STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Whitbeck, P.J., and Hoekstra and Gleicher, JJ.

AROMA WINES AND EQUIPMENT, INC.,

Plaintiff/
Counter-Defendant-Appellant,

v

COLUMBIAN DISTRIBUTION SERVICES, INC.,

Defendant/
Counter-Plaintiff-Appellee.

SC: 148907
COA: 311145
Kent CC: 09-011149-CK

AROMA WINES AND EQUIPMENT, INC.
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Donald R. Visser (P27961)
Rebecca J. Baker (P78657)
VISSER AND ASSOCIATES, PLLC
Attorneys for Plaintiff/
Counter-Defendant-Appellant
2480 - 44th Street, S.E., Suite 150
Kentwood, MI 49512
(616) 531-9480

Jon M. Bylsma (P48790)
Conor B. Dugan (P66901)
VARNUM LLP
Attorneys for Defendant/
Counter-Plaintiff-Appellee
333 Bridge Street, NW
Grand Rapids, MI 49504
(616) 336-6000

November 13, 2014

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authority

JURISDICTIONAL STATEMENT

Appellant Aroma Wines and Equipment, Inc. (hereinafter "Aroma") appeals from the published opinion of the Michigan Court of Appeals, *Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc*, ___ Mich App ___ (Dec. 17, 2013).[1] (App 78a). The Court of Appeals addressed the statutory interpretation of MCL 600.2919a which provides, in part, that "[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 own use." (App 150a).

The Court of Appeals claimed that "at issue in this case is whether plaintiff presented evidence that the conversion was to defendant's 'own use' as required by MCL 600.2919a(1)(a)." By doing so, it erroneously added the element of "use" to Michigan's statutory conversion law, an element that Appellant contends was never intended by the Legislature.

On September 19, 2014, this Court granted Appellant leave to appeal as to the first issue raised in the Application. (App 87a). The appeal is therefore "limited to the issue of the proper interpretation of 'converting property to the other person's own use,' as used in MCL 600.2919a."

[1] Appellant's Motion for Reconsideration was denied on January 31, 2014. (App 86a).

QUESTIONS PRESENTED

I. What is the proper interpretation of the phrase "converting property to the other person's own use" as used in MCL 600.2919a? Does the phrase "convert to one's own use" require elements beyond that of common law conversion?

Aroma Answers:	No
Columbian Answers:	Yes
The Trial Court Answered:	Yes
The Court of Appeals Answered:	Yes, but broader than that required by the trial court.

STATEMENT OF PROCEEDINGS AND FACTS

Plaintiff/Counter-Defendant-Appellant Aroma Wines and Equipment, Inc. ("Aroma") is a wholesale wine importer and distributor that stored its wine in Defendant/Counter-Plaintiff-Appellee Columbian Distribution Services, Inc.'s ("Columbian") public warehouse. Plaintiff and Defendant entered a contract for receiving and warehousing a large quantity of wine in temperature controlled storage between 50 - 55 degrees. Columbian did not store the wine as required but instead stored all or part of the wine in areas where the temperature was not controlled. Aroma fell behind in its storage payment in late 2008 as a result of problems with a distributor. Aroma's President, Christian Pavelescu, was cognizant of Aroma's obligation to make monthly payments - he was in constant contact with Columbian, either through email or face-to-face meetings, and would make small payments whenever he could in attempts to make the account current.

In early 2009, Columbian informed Mr. Pavelescu that unless he brought in at least $6,109.00, he could not access any of the 8,374 cases of wine stored at its facility -- which amounted to hundreds of thousands of dollars of wine. Columbian never assessed the 2% penalty provided for in the contract and wholly failed to follow proper procedures to assert a warehouseman's lien. Instead, Columbian entirely barred Aroma from accessing any of the wine. Despite being told by Aroma that it could not hold the wine, and that the wine value greatly exceeded the amount owed, Columbian was steadfast in asserting control over the wine. It would not allow Aroma to remove *any* of its wine unless the entire payment was made; Columbian was holding on to all of the wine instead of just enough to satisfy the storage fees.

