STATE OF MICHIGAN
IN THE SUPREME COURT

AROMA WINES AND EQUIPMENT INC.,

Plaintiff/Counter-Defendant/Appellant,

v

COLUMBIAN DISTRIBUTION SERVICES INC.,

Defendant/Counter-Plaintiff/Appellee.

Supreme Court Docket No. 148907
Court of Appeals Docket No. 311145

Appealed from the Kent County Circuit Court
Case No. 09-011149-CK

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COLUMBIAN DISTRIBUTION SERVICES, INC.

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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COUNTER-JURISDICTIONAL STATEMENT

The Jurisdictional Statement in Aroma Wines Equipment Inc.'s Brief on Appeal is complete and correct.

QUESTION PRESENTED

Does the statutory phrase "converting property to the other person's own use" in MCL 600.2919a require something more than a technical common law conversion before the discretionary statutory remedy can be applied?

Columbian answers: "Yes."
Aroma answers: "No."
The trial court answered: "Yes."
The Court of Appeals answered: "Yes."

INTRODUCTION

This brief is presented in response to the Brief on Appeal of Appellant, Aroma Wines and Equipment Inc. ("Aroma"), by Appellee, Columbian Distribution Services Inc. ("Colombian"). Aroma argues that any common law conversion is statutory conversion and requires application of the draconian remedy permitted by MCL 600.2919a. Aroma is wrong, and the Court of Appeals' holding in this regard should be affirmed. The conversion statute requires more than just a finding of a mere technical common law conversion.

LAW AND ARGUMENT

I. AROMA HAS FAILED TO CITE ANY FACTS IN THE RECORD UPON WHICH A REASONABLE JURY COULD FIND STATUTORY CONVERSION.

This is an appeal of a directed verdict that eliminated the count of statutory conversion from consideration by the jury. "When reviewing a trial court's decision on a motion for a directed verdict, the standard of review is de novo and the reviewing court must consider the evidence in the light most favorable to the nonmoving party." *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220–21; 716 NW2d 220 (2006). Thus, Aroma has the burden of demonstrating facts in the record upon which a reasonable jury could have found in their favor on the issue of statutory conversion. However, Aroma has failed to cite *any* facts on the record in its Brief on Appeal.[1]

Indeed, Aroma's brief argues that by legislative history and case law, common law conversion and statutory conversion are one and the same and that public policy dictates that result. Aroma is wrong, however, on all counts. Perhaps even more dispositive for purposes of this appeal, however, Aroma did not make this assertion at trial court. On the contrary, Aroma's

[1] Columbian takes exception to the generalizations and broad statements contained in Aroma's Statement of Proceedings and Facts, which are not supported in the record as required by MCR 7.306 and 7.212(c)(6).

counsel conceded at the trial court that the standard for common law conversion is different than the standard for statutory conversion. Appellee's App 9b. Aroma's amended complaint, adding a claim for statutory conversion months after the deadline for amended pleadings, also makes clear that Aroma recognized a difference between statutory and common law conversion. The difference is that statutory conversion requires that property is converted "to the other person's own use." MCL 600.2919a.

By Aroma's own motion, the record on appeal is limited to transcripts of closing statements, and the arguments on the directed verdict motion, the motion for reconsideration, and Aroma's motion for fees and costs post-trial. Aroma's Mot Submission of Appeal on Less than Complete, 6/29/12, Appellee's App 1b–4b; Stipulation & Order for Submission of Appeal on Less than Complete, 7/18/12, Appellee's App 5b–7b. Therefore, even if there was any testimony in Aroma's case-in-chief, Aroma cannot cite any evidence in the record of any use or benefit Columbian received by converting the wine. Instead, there is only the finding by a jury of common law conversion—a finding, apparently, that Columbian was not storing the wine in the specific warehouse for which Aroma contracted and that Columbian threatened to not allow Aroma access to the wine if it did not pay its bill.

Even if Aroma had not limited the record and evidence from its case-in-chief were a part of this appeal, *and* even if a broad definition of *use* were to be applied, Aroma's failure to submit or request a jury instruction regarding statutory conversion is an additional bar to this appeal.[2] Accordingly, the directed verdict should be reinstated.

