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-Appellee,
Cross-Appellant,

v

SC: 148909
COA: 311145
Kent CC: 09-011149-CK

COLUMBIAN DISTRIBUTION
SERVICES, INC.,

Defendant/Counter-Plaintiff-Appellant,
Cross-Appellee,

AROMA WINES AND EQUIPMENT, INC.
BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT REQUESTED

Donald R. Visser (P27961)
Rebecca J. Baker (P78657)
VISSER AND ASSOCIATES, PLLC
Attorneys for Plaintiff/Counter-Defendant-Appellee, Cross-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-Appellant, Cross-Appellee
333 Bridge Street, NW
Grand Rapids, MI 49504
(616) 336-6000

December 17, 2014

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

JURISDICTIONAL STATEMENT iv

COUNTER-STATEMENT OF QUESTIONS PRESENTED v

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS 1

STANDARD OF REVIEW 4

LAW AND ARGUMENT 4

A. THE LEGISLATIVE INTENT OF MCL 600.2919a WAS TO PROVIDE A REMEDY FOR VICTIMS AGAINST CONVERTORS AND NOT TO CREATE ADDITIONAL ELEMENTS FOR RECOVERY 5

B. COURTS HAVE CONSISTENTLY RECOGNIZED THAT STATUTORY CONVERSION AND COMMON LAW CONVERSION REQUIRE IDENTICAL ELEMENTS 9

C. PUBLIC POLICY CONSIDERATIONS SUPPORT APPELLEE'S POSITION 16

CONCLUSION AND RELIEF REQUESTED 20

INDEX OF AUTHORITIES

Cases

ADVO-Systems, Inc v Department of Treasury,
186 Mich App 419, 465 NW2d 349 (1990) 5

Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc,
303 Mich App 441; 844 NW2d 727 (2013) 5,14

Attorney General v Hermes, 127 Mich App 777, 339 NW2d 545 (1983) 19

Campbell v Sullins, 257 Mich App 179, 667 NW2d 887 (2003) 6

Dep't of Agriculture v Appletree Marketing, LLC,
485 Mich 1, 779 NW2d 237 (2010) 10

Dudewicz v Norris-Schmid, Inc. 443 Mich 68, 503 NW2d 645 (1993) 17

Gillis v Wells Fargo Bank, NA, 875 F Supp 2d 728 (ED Mich 2012) 13

In re Dantone, 477 BR 28 (2012) 13

J&W Transportation, LLC v Frazier, unpublished opinion of the Court of Appeals,
issued June 1, 2010 (Docket No. 289711) ..... *passim*

J. Franklin Interests, LLC v Mu Meng, unpublished opinion of the Court of Appeals,
issued Sept. 19, 2011 (Docket No. 296525) 11,12

Jason J Armstrong, DDS, PC v O'Hare, unpublished opinion of the Court of Appeals,
issued April 22, 2014 (Docket No. 308635) 14

JP Morgan Chase Bank, NA v Jackson, GR, Inc, unpublished opinion
of the Court of Appeals, issued July 15, 2014 (Docket No. 311650) 14

Marshall Lasser PC v George, 252 Mich App 104, 651 NW2d 158 (2002) 6,7

McAuley v General Motors Corp, 457 Mich 513, 578 NW2d 282 (1998) 19

Mich Education Ass'n v Secretary of State, 489 Mich 194, 801 NW2d 35 (2011) 5

Murray Hill Publ'ns, Inc v ABC Commc'ns, Inc, 264 F3d 622, (6th Cir. 2001) 13

Nelson v Assoc Financial Services Co of Indiana, Inc,
253 Mich App 580, 659 NW2d 635 (2002) 16

Paul v Paul, unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609) 12

People v Miciek, 106 Mich App 659, 308 NW2d 603 (1981) 19

People v Montreuil, unpublished opinion of the Court of Appeals, issued April 8, 1997 (Docket No. 178759) 19

Puhutski v Allen Park, 465 Mich 675, 641 NW2d 219 (2002) 8

Robinson v City of Lansing, 486 Mich 1, 782 NW2d 171 8

Stockbridge Capital, LLC v Watcke, unpublished opinion of the Court of Appeals, issued March 4, 2014 (Docket No. 313241) 14

Thoma v Tracy Motor Sales, Inc, 360 Mich 434, 104 NW2d 360 (1960) 10

Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury, 270 Mich App 539, 716 NW2d 598 (2006) 7

Victory Estates, LLC v NPB Mortgage, LLC, unpublished opinion of the Court of Appeals, issued Nov. 20, 2012 (Docket No. 307457) 11,12

Statutes

MCL 600.2919a ..... *passim*

MCL 750.362 19

Other Authorities

House Legislative Analysis, HB 4356, March 16, 2005 7,8

House Legislative Analysis, HB 4356, May 31, 2005 7

Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, 93 Mich Bar J 34 (March 2014) 15,16

Rules

MCR 7.212(D)(3)(b) 1

JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the Appellant's Brief is complete and correct.