As of June 2009, Columbian was controlling over a half million dollars' worth of Aroma's wines and most was not in temperature controlled storage as contracted for. These

actions subjected the inventory to spoilage. The move was not for Aroma's benefit but for Columbian's – it allowed Columbian to charge higher prices to third parties for use of the area that Aroma was being charged for. Columbian continued to bill Aroma for the higher price with controlled temperature storage. Furthermore, Columbian used the wine to advance its own purposes of applying pressure to Aroma to pay its bill. These actions are the antithesis of commercially reasonable practices, and what is permitted under the Uniform Commercial Code, and Columbian is liable for statutory conversion.

Trial Court

In response to Columbian's actions, Aroma filed a complaint alleging Columbian breached its contract, violated the Uniform Commercial Code (UCC), and committed both Common Law and Statutory Conversion. Columbian filed a counter-complaint alleging Breach of Contract. The Statutory Conversion claim was never considered by the jury as it was erroneously dismissed by the trial court by directed verdict. (App 56a-57a).

Relevant to the issues raised on appeal, Defendant moved for directed verdict at the close of Plaintiff's proofs. (App 2a and 4a). Defendant argued that Plaintiff failed to demonstrate that Defendant converted the wine to its own use and could therefore not recover for statutory conversion. The trial court granted Columbian's Motion for Directed Verdict on the issue of statutory conversion based upon its perception that the plain language of the statute required that defendant should have "used" the wine by drinking it or selling it.[2] (App 56a and 52a). Essentially, the trial court created an extra element of "use," and applied it very narrowly, in order for a victim to recover treble damages for statutory conversion.

[2] Despite the fact that Aroma produced trial testimony and exhibits showing that Columbian had engaged a salvor to sell the wine -- as if it belonged to Columbian.

After a three week trial, the jury found in favor of Aroma on all Counts presented to it for consideration, including Columbian's counter-claim. (App 72a). The jury returned a special verdict finding conversion (although the Trial Court had taken away statutory conversion of MCL 600.2919a). Notably, the jury also found that Aroma had not breached the contract between the parties but that Columbian had – i.e. that Columbian did not have a factual basis to claim a lien or withhold access to Aroma's wine in any amount.

Court of Appeals

On appeal, Aroma argued that the trial court should have denied Columbian's motion for directed verdict in regards to its statutory conversion claim. Specifically, Aroma argued that the trial court improperly interpreted MCL 600.2919a. Ultimately, the Michigan Court of Appeals granted Aroma's appeal by reversing the trial court's directed verdict and remanding the case for a decision consistent with the opinion. (App 78a). But, the Court of Appeals has remanded with an incorrect statutory interpretation of MCL 600.2919a for the trial court to follow. While the Court of Appeals was correct in reversing the trial court, its reasoning was not in line with the legislative intent of the statute or prior decisions of the Court of Appeals. In its decision, the Court of Appeals has created a much higher burden on the victim of conversion to prove statutory conversion than the Legislature intended.

The Court of Appeals correctly stated that "whether conversion occurred is not an issue on appeal." (App 80a). It is Appellant's position that, as explained below, the analysis should have ended there. When a victim proves conversion then MCL 600.2919a automatically applies and they are entitled to treble damages. MCL 600.2919a was created to provide a remedy for victims against convertors, not an extra hurdle to recovery. The Court of Appeals correctly determined that the trial court was way too narrow in its interpretation, but instead of clearly

setting out that conversion means conversion, the Court of Appeals allowed that "to one's own use" was an additional element of statutory conversion beyond that necessary for common law conversion.

Instead, the Court of Appeals determined that "at issue in this case is whether plaintiff presented evidence that conversion was to defendant's 'own use' as required by MCL 600.2919a(1)(a)." (App 80a). Essentially, the court admitted that even though Aroma proved the elements of conversion, it must now prove an extra element of "use." It then embarked on a discussion of statutory interpretation of "to one's own use." The Michigan Court of Appeals concluded that plaintiff submitted enough evidence that defendant converted the wine to its own use to survive a motion for directed verdict, and sent it back for a jury to consider the facts. Even though the Court of Appeals diminished the burden on the victim to prove "use," Appellant believes that the Legislature never intended for the statute to create this extra element for statutory conversion. Appellant argues that, by even discussing the added "use" element, the Court of Appeals has strayed from the intent of the Michigan Legislature. Believing that the Court of Appeals committed palpable error, Appellant submitted a Motion for Reconsideration. The motion was denied on January 31, 2014. (App 86a).

On March 13, 2014, Appellant appealed to this Court to hear the case. The Application for leave to appeal was granted as to the first issue on September 19, 2014. (App 87a).

