.

However, once Union defaulted on the terms of the sales agreement, Stone Computer had the immediate right to repossess the collateral. MCL 440.9609(1); MCL 440.9601(1)(a); see also *Hartford Financial Corp v Burns*, 96 Cal App 3d 591, 599-600 (1979) (noting that, under the UCC, a secured creditor has an immediate right to possess the collateral securing a debt after the debtor defaults); *Kramer v McDonald's System, Inc.*, 61 Ill App 3d 947, 958; 378 NE2d 522 (1978); *County Construction Co v Livengood Construction Corp*, 393 Pa 39, 43; 142 A2d 9 (1958). And this right could support a claim for conversion. *Hartford Financial Corp*, 96 Cal App 3d at 600 (stating that a wrongful interference with a secured party's right of possession after default can support a claim for conversion); *Kramer*, 61 Ill App 3d at 958. Notwithstanding that, because Union had lawful possession of the computer equipment prior to the default, Stone Computer had to demand possession of the collateral before it could hold Union liable for conversion on the theory that Union interfered with Stone Computer's right of possession by retaining possession. See *Bush v Hayes*, 286 Mich 546, 552; 282 NW 239 (1938) (stating that, because the goods at issue were lawfully possessed by the defendant, the plaintiff could not maintain an action for conversion until he first made demand for the return of his property); *County Construction Co*, 393 Pa at 43 (noting that, although the UCC gave the secured party an immediate right to possession of the collateral after the debtor's default, the secured party had to make a demand for the property before the debtor's continued possession could be wrongful). However, even without a demand, after its default, Union arguably could not impair Stone Computer's security interest in the collateral by disposing of the computer equipment in such a way as to defeat Stone Computer's security interest.<sup>4</sup>

Stone Computer asserted its right to possess the collateral when it sued Union on February 8, 2002, and asked for possession of the property and an injunction barring Union from disposing of the computer equipment—that is, Union clearly had notice from this point that it no longer had the right to make unfettered use of the property and that Stone Computer was asserting its right to repossess the computer equipment. Union could thereafter be liable for converting the computer equipment by selling and shipping it to the individual union members and the Training Center could be liable for participating in that conversion. *Bush*, 286 Mich at 549-550; *Prime Financial*, 279 Mich App at 276. However, in order to obtain treble damages under MCL 600.2919a, Stone Computer would also have to prove that the Training Center knew that Union was wrongfully converting the computer equipment at issue. See MCL 600.2919a.<sup>5</sup> Stone Computer presented evidence that its representatives met with representatives from the Training Center on February 13, 2002 and told them about the lawsuit. Thus, for purposes of statutory conversion, the relevant date is February 13, 2002.

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<sup>4</sup> As noted, a security interest can survive a transfer to a third party. See MCL 440.9315(1)(a). But there are circumstances under which a third-party may purchase goods from a debtor and take free of a perfected security interest. See MCL 440.9320(1).

<sup>5</sup> The Legislature amended this statute in 2005. See 2005 PA 44. However, because the alleged conversion occurred in 2002, we refer to the statute as it existed prior to the 2005 amendment. See 2005 PA 44, enacting § 1.