COUNTER-STATEMENT OF 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.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Inasmuch as this appeal is presently limited by this Court's grant of leave to a single statutory interpretation question, the factual background probably is not significant. However, MCR 7.212(D)(3)(b) instructs an appellee, unless it accepts appellant's statements, to point out the inaccuracies and deficiencies in the appellant's statement of facts. Accordingly, Aroma Wines and Equipment, Inc. (hereinafter "Aroma") feels compelled to correct the factual inaccuracies claimed by Columbian Distribution Services, Inc. (hereinafter "Columbian") in its Brief to this Court.[1] Inasmuch as factual misrepresentations were made by Columbian throughout its Brief, those will also be addressed here for simplicity sake.

Perhaps the most prevalent inaccuracy asserted by Columbian is its excuse for converting the wine by alleging that the mishandling was simply occasioned by a "re-racking project" in the "S" cooler to increase storage availability. Applt Brf pg 3. Its disingenuous claims that it merely "threatened to deny Aroma any access to the wine," and that it simply moved the wine for the sole purpose of the re-racking project were rejected by the jury, when it found Columbian liable for conversion and breach of contract. Applt Brf pg 3 & 7; Appx 1b. Columbian goes so far as to state that "[t]he only evidence that Aroma had provided was that the wine had been moved to accommodate the re-racking project in the "S" Cooler." Applt Brf pg 5. Besides the fact that this statement is completely contrary to the Special Jury Verdict form which was not appealed, it is also factually inaccurate. (Appx 1b). In fact, Aroma proved that the re-racking excuse was a lame excuse. Indeed, the jury determined that the excuse was, at best, an excuse, and probably more accurately a lie since the proofs showed that the wine had been removed from controlled-temperature storage well before the re-racking process began and continued after the re-racking

[1] The facts of this case are also further set forth in Aroma's Brief on Appeal filed with this Court on November 14, 2014 in Supreme Court No. 148907.

process was totally completed – for months up until the lawsuit was filed against Columbian when Columbian tried to cover their tracks. Furthermore, Aroma also presented evidence of Columbian's intents to sell the wine at trial.[2]

In addition to misrepresenting Columbian's mishandling of the wine, Columbian also attempts to assert that Aroma breached its contract. While these were claims of Columbian at trial, they were rejected by the jury. (Appx 1b). Columbian did not appeal the jury's decision. The jury specifically found that Columbian had breached its contract. (Appx 1b). As part of the Special Verdict Form, the jury found that Columbian converted Aroma's property. (Appx 1b). Finally, Columbian's claims of wrongdoing by Aroma were completely rejected by the jury when it determined that there was "no cause" for action on Columbian's Counter-Complaint. (Appx 1b).

Despite Columbian's attempts to minimalize what it did with the wine by minimizing its absolute dominion over the wine to simply moving it when necessary, the fact is that Columbian refused Aroma access to any of the wine, removed it from the contracted for cooler which led to spoilage, and even attempted to sell the wine itself. The obvious intent of Columbian is to reconstitute the facts and create some type of impression at this Court that Aroma's interpretation of MCL 600.2919a, as well as the Court of Appeals interpretation, somehow wreaks an injustice. That argument obviously went out the door with the unappealed jury decision that Columbian is the one that breached the contract, that Aroma did not, and that Columbian committed conversion.

Lastly, Columbian raises the fact that Aroma amended its Complaint to add statutory conversion. Applt Brf pg 4. In its Brief, Columbian later suggests that statutory conversion was

[2] It contacted the Michigan Liquor Control Commission with the intent of selling (*Burgess* October 14, 2011 Trial Transcript (Appx 5b-6b); *Palmer* October 21, 2011 Trial Transcript (Appx 7b-8b)). Columbian also contracted with a salvor to sell the wine (Appx 9b). Lastly, Columbian's version also does not account for 1728 bottles that were missing from the inventory. (Appx 10b-18b).