Appellant now appeals to this Court to remand with the correct statutory interpretation of MCL 600.2919a.

STANDARD OF REVIEW

The issue presented in this appeal concerns statutory construction. The standard of review the Court should employ in this matter is therefore *de novo*. This standard of review has been confirmed by the Michigan Supreme Court where the Court stated "[t]his Court reviews de novo issues of statutory interpretation." *Halloran v Bham MD*, 470 Mich 572, 576, 683 NW2d 129 (2004).

LAW AND ARGUMENT

I. Statutory Conversion does not require elements beyond common law conversion.

In its most simple terms, this issue revolves around the question of whether:

1. Common law conversion = statutory conversion; or
2. Common law conversion + "use" = statutory conversion.

In other words, does statutory conversion contain an extra element that common law conversion does not? The legislative intent, as well as recent unpublished decisions of the Michigan Court of Appeals, seems to point directly at the first theory. But, in *Aroma*, the Court of Appeals has taken a contrary position by analyzing the "use" element.

Less than a decade ago, the Michigan Legislature amended its statutory conversion law - MCL 600.2919a. (App 150a). The purpose of the amendment was to broaden the scope of the statute and address an oversight in the existing law. Since the amendment, a number of cases have made their way to the Michigan Court of Appeals requesting interpretation of the amended statute. In some regards, the published decision in this case directly conflicts with earlier, and concurrent, unpublished decisions of the Michigan Court of Appeals. As explained further below, Appellant's position is consistent with a vast majority of unpublished decisions. Based on the legislative intent, the overwhelming majority of Michigan Court of Appeals decisions, and

important public policy considerations, this Court's determination that statutory conversion and common law conversion be analyzed the same is imperative.

A. *The Legislative history of the statute indicates that statutory conversion does not require an element above and beyond that of common law conversion.*

A complete look at the history and progression of MCL 600.2919a more appropriately puts this statute in prospective. Prior to the 2005 amendment of MCL 600.2919a the statute read:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

MCL 600.2919a. The courts began to recognize the problem with the previous statute in that it only assessed treble damages against aiders and abettors of conversion, leaving victims of conversion without a statutory right of recourse against the convertors themselves. *See Marshall Lasser PC v George*, 252 Mich App 104, 651 NW2d 158 (2002); *See also Campbell v Sullins*, 257 Mich App 179, 667 NW2d 887 (2003). In *Marshall Lasser*, the Michigan Court of Appeals pointed out that, by its clear language, "the statute is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property." *Marshall Lasser, supra* at 112. According to the Court of Appeals, "If the Legislature had meant for the statute to also apply to the thief as well as someone who aids him it could have written the statute to include the thief's action in possessing or concealing the property." *Id.*

In response to the Court of Appeals decisions, the Michigan Legislature endeavored to correct the oversight by amending the statute - it proposed a bill to expand the provision to specify triple damage liability for the person who embezzled, stole, or converted the property. The legislative analysis of Substitute H-2 provided:

THE APPARENT PROBLEM:

> Legislation in the 1960's was enacted to allow the victim of theft or embezzlement to bring a civil action against the "fence" or person who bought, received, or concealed the stolen property. Under the statute, the victim can recover up to three times the amount of actual damages sustained, plus costs and reasonable attorney fees. The provision did not, however, specifically mention that an action could be brought against the person who committed the original theft. The Michigan Court of Appeals recently ruled, in 2002, that the statute in question does not apply to the person who actual steals, embezzles, or converts the property; therefore, a victim may not currently sue the person who actually commits the theft (*Marshall Lasser PC v George*, 252 Mich App 104).
>
> Legislation has been introduced to expand MCL 600.2919a to include the person who commits the theft, embezzlement, or conversion of another's property.

House Legislative Analysis, HB 4356 March 16, 2005. (App 88a). *See also* House Legislative Analysis, HB 4356, May 31, 2005. (App 90a). The Legislative Analysis indicates a clear intent to provide a statutory cause of action against the converters themselves.[3] It would allow the victim to seek enhanced damages from the person who actually stole or converted the money or property in the first place. There is absolutely no indication that the Legislature ever intended to modify the elements of conversion, or create a higher hurdle to recovery against the convertor. In fact, just the opposite is apparent - the Legislature wanted statutory conversion to apply equally to convertors as it previously did only to aiders and abettors.