#### D. PROVING CONVERSION: SPECIFICITY AND DAMAGES

In an action to recover damages for the conversion of collateral, the plaintiff is entitled to the lesser of the remaining debt as of the time of trial or the actual value of the collateral converted as of the time of the demand for the return of the collateral. See *Burk v Webb*, 32 Mich 173, 178 (1875) (“If, however, the plaintiff can be indemnified by a sum of money less than the full value of the property, as where he has only a special property, subject to which the defendant is entitled to the goods, that sum is the measure of damages.”); see also *William Goldberg & Co, Inc v Cohen*, 219 Ga App 628, 640-641; 466 SE2d 872 (1995) (stating that in cases involving the conversion of collateral, the plaintiff is entitled to the lesser of the debt remaining as of the trial date or the value of the collateral on the date of the conversion). However, in order to establish its damages, the plaintiff must specifically identify the property allegedly converted. *Hance*, 70 Mich at 231-232; *Lettinga v Agristor Credit Corp*, 686 F2d 442, 448-449 (CA 6, 1982) (noting that the plaintiffs presented only sufficient evidence to specifically identify four cows and, for that reason, could not assert any claims as to the remaining unidentified animals). It is not enough for the plaintiff to provide proof that the defendant likely converted some unknown quantity of the collateral. Rather, the plaintiff must identify the goods with sufficient specificity for the jury to find that the items were actually converted and to find their value. *Hance*, 70 Mich at 233 (stating that the trial court properly directed a verdict in favor of defendant after the plaintiffs failed to specifically identify which logs belonged to them out of all the commingled logs); *Lettinga*, 686 F2d at 448. As our Supreme Court explained, “[t]he action of trover is not one of an equitable nature, and we cannot in this action say that plaintiffs are entitled to and own a *pro rata* share of all the logs bearing that mark which were put afloat that year, and became mingled with each other.” *Hance*, 70 Mich at 233.

In this case, Stone Computer provided evidence that it sold more than 10,000 individual components of computer equipment to Union with varying values. It is, however, undisputed that Union also bought significant amounts of computer equipment from other suppliers and that it continuously shipped computer packages to the ultimate consumers throughout the period at issue. There was also evidence that Stone Computer sold the computers to Union with full knowledge that Union was shipping them to individual union members who had already placed their orders. From this evidence, the jury could have concluded that some, most, or even all the computer equipment at issue was shipped prior to Union’s default. As already noted, neither Union nor the Training Center could be said to have wrongfully exerted dominion over the computer equipment shipped prior to Union’s default. Similarly, the Training Center could not be said to have knowingly bought, received, or aided in the concealment of allegedly converted computer equipment prior to February 13, 2002. See MCL 600.2919a. Therefore, the Training Center could not be liable for statutory or common law conversion of the computer equipment shipped before the relevant dates.

Despite this, Stone Computer did not present evidence concerning the specific pieces of computer equipment that Union shipped prior to those dates or concerning the equipment still in Union’s possession after those dates. Because there was no evidence adequately identifying the origin of specific items of equipment shipped after the relevant dates, the jury was left to speculate as to whether and how many of the pieces of the computer equipment at issue might have been shipped on or after February 8, 2002, or February 13, 2002—that is, the jury would have had to speculate as to whether and how many pieces were actually converted. Indeed,

under the facts presented at trial, it is entirely possible that all the computers at issue were shipped before February 8, 2002, and that the only computers shipped after were computers that Union purchased from other suppliers. For that reason, there may very well have been no conversions and no damages. See *Lettinga*, 686 F2d at 448.

Similarly, because the various pieces of computer equipment had varying values, without specifically identifying the equipment remaining in Union's possession after the relevant dates, the jury would have had to speculate about the value of the units that may have been converted. For the same reasons, the jury would have had to speculate about whether and to what extent the Training Center received a benefit from Stone Computer that resulted in an inequity. See *Prime Financial*, 279 Mich at 275-276. Stone Computer bore the burden of proving each of the elements of its claims, including damages; and damages that are predicated on speculation and conjecture are not recoverable. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Consequently, given the evidence actually presented at trial, we conclude that Stone Computer failed to meet its burden of proof with regard to the specific items actually converted and failed to meet its burden of proof on damages.

#### E. CONCLUSION

Because Stone Computer failed to present evidence sufficient for the jury to determine which—if any—pieces of computer equipment were wrongfully sold to individual union members, the Training Center was entitled to a directed verdict in its favor on the conversion and unjust enrichment claims. Consequently, any error in the admission of the settlement agreement was harmless. MCR 2.613(A).

#### IV. APPORTIONMENT INSTRUCTION

Stone Computer next argues that the trial court erred in failing to instruct the jury that it could not apportion fault or damages to a non-party. We conclude that the instructions given to the jury adequately and fairly presented the parties' theories and the applicable law. See *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997) (“[T]here is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury.”). This case did not involve apportionment, see MCL 600.6304(1), and, based on the instructions and verdict form provided to the jury, there was no danger that the jury would apportion fault on its own initiative absent a prophylactic instruction such as the one requested by Stone Computer.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder