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,

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

v

COLUMBIAN DISTRIBUTION
SERVICES, INC.,

Defendant/
Counter-Plaintiff-Appellee.

AROMA WINES AND EQUIPMENT, INC.
REPLY BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Columbian has apparently lost sight of the limited issue that this Court granted leave to appeal - the proper interpretation of "converting property to the other person's own use," as used in MCL 600.2919a. Instead of addressing the pertinent issue of the proper interpretation of MCL 600.2919a, Columbian embarked on discussions revolving around what arguments that Aroma did or did not make at the trial court, which facts Aroma cited in its appeal, and whether the record on appeal is limited to certain motions and transcripts. Columbian's red herrings certainly suggest that it cannot argue with sincerity the most critical and dispositive issue.

Inasmuch as this appeal is limited by this Court's grant of leave to a single statutory interpretation question, the factual issues are not significant. Furthermore, all arguably relevant factual issues have already been decided by the jury as shown by the Special Verdict - Columbian breached the contract and Aroma did not, and Columbian converted Aroma's property. (App 72a). This jury verdict was not appealed. Although Columbian suggests that Aroma failed to cite any facts in the record upon which a reasonable jury could find statutory conversion, it is Aroma's position that the Jury Verdict finding for conversion is enough. Statutory conversion and common law conversion have identical elements - once Aroma proved to the jury that Columbian was liable for conversion, the statutory remedy is automatically applicable. No further proofs are necessary.

Nevertheless, with respect to the pertinent issue in this case, it does not turn on how narrowly or broadly to interpret the term "use," but rather, the issue is whether the extra term "use" is relevant at all to a finding of statutory conversion. As outlined in its Appellate Brief, it is Aroma's position that the Michigan Legislature never intended to create an added element of "use" in order for a victim to be able to recover treble damages for conversion. To the contrary,

the legislative intent of the statute was simply to allow the victim, upon proving conversion, to recover treble damages from the convertor. Accordingly, common law conversion = statutory conversion.

ARGUMENT

I. THE LEGISLATIVE INTENT OF MCL 600.2919a WAS TO PROVIDE A REMEDY FOR VICTIMS AGAINST CONVERTORS AND NOT TO CREATE ADDITIONAL ELEMENTS FOR RECOVERY.

It is undisputed that the primary goal of statutory construction is to give effect to the Legislature's intent. *Briggs Tax Service, LLC v Detroit Public School,* 485 Mich 69, 76; 780 NW2d 753 (2010). When "statutory language is susceptible to two different interpretations and is of sufficiently indefinite meaning that reasonable minds can and do disagree as to its true construction, interpretation of the statute in question is a proper function of [the court]." *Kizer v Livingston County Board of Com'rs*, 38 Mich App 239, 246; 195 MW2d 884 (1972). Here, not only do the parties assert vastly different interpretations, but the courts have interpreted it differently as well. While it appears that both Columbian and the Michigan Court of Appeals believes that "own use" creates an additional element, neither agrees on the definition of use or how narrowly or broadly to define it. On the opposite side of the spectrum, Aroma asserts that "own use" does not create an additional element above common law conversion, but that it simply indicates that the statute, unlike the previous version, applies to the convertors themselves. Ultimately, MCL 600.2919a is sufficiently uncertain to necessitate judicial interpretation. Thankfully, a look at the legislative history of the statute undisputedly evaporates the uncertainty, and indicates that Aroma's position is correct.

As discussed in Aroma's Appellant Brief, the Michigan Legislature amended MCL 600.2919a in 2005 to correct an oversight in the existing law - at that time, convertor's themselves were not subject to the treble damages provided for by statutory conversion, only

aiders and abettors were.[1] Prior to the amendment, the courts only had the authority to apply treble damages to aiders and abettors of conversion, but not to the actual person who converted the property. In explaining its purpose for amending the statute, the Legislature cited *Marshall Lasser*. (88a). *Marshall Lasser* was a Court of Appeals decision that refused to award treble damages against the actual culprit because, 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 PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002). The Legislature recognized that the statute did not explicitly apply to the person who "actually steals, embezzles, or converts the property," and, therefore, the victim could not pursue a remedy from the actual wrongdoer. (88a). In response, it endeavored to create a statute that would provide the enhanced remedy to victims who chose to pursue the initial culprit, and not simply the aiders and abettors. Or, as explained in the Legislative Analysis, "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. (88a).