The result of the Michigan Legislature's consideration of the problem was MCL 600.2919a, a statute that read:

> (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 own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted

[3] "Courts may look to the legislative history of an act, as well as to the history of the time during which the acts was passed, to ascertain the reason for the act and the meaning of its provisions." *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 546, 716 NW2d 598 (2006).

> property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.
>
> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

The Legislature's sole purpose in amending the statute and including Section (1)(a) was to allow a victim to recover treble damages from the converter. The term "to one's own use" was never intended as an extra element that must be proven, it was simply clarifying that the statute no longer applied only to aiders and abettors. Unfortunately, the *Aroma* opinion has managed to create an extra element of statutory conversion through erroneous interpretation of the statute, and by failing to appropriately consider the legislative intent for the amendment.

B. *The Courts have consistently recognized that a statutory conversion analysis is identical to a common law conversion analysis.*

Initially, when statutory conversion cases started to make their way to the Michigan Court of Appeals, it was clear that the court recognized that common law conversion and statutory conversion had identical elements. First, in *J&W Transportation, LLC v Frazier*, unpublished opinion of the Court of Appeals, issued June 1, 2010 (Docket No. 289711), the court acknowledged that the appeal concerned both common law and statutory conversion, and then proceeded to analyze both with the exact same factors and reasoning. (App 92a). Ultimately, it determined that since the defendants failed to return property to plaintiffs after demand had been made and *used* the property without permission, the trial court correctly found them liable for common law conversion. *Id.* at *14 (emphasis added). The Court of Appeals then decided that simply because the defendants converted the trucks (under a common law analysis), they were liable for treble damages under statutory conversion. *Id.* Stated another way, the Court of Appeals held that:

a. The defendants used plaintiff's property without authority to do so making them liable for common law conversion; and

b. Because defendants were liable for common law conversion then plaintiffs were entitled to statutory damages.

It is Appellant's position that the *J&W* opinion got it exactly right -- "use" is a factor for common law conversion and upon proving common law conversion the victim is entitled to the remedies provided for in statutory conversion. Notably, the *J&W* court's discussion of "use" was already addressed in its discussion of common law conversion. Hence, the *J&W* opinion points out an explicit anomaly - already inherent in a claim for common law conversion is the concept of "use." It becomes duplicitous to require a plaintiff to prove common law conversion, which can encompass the defendant's wrongful use of the property, and then to prove "use" again for statutory conversion.

The *J&W* court reasoned that conversion occurs when a party *uses* personal property in their possession without the authority to do so. *Id.* at *13 (emphasis added); citing *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 104 NW2d 360 (1960). In *Thoma*, this Court adopted the Restatement of Torts definitions of conversion. *Thoma, supra* at 438. In citing the Restatement of Torts, this Court deemed that conversion can be committed by any of the following ways:

a) Intentionally dispossessing another of a chattel,
b) Intentionally destroying or altering a chattel in the actor's possession,
c) **Using a chattel in the actor's possession without authority so to use it,**
d) Receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,
e) Disposing of a chattel by a sale lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,
f) Misdelivering a chattel, or
g) Refusing to surrender a chattel on demand.

Id. (emphasis added). According to subsection (c), common law conversion can be committed by using property without authority to do so. *See also Dep't of Agriculture v Appletree Marketing,*

LLC, 485 Mich 1, 13, 779 NW2d 237 (2010) ("conversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose.") It doesn't then logically follow that statutory conversion should require "use" as an extra element -- "use" is simply a factor in determining the underlying tort.

Again, in 2011, the Court of Appeals held that a plaintiff was entitled to treble damages under statutory conversion after proving the elements of common law conversion. *J. Franklin Interests, LLC v Mu Meng*, unpublished opinion of the Court of Appeals, issued Sept. 19, 2011 (Docket No. 296525). (App 104a). The trial court had found the defendant liable for conversion because he had unlawfully locked out the plaintiff and held the plaintiff's belongings as security for overdue rent. The Court of Appeals upheld the decision and stated that plaintiff was entitled to treble damages for the conversion, all without any discussion of "use" being an added issue.[4] *Id.* at *8. The Court reasoned that when defendants changed the lock on plaintiff's building and refused plaintiff access to his belongings, the conversion had been fully accomplished. *Id.* It then granted treble damages for statutory conversion without any further discussion. *Id.*