added because Aroma recognized that statutory conversion was distinct and required additional elements. Applt Brf pg 13. However, that is certainly an unjustified innuendo. The motion itself refutes such suggestions (Appx 19b). Indeed, the motion asserts that treble damages were anticipated and that no additional elements of proof are added by MCL 600.2919 -- but only clarity that Aroma was seeking those treble damages:

> 7. While treble damages had been anticipated by Plaintiff, Defendant recently suggested it would object in that the statutory reference was not included in the complaint. For the sake of clarity, Plaintiff brings this motion to amend its pleadings to clarify it is entitled to and seeks treble damages for conversion pursuant to MCL 600.2919a(1) as part of its existing claim of conversion.
>
> . . .
>
> 9. Plaintiff is seeking to amend its complaint to include treble damages for conversion pursuant to MCL 600.2919a. Plaintiff's existing amended complaint alleges conversion but does not, in its prayer for relief, specifically request treble damages. Plaintiff seeks simply to clarify the pleadings so there is no question going forward. See *Christie v. Fick*, 2010 WL 716097 *5. (Attached as **Exhibit 1**.) [omitted].
>
> . . .
>
> 12 (c). There is no undue prejudice to the Defendant because the proofs necessary remain the same. Once common law conversion has been proved, treble damages under the statute are allowed. See *J & W Transportation, LLC v. Frazier*, 2010 WL 2178555 *14 (Mich App).
>
> . . .
>
> 12 (d). Amendment of these pleadings to include statutory conversion would not be futile. As explained above, there are no additional proofs other than those required for common law conversion, therefore if Plaintiff is successful in its claim of conversion, statutory damages naturally follow.

(Aroma Motion to Amend, Appx 20b-22b).

Ultimately, the factual issues are not as imperative in an appeal revolving solely around the correct interpretation of a statute. But, inasmuch as Columbian attempts to minimize its unlawful behavior in an effort to sway this Court's decision, addressing the factual misrepresentations was necessary.

STANDARD OF REVIEW

The Standard of Review of *de novo* stated in the Appellant's brief is complete and correct.

LAW AND ARGUMENT

Interestingly, Columbian claims to this Court that the Court of Appeals interpreted MCL 600.2919a "so broadly as to eviscerate any distinction between statutory and common-law conversion," and that the decision "effectively collapses the distinction between common-law and statutory conversion." Applt Brf pg 2 and 9. If indeed the Court of Appeals decision in *Aroma* does that, Aroma asserts to this Court that the Court of Appeals got it right. Unfortunately, Aroma did not read the Court of Appeals decision apparently as clearly as Columbian did, and therefore believes it is necessary for this Court to clarify that indeed conversion is conversion, whether common-law or statutory.[3]

Columbian also attempts to frame the pertinent issue on appeal as "whether Columbian converted Aroma's wine to Columbian's 'own use.'" Applt Brf pg 9. This very narrow question allows Columbian to focus the entirety of its appeal on the definition of "use," and whether or not its conduct amounted to "use." But, this form of analysis is improper, and gives no deference to the intent of the Michigan Legislature in writing MCL 600.2919a. Rather, the proper question, and a more appropriate beginning point for statutory interpretation, is whether the phrase "to one's own use" adds an additional element to conversion at all. If, in fact, it does not, as Aroma asserts in its Brief, then an analysis of how "use" should be defined, and whether Columbian used the wine it converted, is a moot point.

[3] It is Aroma's position that the Michigan Court of Appeals offered credibility to the idea that statutory conversion has an additional element of "use" through its discussion revolving around the meaning of the term. Despite the fact that the Court of Appeals adopted a very broad definition of "use," the analysis was unnecessary in light of the fact that statutory conversion does not require an additional element.

As discussed below, 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. In essence, common law conversion = statutory conversion, and "statutory conversion" simply refers to the request for the enhanced treble damages provided for under MCL 600.2919a. Accordingly, the pertinent issue is not 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.