In explaining the content of the bill, the Legislative Analysis stated that "[t]he bill would amend the Revised Judicature Act to expand the provision that specifies triple damage liability for offenses **related** to embezzling, stealing, receiving, and concealing stolen property to also apply **to the person who** embezzled, stole or converted the property." House Legislative Analysis, HB 4356 March 16, 2005 (emphasis added). (App 88a). Period. Even Columbian recognized that the term "own use" was not discussed in the legislative history. Appellee Brf pg

[1] It is imperative to note that the so-called "draconian remedy," that Columbian asserts was never intended to apply to "mere technical convertors," (Columbian's self-serving label for common law convertors) is, and was, applicable to aiders and abettors of theft, embezzlement, or conversion for years before being corrected to apply to the convertors as well. To then assert that the Legislature would never want such a remedy to apply to a convertor who does not convert the property to his or her own use is unconvincing. In light of the fact that aiders and abettors are liable, there is absolutely no justification for the proposition that the Legislature somehow intended the "draconian remedy of treble damages" to only apply to those who steal, or embezzle property or convert property to their own use.

4. That is precisely the point. Had the Legislature intended for there to be some distinction between common law convertors and those liable for statutory conversion, there surely would have been some discussion regarding the inclusion of an additional element. The fact that there was no such discussion or comment indicates that the Legislature did not intend to create a distinction between "mere technical convertors"[2] and those who convert property to their "own use." The alternative interpretation, and the one that Aroma submits is correct, is very clear - the Legislature intended that people who convert property would be subject to statutory remedies. Therefore, the difference between the definitions of common law conversion and statutory conversion is one of form, not substance.

II. COMMON LAW CONVERSION AND STATUTORY CONVERSION HAVE IDENTICAL ELEMENTS.

Columbian does not dispute that "conversion" has the same meaning in the statute as at common law. Appellee Brf pg 5. It further agrees that conversion, in MCL 600.2919a as well as the common law, is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Id.* But then Columbian continues to argue that the conversion must be "to the other's own use" in order to be subject to treble damages. What Columbian fails to recognize is that the accepted definition cannot coincide with the additional element of "own use." If conversion is truly **any** act inconsistent with another's rights, it does not logically follow that it would have such an extreme limitation.

[2] "Mere technical conversion" is Columbian's self-serving title for common law conversion in an attempt to minimize the illegality of the conduct of converting another's property. See Appellee Brf pg 1 (stating that the "conversion statute requires more than just a finding of mere technical common law conversion); *see also* Appellee Brf pg 11 (attempting to distinguish between a mere technical convertor who temporarily use a bag of flour as a door stop from a "morally culpable actor," - but these terms are not mutually exclusive, and it is a distinction that simply should not exist).

This concept is further put into perspective by considering the Restatement of Torts definition of conversion, adopted by this Court in *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434; 104 NW2d 360 (1960). 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). One of the laundry list of ways that conversion can be committed is "[u]sing a chattel in the actor's possession without authority so to use it." *Id.* But, by accepting Columbian's position, it would be conceding that all the other "acts of domain wrongfully exerted over another's personal property" would be trumped by the "own use" element, and a very narrow element at that. For example, this would automatically eliminate consideration of such acts as described in subparagraph (d) which defines conversion as "receiving a chattel ... intending to acquire for himself **or for another** a proprietary interest in it." *Id.* (emphasis added). This interpretation wrongly and unnecessarily limits the application of statutory conversion.

Lastly, Columbian has failed to explain how "mere technical conversion" (in other words, common law conversion) differs from statutory conversion. It has failed to give one example of how converting property to "one's own use" is somehow much more egregious than common law conversion and should therefore be the only conduct subject to treble damages. This assertion is nothing more than an artificial distinction. Somehow, Columbian believes that if a person were to convert property for their son's or wife's or a complete strangers use, that the act

of converting is somehow less egregious than if he were to use the property for his own use. No matter who actually uses the property, the victim suffers the same damage. There is absolutely no logic in applying the statute differently depending on who actually uses the converted property. The authorization of treble damages is occasioned by the loss to the victim - not whether the perpetrator actually applied the converted asset in a singular way.

Such an artificial distinction as differentiating between "mere technical conversion" and statutory conversion also implies that **how** someone else's property is actually used can make the conduct more or less egregious. For example, if "use" were to be defined narrowly as "for its intended purpose," then a person who temporarily refuses to return a bag of flour and uses it for a doorstop would escape treble damages.[3] By using the flour for anything other than eating, a crafty convertor could escape liability for statutory conversion. But, if the baker cannot bake a cake because Columbian wants a flour-footstool, it should not matter that Columbian did not bake a cake with the flour - the damage to the baker remains the same.

Ultimately, Aroma adamantly believes that the Court of Appeal's decision should 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.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court to establish the proper interpretation that MCL 600.2919a imposes treble damages upon a showing that common

[3] The "flour footstool" hypothetical was advanced by Columbian in its Appellant Brief in Supreme Court Case No. 148909, and is used here for continuity.

law conversion has occurred, and to remand with instructions to enter a judgment in favor of Aroma for treble damages and attorney fees.

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Dated: January 6, 2015

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