Another year later, and it appeared that the Court of Appeals directly addressed the issue in yet another unpublished decision. In *Victory Estates, LLC v NPB Mortgage, LLC*, unpublished opinion of the Court of Appeals, issued Nov. 20, 2012 (Docket No. 307457), the Court upheld a judgment as a matter of law regarding common law and statutory conversion. (App 111a). In its discussion the Court stated:

> Common-law conversion is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' Therefore, there are three elements to a common-law conversion claim: (1) a distinct act of dominion; (2) wrongfully exerted; and (3) over

[4] It is important to note the factual similarity in the *J. Franklin Interests* decision. The defendant simply denied access to personal property claiming an overdue amount. The court focused on the interference with dominion over property – and found that statutory conversion occurred. In the same way, Columbian denied Aroma access to personal property, and is therefore liable for statutory conversion.

> another's personal property. The act is wrongful when it is inconsistent with the ownership rights of another. Statutory conversion is found at MCL 600.2919a, which prohibits but does not define 'conversion.' 'When a statute does not define a term, we will construe the term according to its common and approved usage.' 'A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning.' **Therefore, the common-law definition defines both common-law and statutory conversion.**

Id. at *2. (emphasis added) (citations omitted).

According to *Victory Estates*, then, statutory conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." And the elements of common law conversion and statutory conversion are identical: (1) a distinct act of dominion; (2) wrongfully exerted; and (3) over another's personal property.[5] The Michigan Court of Appeals utilized the exact same reasoning a year later in *Paul v Paul*, unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609).[6] (App 113a). It claimed that "plaintiff was required to show that defendants wrongfully exerted domain over his personal property in denial of his rights to sustain both his common-law and statutory conversion claims." *Id.* at *2.

The *J&W*, *J. Franklin Interests*, *Victory Estates*, and *Paul* decisions began to establish a consistent theme in Court of Appeals opinions regarding statutory conversion. Never did the opinions address an added "use" element. They simply discussed common law conversion, then, if the victim proved the elements, it allowed the victims to pursue treble damages pursuant to statutory conversion. The *Aroma* decision, and first published decision on the issue, has completely changed the course of statutory conversion cases.

---

[5] This is precisely the conduct that a jury specifically found Columbian guilty of.

[6] Ironically, on the exact same day as the decision in *Paul* was released, a different panel of the Michigan Court of Appeals published its opinion in this case. While the *Paul* decision interpreted statutory conversion to contain the same elements as common law conversion, the *Aroma* panel determined that a plaintiff must establish the added element of "use" to claim relief under the statute.

Furthermore, the stance that the United States District Court for the Eastern District of Michigan and the United States Bankruptcy Appellate Panel of the Sixth Circuit has taken is the same position as previous Court of Appeals decisions - statutory conversion is identical to common law conversion. While the motion before the Eastern District of Michigan concerned both common law conversion and statutory conversion in violation of MCL 600.2919a, it is notable that the Court discussed the facts under one blanket umbrella of conversion. *Gillis v Wells Fargo Bank, NA*, 875 F Supp 2d 728 (ED Mich 2012). It began its analysis by stating that "'Conversion' for purposes of statutory and common law conversion is defined under Michigan law as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Id.* at 737; citing *Murray Hill Publ'ns, Inc v ABC Commc'ns, Inc*, 264 F3d 622, 636-37 (6th Cir. 2001). It then reasoned that the use of the property inconsistent with the owner's rights constituted conversion.[7] *Id.* It never addressed common law conversion separately from statutory conversion; it simply applied the facts to conversion and determined that both causes of actions could proceed.

Similarly, in *In re Dantone*, 477 BR 28 (2012), the court deemed statutory conversion analogous to common law conversion. In the context of an issue preclusion decision, the Sixth Circuit Bankruptcy panel was required to analyze the issues that were "necessarily determined" in the state court when treble damages were awarded under MCL 600.2919a. The panel was attempting to decipher whether statutory conversion had elements above and beyond common law conversion -- in this instance an element of fraud. The court determined that it did not. It recognized that MCL 600.2919a does not define or give elements for conversion - "**[the elements] are supplied by Michigan common law.**" *Id.* at 38 (emphasis added).

[7] Again, "use" was analyzed as a factor of common law conversion. Requiring litigants who claim treble damages to prove "use" as an added element is redundant.