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

Columbian begins its argument by correctly stating that a "court's primary purpose in interpreting a statute is to ascertain and effectuate legislative intent." Applt Brf pg 9, quoting *Mich Education Ass'n v Secretary of State*, 489 Mich 194, 217-218, 801 NW2d 35 (2011). But, instead of delving into the legislative history of MCL 600.2919a, which is the most appropriate method of ascertaining legislative intent, it instead chooses to cherry-pick definitions of "use" and concludes that, clearly, these are precisely what the Michigan Legislature had in mind when writing the revised MCL 600.2919a.[4] But, an in-depth look at the legislative history offers a

[4] Columbian asserts that the "plain and ordinary" meaning of the term "use" can only be determined by a close examination and strict application of these dictionary definitions. But, the Michigan Court of Appeals has rightfully cautioned against the position that Columbian now attempts to advance. It acknowledged that the "plain and ordinary" meaning of a statutory term controls, but recognized that "by its very nature, a dictionary definition, which seeks to provide the most complete description possible of a particular word's meaning, may be broader in scope than the 'plain and ordinary' meaning of the word as it is commonly used and understood." *ADVO-Systems, Inc v Department of Treasury*, 186 Mich App 419, 425, 465 NW2d 349 (1990). In *Aroma*, the Michigan Court of Appeals recognized that Random House Webster's College Dictionary alone offers 22 definitions of use. *Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc*, 303 Mich App 441, 447-48; 844 NW2d 727 (2013) (Appx 7a). Columbian's attempt at narrowing the definition of use by advancing a few definitions, out of potentially hundreds of options, presents a clear example of dictionary definitions failing to provide the "plain and ordinary" meaning of a word as it is commonly understood.

better insight into the purpose of the amendment than does the parsed dictionary definitions offered by Columbian.

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*, 252 Mich App 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 reasoning, 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. (Appx 23b); *see also* House Legislative Analysis, HB 4356, May 31, 2005. (Appx 25b). This Legislative Analysis unmistakably confirms the intent of the Michigan Legislature for the revised MCL 600.2919a - to provide a statutory cause of action with treble damages against the convertors themselves.[5] 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.

[5] "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).

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

Again, 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 convertor. 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.

This interpretation does not neglect the requirement of statutory interpretation for courts to "presume every word is used for a purpose." *Puhutski v Allen Park*, 465 Mich 675, 683, 641 NW2d 219 (2002). It also avoids an interpretation "that would render part of the statute surplusage or nugatory," as Columbian warns of in its Brief. Applt Brf pg 10, citing *Robinson v City of Lansing*, 486 Mich 1, 21, 782 NW2d 171 (2010) (internal quotation marks omitted). Clearly, the purpose of the phrase "to one's own use" was to make explicit that the statute now applied to convertor's themselves, and not simply the "fence." Ultimately, although Columbian painstakingly attempts to provide meaning to every word of the statute, its position fails to appropriately consider the legislative intent for the amendment, and erroneously frames the purpose of the Legislature's inclusion of the term "to one's own use."[6] As is evident in the Legislative Analysis, MCL 600.2919a was introduced for the sole purpose of including "the person who commits the … conversion of another's property." House Legislative Analysis, HB 4356 March 16, 2005. (Appx 23b)

[6] Notably, this incredibly narrow interpretation is necessary for Columbian to assert that it cannot possibly be liable for statutory conversion because it merely moved the wine and threatened to keep Aroma from it as opposed to consuming or selling it – a position Columbian is estopped from taking since it's factual proposition was rejected by the jury.

B. COURTS HAVE CONSISTENTLY RECOGNIZED THAT STATUTORY CONVERSION AND COMMON LAW CONVERSION REQUIRE IDENTICAL ELEMENTS.

Columbian next asserts that common law and statutory conversion are distinct. Applt Brf pg 12. It asserts that in order to be liable for statutory conversion a defendant must not only convert the property, but then they must also use it. Columbian does not offer any cases to support this position, but simply continues to rely solely on its own interpretation of the statute to make this bold claim. To the contrary, Michigan courts have consistently utilized the exact same analysis for statutory and common law conversion, essentially recognizing that the elements for each are the same.

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. (Appx 49a). 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 Aroma'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,* 360 Mich 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.

This analysis eviscerates Columbian's position that "to be liable for statutory conversion, a defendant must not only convert the property (i.e., exercise wrongful dominion over it), but must also *use* it." This position is also negated by a plethora of other Michigan courts, as explained further below.

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). (Appx 27b). 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. *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.[7] *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. (Appx 34b). In its discussion the Court stated:

[7] 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.

> 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 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.[8] 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).[9] (Appx 36b). 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. Columbian's argument entirely ignores this pattern.

---

[8] This is precisely the conduct that a jury specifically found Columbian guilty of when it determined that Columbian converted the wine.

[9] 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.[10] *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).

[10] 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. (Appx 39b). 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 convertor.