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[2] Aroma's failure to seek a jury instruction was noted on the record during argument for directed verdict. While clearly preclusive of this appeal, it is not mere form over substance. Because there was no jury instruction submitted, and therefore never any formal request for the statutory remedy, Columbian has not yet had any forum to argue or address its dispositive affirmative defense to that claim of the economic loss doctrine. See *Llewellyn-Jones v Metro*

II. THE LEGISLATIVE HISTORY NEITHER REQUIRES NOR PERMITS THE COURT TO IGNORE THE PLAIN LANGUAGE OF MCL 600.2919A.

A. THE PLAIN LANGUAGE OF THE STATUTE DICTATES THAT TREBLE DAMAGES ARE NOT APPLICABLE TO A TECHNICAL CONVERSION.

Aroma urges the Court to ignore the plain language of MCL 600.2919a and instead consider its legislative history. This is not permissible. "Before looking to the legislative history and other aids to statutory interpretation, consideration should be given to the plain language of the statute." *Luttrell v Dep't Corrs*, 421 Mich 93, 101; 365 NW2d 74, 78 (1984). "Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick v Carrier*, 487 Mich 180, 191–92; 795 NW2d 517, 524–25 (2010). "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004).

In this case, the plain language of MCL 600.2919a is unambiguous: treble damages are only available against a converter who converts property to his "own use". The plain meaning of the word *use* is the "application or employment of something; esp., a long-continued possession and employment of a thing *for the purpose for which it is adapted*, as distinguished from a possession and employment that is merely temporary or occasional." Black's Law Dictionary at 1681 (9th ed 2009)(emphasis added). Construing the statute differently than its plain meaning by consulting the legislative history or any other aids of statutory interpretation is simply not permitted.

Prop Group LLC, __ F Supp 2d __, 2014 WL 2214209 (ED Mich, 2014); *Scarff Bros Inc v Bishcer Farms Inc*, 546 F Supp 2d 473 (ED Mich 2008)(holding that conversion and statutory conversion claims were barred by the economic loss doctrine where a defendant lost cattle entrusted to it, but where relationship was fully governed by contract).

B. THE LEGISLATIVE HISTORY DOES NOT SUPPORT AROMA'S CONTENTION THAT TREBLE DAMAGES SHOULD BE APPLIED TO A TECHNICAL CONVERTER.

Even if the Court were permitted to examine the legislative history, nothing in the legislative history suggests that the draconian remedy of treble damages was intended to apply to mere technical converters. The meaning of the "own use" requirement is not discussed at all in the legislative history. See House Legislative Analysis, HB 4356 March 16, 2005; House Legislative Analysis, HB 4356, May 31, 2005. Additionally, the version of MCL 600.2919a that existed prior to the 2005 amendments only allowed recovery of treble damages when the person buying, receiving, or aiding in the concealing of stolen, embezzled, or converted property—the "fence"—*knew* that the property had been stolen, embezzled, or converted. The current version of MCL 600.2919a(1)(b) contains this same limitation. This reveals that the legislature has never been interested in punishing technical violators with treble damages. Instead, it is concerned only with punishing truly bad actors: those who steal; those who embezzle; those who knowingly act as a fence; and those who convert property to their own use.

III. AROMA'S ASSERTION THAT MICHIGAN COURTS HAVE TREATED COMMON LAW CONVERSION AND STATUTORY CONVERSION AS IDENTICAL IS NEITHER RELEVANT NOR CORRECT.

To support the proposition that common law conversion and statutory conversion are indistinguishable, Aroma relies primarily on several opinions of the Michigan Court of Appeals. Aroma also cites several cases from courts outside of this jurisdiction. See, e.g., *Gillis v Wells Fargo Bank NA*, 875 F Supp 2d 728 (ED Mich 2012); *In re Dantone*, 477 BR 28 (2012). Not only are these cases not binding on this Court, but Aroma has also severely misconstrued their meaning.