Interestingly, despite the fact that *Aroma* was published on December 19, 2013, the Michigan Court of Appeals continues to use the standard that was taking shape before the *Aroma* decision. In *Stockbridge Capital, LLC v Watcke*, unpublished opinion of the Court of Appeals, issued March 4, 2014 (Docket No. 313241), the court discussed statutory conversion. (App 116a). It stated:

> Plaintiff correctly notes that MCL 600.2919a(1)(a) was added in 2005 to establish a cause of action against the individual who converts the property. Following the amendment, a plaintiff now has a cause of action against a defendant if that defendant stole, embezzled, or converted property. Thus, plaintiff could have a valid statutory conversion claim against defendant as the actual converter.

Id. at *2 (internal citations omitted). It then went on to hold that the defendant's failure to return insurance proceeds to plaintiff "constituted conversion pursuant to **both the common law and statute**." *Id.* (emphasis added).

Again, on April 22, 2014, the Michigan Court of Appeals reiterated:

> Because the term 'conversion' is not defined in the statute and this word has acquired a peculiar meaning in the law, the common-law defines the term for both common-law and statutory conversion. Accordingly, plaintiffs were required to show that defendants wrongfully exerted domain over their personal property in denial of their rights to sustain both their common-law and statutory conversion claims.

Jason J Armstrong, DDS, PC v O'Hare, unpublished opinion of the Court of Appeals, issued April 22, 2014 (Docket No. 308635); *See also JP Morgan Chase Bank, NA v Jackson, GR, Inc*, unpublished opinion of the Court of Appeals, issued July 15, 2014 (Docket No. 311650) ("[appellant] possessed a statutory and common law cause of action for the wrongful exercise of dominion over the property by another"). (App 118a and 126a). In sum, statutory conversion exists simply when a defendant wrongfully exerts domain over a plaintiff's personal property.

Also, since Aroma filed its Application for Leave to Appeal, the Michigan Bar Journal published an article regarding the proper interpretation of MCL 600.2919a. (App 135a). The

article raises the exact issue Aroma advances now. The author reinforces Aroma's position with an exemplary discussion regarding how common law conversion equates to statutory conversion:

> To understand subparagraph (a), the key concern is the meaning of the phrase "own use." Defendants who have been sued under subparagraph (a) seek to avoid exposure to treble damages liability by arguing they have not *used* the chattel that was converted. The Michigan Court of Appeals recently validated this analysis by considering the dictionary definition of the word "use" and concluding, "[t]he term 'use' requires only that a person 'employ for some purpose'" the chattel at issue. While setting out the a broad definition of "use," this analysis maintains a distinction between statutory conversion, which requires that the chattel be converted to the tortfeasor's own use, and common law conversion, which does not contain such a requirement.
>
> This interpretation, however, disregards that the phrase "own use" is a term of art. As has been observed in the past, the conversion statute does not define the word "convert," so the common law definition of "conversion" is incorporated into the statute by reference. 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. Because the legislature is presumed to be aware of the common law and legislate in light of it, and innovations on the common law are narrowly construed, treating the phrase "own use" as having independent meaning appears to overlook the provenance of the phrase. While it is true that "common law conversion does not necessarily require a determination regarding conversion to one's own use," this is because "own use" is not an element of the tort but part of the name of the tort itself; it is simply a rote legal formula with no independent meaning that satisfies antiquated requirements of the common law.
>
> ...
>
> While courts continue to recognize common law and statutory conversion as separate causes of action, this distinction is predicated on investing the phrase "own use" with meaning which its common law heritage indicates it does not have - an argument the appellate courts have yet to confront.
>
> ...
>
> The current interpretation of MCL 600.2919a may have overlooked the common law origins of the phrase "own use." The statute can be interpreted as an enhancement of the remedy available for the common law tort of conversion and is thus incorporated in any complaint for conversion simply as a measure of relief without needing to plead it separately.

Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, 93 Mich BJ 34 (March 2014) (internal citations omitted).