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) (Appx 41b); *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") (Appx 49b). 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. (Appx 58b). 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 Bar J 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. Columbian's assertion that "a defendant is not liable for statutory conversion unless it *both* (1) converts the property *and* (2) puts the property 'to its own use,'" is simply wrong, and without legal support. Applt Brf pg 12. 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. And, while this Court obviously is not bound by the cited decisions, there is great weight in the cumulative wisdom in the reasoning of the many jurists involved in the cited cases.

C. PUBLIC POLICY CONSIDERATIONS SUPPORT APPELLEE'S POSITION.

Columbian also asserts that MCL 600.2919a is a punitive statute, and, as such, should be strictly construed. Applt Brf pg 14. But it is Aroma's position that clearly MCL 600.2919a is a remedial statute which was implemented to address an oversight in existing law, specifically the fact that convertors themselves were not liable, but only the "fences."[11] 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

[11] This also pokes holes in Columbian's assertion that the Legislature would never have intended for such "draconian" damages to apply to the simple act of conversion -- if it had intended treble damages against aiders and abettors when it passed the previous MCL 600.2919a, there is no validity to the assertion that it would not also intend treble damages against the initial wrongdoer.

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

In asserting that the statute is punitive, Columbian attempts to minimize its conduct, and implied that it was not "sufficiently egregious" to be subject to the "draconian remedy of treble damages." Applt Brf pg 15. In making its point, Columbian uses an example of a convertor "who temporarily refuses to return a bag of flour and uses it for a doorstop." *Id.* It then boldly claims that this convertor should not be subject to treble damages because "[s]uch a technical conversion is nothing like stealing or embezzling." *Id.* Apparently Columbian believes that somehow someone who converts a bag of flour for use as "doorstop or footstool" should not be subject to treble damages. Why not? Columbian jumps to the conclusion that the Legislature did not intend for that to be the case. Where is that conclusion drawn from? If somebody wishes to use someone else's bag of flour for a footstool instead of buying their own footstool (or bag of flour for a footstool), certainly the Legislature intended such action to be subject to treble damages.

Furthermore, if Columbian's definition of "use" is applied to this hypothetical, that being it must be used for its intended purposes, then using the flour for anything other than eating would allow a convertor to escape treble damages. Therein lies the slippery slope that Columbian is now intending to create. If the baker cannot bake a cake because Columbian decides it wants a flour-footstool, it should not matter that Columbian did not bake a cake with the flour. If Columbian decides to use the flour for one of its executive's children's school projects, there is no suggestion that the Legislature intended any different consequences than if Columbian had baked a cake. But even better distinctions can be drawn. We all know that flour is ground for purposes of eating. If I convert your flour, burn the bread while baking, and throw the burnt bread away, can I escape treble damages? Columbian's definition would demand different

results if the "convertor" took a bite before throwing the bread away. What if a mouse eats a hole in the bag of flour while it is being used for a doorstop, thereby contaminating it and making it unusable, does the convertor purge himself by returning it? Certainly toying with the direction that Columbian urges this Court to go leads to humorously absurd results. While that can be fun, it does also illustrate why such results cannot be imputed as Legislative intent.[12]

Adopting Columbian's position would create a major burden on courts in the future for determining what conduct constitutes statutory conversion by requiring them 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 Columbian's position. It would force courts in the future to undergo analyses that could result in illogical and incongruous results.

It also 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?

[12] Columbian essentially urges this court to adopt a wordsmithing gamesmanship to be applied to MCL 600.2919a that has been rejected in the "beyond a reasonable doubt" context of criminal cases (discussed below). The broad "for one's own use" in common law and statutory conversion is supplied by showing that dominion of the offender is inconsistent with the owner's rights. In short, if the use is not for the owner's use, then it is for the offender's use.

- 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?

Although Columbian recognized that "[s]tatutes should be construed so as to prevent absurd results," that is precisely what would happen should Columbian's position be accepted. Applt Brf pg 16, quoting *McAuley v General Motors Corp*, 457 Mich 513, 518, 578 NW2d 282 (1998).

Along the same lines, adopting Columbian's interpretation of MCL 600.2919a 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. ...") (Appx 63b); *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.

Given the clear legislative intent behind MCL 600.2919a, the plethora of courts agreeing that common law conversion and statutory conversion require identical elements, and the public policy considerations, it is clear that statutory conversion does not require additional elements beyond those of 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. 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.

Dated: December 16, 2014

VISSER AND ASS[redacted]

Donald R. Visser (P27961)
Attorney for Aroma Wines and Equipment, Inc.

Dated: December 16, 2014

Rebecca J. Baker (P78657)
Attorney for Aroma Wines and Equipment, Inc.