A. THOUGH *CONVERT* IS DEFINED THE SAME IN MCL 600.2919A AND AT COMMON LAW, THE STATUTE CONTAINS THE ADDITIONAL REQUIREMENT OF "OWN USE."

Aroma cites several cases to support the proposition that *converting* in MCL 600.2919a is defined exactly the same as it is at common law: "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." See, e.g., *Victory Estates LLC v NPB Mortg LLC*, unpublished opinion of the Court of Appeals, issued November 20, 2012 (Docket No. 307457); *JP Morgan Chase Bank NA v Jackson, GR Inc*, unpublished opinion of the Court of Appeals, issued July 15, 2014 (Docket No. 311650); *Jason J. Armstrong DDS PC v O 'Hare*, unpublished opinion of the Court of Appeals, issued April 22, 2014 (Docket No. 308635); *Paul v Paul*, unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609); *Gillis*, 875 F Supp 2d at 728; *Dantone*, 477 BR at 28. Columbian agrees and has never disputed that conversion has the same meaning in the statute as at common law. However, the statute only provides the remedy of treble damages for "another person's stealing or embezzling property or converting property *to the other person's own use.*" MCL 600.2919a(1)(a)(emphasis added).

Thus, while the word *converting* in the statute may have the same meaning as at common law, the addition of the words "to the other's own use" changes the meaning of the entire phrase to mean something more than mere technical conversion. If the legislature meant to say that all common law conversion was subject to treble damages, they could have done so. They did not. Instead, they reserved the draconian remedy of treble damages for those who steal or embezzle property or convert property to their own use. None of the cases cited by Aroma equate "converting property to [one's] own use" with common law conversion.

B. CASES CITED BY AROMA TREAT STATUTORY CONVERSION AND COMMON LAW CONVERSION AS DISTINCT.

Aroma also asserts that several cases treat statutory conversion and common law conversion as indistinct causes of action subject to the exact same analysis. In each case, this is incorrect. For example, regarding *J & W Transportation LLC v Frazier*, unpublished opinion of the Court of Appeals, issue June 1, 2010 (Docket No. 289711), Aroma claims that the court of appeals "decided that simply because the defendants converted the trucks (under a common law analysis), they were liable for treble damages under statutory conversion." Aroma's Br 8. This is a blatant misrepresentation of the holding. In reality, the court of appeals concluded its common law conversion analysis and then *explicitly considered the additional factor* of conversion to one's own use: "Having concluded that defendants converted the trucks, the trial court then properly concluded that plaintiffs were entitled to damages under MCL 600.2919a(1)(a) **because defendants had converted plaintiff's property to their own use.**" *J & W Transp*, at 15 (defendant used plaintiff's trucks for transporting goods to generate revenue for defendant's own business); see also *Stockbridge Capital LLC v Watcke*, unpublished opinion of the Court of Appeals, issued March 4, 2014 (Docket No. 313241)(analyzing statutory conversion and common law conversion separately, when defendant used insurance proceeds, in which plaintiff had an ownership interest, by depositing them into defendant's own bank account and treating the proceeds as his own cash); *Jason J. Armstrong DDS PC* (analyzing statutory conversion and common law conversion separately and finding that neither was present because intangible goodwill cannot be the subject of conversion).

C. THE "OWN USE" REQUIREMENT OF STATUTORY CONVERSION HAS NEVER PREVIOUSLY BEEN AT ISSUE.

While many cases do not separately discuss the "own use" element of statutory conversion, this is simply because the distinction has never been at issue before. In many cases,

the use was obvious and uncontested, and therefore not necessary to discuss. See, e.g., *Stockbridge Capital* (no discussion of the use element was necessary because converted insurance proceeds are used merely by being held as a store of value, since that is one of the ordinary uses of cash); *J. Franklin Interests LLC v Mu Meng*, unpublished opinion of the Court of Appeals, issued September 29, 2011 (Docket No. 296525), at 10 (business assets were converted to the converter's own use because he was holding the property and preparing to sell it).