When analyzing the cases regarding statutory conversion since the 2005 amendment to MCL 600.2919a, it becomes abundantly clear that statutory conversion is nothing more than common law conversion, and that it requires the exact same elements. To resummarize:

1. **J&W:** analyzed both common law and statutory conversion with the same factors and reasoning, and then decided that because defendants had converted the trucks they were liable for treble damages;

2. **J Franklin:** held that plaintiff was entitled to treble damages under statutory conversion after proving the elements of common law conversion;

3. **Victory Estates:** stated that "the common-law definition defines both common-law and statutory conversion;"

4. **Paul:** claimed that "plaintiff was required to show that defendants wrongfully exerted domain over his personal property in denial of his rights to sustain both his common-law and statutory conversion claims;"

5. **Gillis:** defined both common law and statutory conversion as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein;"

6. **Dantone:** determined that statutory conversion did not have elements above and beyond common law conversion;

7. **Stockbridge Capital:** recognized that MCL 600.2919a was amended in 2005 simply to create a cause of action against a convertor;

8. **Armstrong:** held that plaintiffs only had to establish that defendants wrongfully exerted domain over their personal property to sustain **both** the statutory and common law conversion claims; and

9. **JP Morgan:** held that a plaintiff "possessed a statutory and common law cause of action for the wrongful exercise of dominion over the property by another."

Aroma is quite clearly an outlier. Michigan courts have consistently recognized that statutory conversion is synonymous with common law conversion. While the decisions are only persuasive, they are notable because of the same logic employed by a great number of panels.

C. Public policy considerations further support Appellant's position.

It would be amiss to rest without consideration of public policy concerns. First, allowing the *Aroma* decision to stand has the potential of rewarding the craftiness of defendants. Consider a defendant who could escape statutory conversion liability simply by avoiding *using* the personal property for its intended use. The absurdity of this application can be expressed with a number of examples:

- If a person converts a vehicle by towing it away on a flatbed and selling it for parts, would they not be liable for statutory conversion due to the fact they didn't actually drive the vehicle, which is its normal and intended purpose?
- Would farm equipment or construction tools have to be used to till a field or build a house in order for the convertor to be liable for treble damages?
- As in *Attorney General v Hermes*, 127 Mich App 777, 339 NW2d 545 (1983), where fish was the property converted, would the convertors not be liable for treble damages had they put the fish in a decorative fish tank as opposed to consuming them?
- If a person converts a gun can he/she avoid statutory conversion by claiming he/she did not intend to shoot it but only add it to a collection?

Furthermore, this type of application would also require courts in the future to: (1) classify each and every item that had been converted; (2) then determine its normal and intended use; and (3) then decide if it had actually been used accordingly. Would the courts also have to classify an item differently depending on who possessed that item? Take wine, for example. In the hands of a distributor its intended use is to sell; in the hands of the consumer, it is to drink. The intended purpose and use of the wine changes as it proceeds through the chain, forcing courts to determine what the intended use would be for each individual. In sum, the burden on the courts would be dramatically and unnecessarily increased by employing the *Aroma* decision. To employ the decision in *Aroma* would force courts to undergo analyses that could result in illogical and incongruous results.

As a second public policy consideration, allowing the *Aroma* panel's interpretation of MCL 600.2919a to stand could open a slippery slope for criminal convictions. The provision for larceny by conversion in the Michigan Penal Code also employs the term "convert *to his own use*." MCL 750.362 (emphasis added). But, the courts have not interpreted this term to mean anything more than exercising dominion and control. *See People v Montreuil*, unpublished opinion of the Court of Appeals, issued April 8, 1997 (Docket No. 178759) ("The salesman converted the shoes to his own use by giving them to defendant. In converting the shoes, the salesman need not have taken them for his personal use. The gist of this element is that the defendant exercises dominion or control or uses the property against the interests of the actual owner. ...") (App 140a); *See also People v Miciek*, 106 Mich App 659, 308 NW2d 603 (1981) (the court rejected a narrow reading outright by stating "[w]e do not believe that the phrase 'converted to his own use' connotes as narrow an interpretation as defendant suggests. The gist of this element is that defendant exercises dominion or control or uses the property against the interest of the actual owner"). Considering the higher standard of "beyond a reasonable doubt" and that a criminal's liberty is at stake, one would think that if this phrase is to be narrowly construed, it certainly would be narrowly construed in the criminal arena.

Lastly, MCL 600.2919a is a remedial statute which was implemented to address an oversight in existing law, specifically the fact that convertors themselves could not be liable. A statute is remedial "if it is designed to correct an existing oversight in the law, redress an existing grievance, introduce regulations conducive to the public good, or is intended to reform or extend existing rights." *Nelson v Assoc Financial Services Co of Indiana, Inc*, 253 Mich App 580, 590, 659 NW2d 635 (2002). As explained above, MCL 600.2919a was revised to extend the right of recovery for a person damaged by another who converted his/her property. As such, it should be

liberally construed in favor of the persons intended to be benefited. *Dudewicz v Norris-Schmid, Inc.* 443 Mich 68, 77, 503 NW2d 645 (1993).