In other cases, the court never reached a discussion of "own use" because the other elements of conversion were not present; as such, the discussion ended when the court determined there had been no common law conversion. See, e.g., *Victory Estates*, at 2 (because the "defendant lawfully exerted dominion over the proceeds of a foreclosure sale," there was no common law conversion, and thus no statutory conversion); *Paul*, at 3 (plaintiff's complaint failed to state a claim for either common law or statutory conversion because he "did not have an enforceable interest" in the personal property such that defendant could have "wrongfully exerted domain over his personal property"); *Jason J. Armstrong DDS PC*, at 4–8 (separately analyzing claims for common law and statutory conversion and determining that neither could proceed because intangible goodwill cannot be the subject of conversion).

D. CASES INTERPRETING MCL 600.2919a(1)(b) ARE IRRELEVANT.

Aroma also cites *Christie v Fick*, unpublished opinion of the Court of Appeals, issued March 2, 2010 (Docket No. 285924), which suggests that MCL 600.2919a(1)(b) arguably permits recovery of treble damages against a converter who conceals or possesses, but does not use, converted property. However, the interpretation of MCL 600.2919a(1)(b) was not at issue in that appeal. Moreover, the very passage of *Christie* relied upon by Aroma advocates interpreting unambiguous statutes as written, contrary to Aroma's wishes in this appeal:

"Unambiguous statutes must be applied as written." *Christie*, at 7 (citing *Shinholster*, 471 Mich at 549 ("If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written")). This reinforces the necessity of a narrow "own use" requirement.

E. CITED SUPREME COURT CASES DO NOT SUPPORT AROMA'S POSITION.

Aroma also makes the tortured argument that because common law conversion can be committed by "using a chattel in the actor's possession without the authority so to use it" (*Thoma v Tracy Motor Sales Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960)) or by "using it in an improper way, for an improper purpose" (*Dep't Agric v Appletree Mktg LLC*, 485 Mich 1, 13; 779 NW2d 237 (2010)), statutory conversion cannot possibly impose a distinct "own use" requirement above and beyond the requirements of common law conversion. In other words, Aroma argues that all conversions to one's own use qualify as common law conversion, and therefore all common law conversions qualify as conversions to one's one use.

This is completely illogical. The fact that all apples are fruits does not imply that all fruits are apples. Common law conversions come in many varieties. Some instances are coupled with behavior that satisfies the "own use" requirement; others are not. The mere fact that some instances of common law conversion do satisfy the "own use" requirement does not mean that *all* common law conversions satisfy this requirement. The purpose of the "own use" requirement is to differentiate among these different types of conversions and reserve the draconian remedy of treble damages for the more culpable instances: those when the converter converted the property to his own use.

IV. THE *MICHIGAN BAR JOURNAL* ARTICLE CITED BY AROMA CONTAINS NO RELEVANT AUTHORITY SUPPORTING ITS ASSERTIONS.

Aside from misconstruing Michigan cases on this issue, Aroma has also cited a *Michigan Bar Journal* article for support of its assertion that common law and statutory conversion are identical. The excerpted portion of the article cited by Aroma states: "The phrase 'own use' is part of the name of the tort at common law, 'conversion to another's own use'; it is a vestigial remnant of the legal fiction that was the foundation for the tort of conversion." Aroma's Br 14 (citing Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, 93 Mich BJ 34 (March 2014)).

However, the only support for this proposition cited in the *Michigan Bar Journal* article itself is a case from the federal district court in the Eastern District of Wisconsin, *Maryland Staffing Services Inc v Manpower Inc*, 936 F Supp 1494, 1507 (ED Wis 1996). The only reference to the phrase "own use" in that case is this innocuous sentence: "Historically, an action for conversion was based on the legal fiction that the plaintiff lost a chattel and that the defendant found it and converted it to his own use." *Maryland Staffing Servs*, 936 F Supp at 1507. Aside from the fact that this case has absolutely no binding authority on Michigan courts, it offers nothing to suggest that the Michigan legislature would have inserted the words "to the other's own use" as an entirely meaningless tagline when the word "conversion" by itself would have accomplished the same purpose. Indeed, there can be no doubt that a period in the statute after the word "converting" would clearly mean any common law conversion would subject the converter to the potential statutory remedy. That the legislature chose not to do so is dispositive that the use requirement means something. Actually, that it means *use*.

V. PUBLIC POLICY REQUIRES THAT THE DRACONIAN REMEDY OF TREBLE DAMAGES IS NOT APPLIED TO MERE TECHNICAL CONVERTERS.

A. COURTS ARE WELL EQUIPPED TO HANDLE A NARROW "OWN USE" REQUIREMENT.

Aroma raises concerns that interpreting *use* according to its plain meaning of "use for ordinary, intended purposes" will require courts to classify items that have been converted, determine their normal and intended uses, and decide if they have been used accordingly. This is not a legitimate concern. This is precisely the sort of analysis that courts should be engaged in and are engaged in every day. Requiring this sort of analysis would not "dramatically and unnecessarily" increase the burden on the courts. Aroma's Br 16.

B. A NARROW "OWN USE" REQUIREMENT HAS NO ADVERSE CONSEQUENCES ON CRIMINAL LAW.

Aroma also argues that a narrow "own use" requirement would "open a slippery slope for criminal convictions." This concern is also overstated, as courts interpreting criminal statutes have no need to rely on the interpretation of a statute that provides a civil remedy for certain personal property torts. Moreover, the criminal cases Aroma cites would meet the narrow definition of *use* that Columbian urges this Court to adopt. See *People v Montreuil*, unpublished opinion of the Court of Appeals, issued April 8, 1997 (Docket No. 178759)(converter gave personal property to a third party who used it for the ordinary, intended purpose); *People v Miciek*, 106 Mich App 659; 308 NW2d 603 (1981)(holding that the defendant satisfied the "own use" requirement of the criminal larceny by conversion statute when he "converted the bank's money to the use of the corporation, of which he was president and an employee").

C. THE REMEDIAL NATURE OF MCL 600.2919a DOES NOT REQUIRE NOR PERMIT EXPANSION BEYOND THE PLAIN MEANING OF THE STATUTE.

Aroma also argues that because MCL 600.2919a is a remedial statute designed to correct an oversight in the law, it should be expanded beyond its plain language to permit the draconian

remedy of treble damages against technical converters. Yet the legislature's desire to expand the remedy of treble damages in no way requires that the remedy be expanded to the maximum possible limits, especially if doing so would contravene the plain language of the statute. Just as the previous version of the statute contained a knowledge requirement to limit the penalty of treble damages to truly culpable fences, the current version of the statute only permits the recovery of treble damages against truly culpable actors who steal, embezzle, or convert property to their own use. Nothing about the remedial nature of the amended statute requires otherwise.

Moreover, if the legislature was "address[ing] an oversight" (Aroma's Br 17) in the law by amending MCL 600.2919a, the legislature would choose its words even more deliberately in specifying the availability of the treble damages remedy. This is yet another reason to interpret the statute according to its plain language and require that the converted property be used in its ordinary, intended manner.

D. TECHNICAL CONVERTERS SHOULD NOT BE SUBJECT TO THE DRACONIAN PUNISHMENT OF TREBLE DAMAGES.

Aroma takes the position that any conversion, no matter how technical, would subject a defendant to treble damages. Aroma ignores the fact that the remedy provided in MCL 600.2919a is discretionary, having proceeded as though the remedy is mandatory without even requesting a jury instruction regarding treble damages. Under Aroma's interpretation, a technical converter who temporarily uses a bag of flour as a door stop would be automatically subject to the same punitive damages as a morally culpable actor who takes control of a former business partner's trucks and uses them to earn a profit in her own business. See *J & W Transp*, at 15. Interpreting the statute according to its plain language and permitting the remedy of treble damages only when a converter uses the property for its ordinary, intended purpose avoids this absurd result.

RELIEF REQUESTED

Columbian respectfully requests that this Court affirm the Court of Appeals' holding that statutory conversion and the award of treble damages requires more than a finding of a technical, common law conversion. As is set forth in Columbian's separate appeal, the Court of Appeals should be reversed in its reversal of the trial court's grant of directed verdict.

Respectfully submitted,

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