In its application for leave, Aroma also contended that it was not necessary for the Court of Appeals in *Aroma* to have added another element of "use" to the definition of statutory conversion because Columbian was also liable for statutory conversion under the provisions of MCL 600.2919a(1)(b) – a provision that imposes liability for the "possessor" of converted property. This subsection contains no reference to the term "use." While the Court did not grant leave as to that issue, a review of that claim adds credence to Aroma's position on the issue before the Court.

Initially, it had appeared that MCL 600.2919a(1)(b) encompassed the statute prior to the 2005 amendment in which only the aider or abettor was liable for treble damages, and the convertors themselves could now only be liable under MCL 600.2919a(1)(a). Yet, the Michigan Court of Appeals seems to have rejected that notion in a recent unpublished decision, *Christie v Fick*, unpublished opinion of the Court of Appeals, issued March 2, 2010 (Docket No. 285924). (App 143a).

In *Christie*, a jury found defendants liable for statutory conversion. Defendants argued that, as the alleged convertors, the court erred in allowing the jury to consider claims under MCL 600.2919a(1)(b). *Id.* at *5. Defendants claimed that because MCL 600.2919a(1)(b) and the previous statutory conversion statute were materially identical, then, under *Marshall Lasser*, the convertor could not be liable under subsection (b). *Id.* at *6. The Court of Appeals disagreed. *Id.* It reasoned that the two statutes are materially different because the current statute, in subsection (b), had added "possessing" and "concealing" converted property as prohibited acts.

Id. It stated that because a converter is capable of "possessing" or "concealing" converted property, he could be liable under subsection (b) as well. *Id.*

It does not appear that subsections (1)(a) and (1)(b) are mutually exclusive. Arguably, according to *Christie*, Aroma is entitled to treble damages either because Columbian converted the property under subsection (a) or because it possessed and concealed the property as under subsection (b).[8] But, an application of the *Aroma* decision would make *Christie* illogical. While according to *Christie*, a converter can be liable under both subsections, according to *Aroma* subsection (a) would actually have an additional element. As previously mentioned, that would distort the remedial aspect of the Legislature's actions in bringing the remedies against a converter in line with the remedies available against a possessor of converted property.[9]

The great weight of the public policy considerations lend credence to Aroma's position, and begs for this Court to appropriately define statutory conversion as analogous to common law conversion.

CONCLUSION AND RELIEF REQUESTED

Aroma requests that the Court of Appeal's decision be clarified in a manner that explicitly recognizes that statutory conversion is identical to common law conversion. More specifically, this Court should determine that statutory conversion does not require a plaintiff to prove an added element of "use," regardless of how broadly or narrowly that term is defined. In

[8] Columbian possessed Aroma's wine prior to trial, during trial, and after trial. Columbian's wrongful possession continues to this day.

[9] More repugnant is the thought that the next round of challenges to the remedial aspect of this statute is that a possessor of converted property will claim that common law conversion is no longer the threshold for liability for possession, but that if some specialized "use" was required for effective conversion under the statute, that such specialized use would apply to the possessor as well. After all, if the converter did not drink the wine, then how could the possessor be liable for the wine in his cupboard. And if the original converter did not drink the wine, could the possessor ever be liable for treble damages – even if the possessor (and not the converter) drank the wine?

order to prove statutory conversion pursuant to MCL 600.2919a, Plaintiff is not required to prove an extra element of "use." Statutory conversion is equivalent to common law conversion.

WHEREFORE, Appellant respectfully requests this honorable Court to establish the proper interpretation that MCL 600.2919a imposes treble damages upon a showing that common law conversion has occurred, and to remand with instructions to enter a judgment in favor of Aroma for treble damages and attorney fees.

VISSER AND ASSOCIATES, PLLC

Dated: November 14, 2014

Donald R. Visser (P27961)
Attorney for Plaintiff/
Counter-Defendant-Appellant

Dated: November 14, 2014

Rebecca J. Baker (P78657)
Attorney for Plaintiff/
Counter-Defendant-Appellant