IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
William C. Whitbeck, Joel P. Hoekstra, Elizabeth L. Gleicher

AROMA WINES and EQUIPMENT, INC., a Michigan corporation,

Plaintiff/Counter-Defendant-Appellee, Cross-Appellant

v

COLUMBIAN DISTRIBUTION SERVICES, INC., a Michigan corporation,

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

Sup Ct Case No. 148909

Michigan Court of Appeals No. 311145

Lower Court Case No. 09-11149-CK
Honorable Dennis B. Leiber

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COLUMBIAN DISTRIBUTION SERVICES, INC.'S REPLY TO APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

DATED: January 7, 2014

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I. INTRODUCTION

Aroma has mischaracterized the ultimate issue in this appeal. The ultimate issue in this appeal is not whether common law conversion and statutory conversion under MCL 600.2919a are distinct; that question is at issue in Aroma's separate appeal, Case No. 148907, and Columbian has addressed Aroma's arguments in that regard in its Response Brief in that case. Columbian agrees with the Court of Appeals and with Aroma's position at the trial court that MCL 600.2919a requires an additional element of "use" beyond the elements of technical common law conversion before the draconian remedy of treble damages is available.

This appeal, Case No. 148909, concerns the breadth of the "use" element. Columbian urges this Court to find that the "use" element of statutory conversion requires more than a mere technical conversion. The Court of Appeals, however, interpreted "use" so broadly that it would eviscerate any distinction between statutory and common law conversion, such that treble damages would apply to any technical common law conversion, contrary to the plain meaning of the statute and the intent of the Legislature.

Because Aroma has neglected to focus on the ultimate issue in this appeal, it has failed to provide any evidence or arguments that Columbian used the wine it was storing for Aroma, *even under the broad interpretation of "use" adopted by the Court of Appeals*. Thus, Aroma has failed to show that a reasonable jury could find the required elements of statutory conversion. Accordingly, the directed verdict in favor of Columbian should be reinstated.

II. FACTS

This appeal is an admittedly unusual one in that the original appellant specifically sought to and did in fact limit the record on the appeal to only the oral arguments on the motion for directed verdict and the motion for reconsideration of the granting of that motion. Appx 75a – 80a. When Aroma filed the motion to limit the record to only those items, Columbian gladly

agreed, asking only that the opening and closing statements be included. The parties eventually stipulated to those items, plus oral argument on Aroma's motion for attorneys' fees. *Id.*

Aroma's submission of a sliver of facts that are, by their own request, not a part of the record before this Court is underhanded and unfair. The Court should disregard Aroma's assertions regarding the facts in Appellee's Brief, not just because they are procedurally improper, but because they are untrue. Most to the point, there is no evidence that Columbian ever attempted to sell the wine on its own because it did not. In fact, the transcript provided (that is NOT a part of the record) in Appellee's Appendix at 5b-8b, only shows that Columbian looked into whether or not it could sell the wine if it was able to exercise its warehouse lien. Aroma's submission of a Salvor Contract, Appellee's Appendix at 9b, is equally misleading to suggest Columbian attempted to sell the wine for itself. As part of the litigation, an expert salvage company was hired to determine if the wine had any value or could be sold, and that was done with the knowledge and consent of Aroma's current counsel. Appx 66a. To suggest that Columbian attempted to sell Aroma's wine on its own is intentionally misleading.

What is in the record is that Aroma never submitted a jury instruction regarding statutory conversion. Appx 32a – 34a. This was argued at the motion for directed verdict and the record does not contain any attempt by Aroma to seek a statutory conversion jury instruction. What is also in the record are the exact facts that Aroma claimed from its case in chief that supported the "use" requirement of the conversion statute. Counsel for Aroma argued essentially "use" and "benefit" were synonymous. The trial court asked "in what matter did the defendant use, employ the plaintiff's property?" Appx at 47a. Counsel for Aroma identified two ways: First, by using its possession of the wine as leverage to get paid. *Id.* at 47a – 48a. Second, by moving the wine out of the cooler and into the general warehouse. *Id.* at 48a. As the Court pointed out, there was

not even a benefit from either of these, since Columbian was no longer being paid for storing the wine. By that point, storing Aroma's wine was nothing but a burden for Columbian.

III. LAW AND ARGUMENT

A. Legislative History.

1. The Court cannot disregard the plain language of the statute, which dictates that treble damages are not applicable to technical common law conversion.

Aroma urges this Court to disregard the plain meaning of the language in MCL 600.2919a and instead consider its legislative history. This is simply not permitted. "Before looking to the legislative history and other aids to statutory interpretation, consideration should be given to the plain language of the statute." *Luttrell v Dep't Corrs*, 421 Mich 93, 101; 365 NW2d 74, 78 (1984). "Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick v Carrier*, 487 Mich 180, 191–92; 795 NW2d 517, 524–25 (2010).

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

2. The legislative history does not support Aroma's contention that treble damages should be applied to a technical converter.

Even if the Court were permitted to examine the legislative history of MCL 600.2919a, nothing in the legislative history suggests that the draconian remedy of treble damages was intended to apply to mere technical converters. In fact, there is plenty of evidence that the

legislature only intended to punish truly devious actors – as opposed to mere technical violators – with treble damages. The version of MCL 600.2919a that existed prior to the 2005 amendments only allowed treble damages when the person buying, receiving, or aiding in the concealing of stolen, embezzled, or converted property – the "fence" – knew that the property had been stolen, embezzled, or converted. The current version of MCL 600.2919a(1)(b) contains this same limitation. Moreover, the current version of MCL 600.2919a(1)(a) allows recovery against those who steal or embezzle – truly devious property torts that are much more morally culpable than technical common law conversion. This reveals that the legislature has never been interested in punishing technical violators with treble damages. Instead, it is concerned only with punishing truly bad actors: those who steal; those who embezzle; those who knowingly act as a fence; and those who convert property to their own use.

Additionally, Aroma argues that because MCL 600.2919a was amended to address a "problem" (Aroma's Br 7) in the previous incarnation of the statute, it should be expanded beyond its plain meaning to subject mere technical converters to treble damages. Yet the legislature's desire to expand the remedy of treble damages in no way requires that the remedy be expanded to the maximum possible limits, especially if doing so would contravene the plain language of the statute. Moreover, if the legislature was addressing an oversight in the law by amending MCL 600.2919a, the legislature would choose its words even more deliberately in specifying the availability of the treble damages remedy.

B. Case Law and Bar Journal.

1. Aroma's cited authority is neither binding nor relevant.

Aroma cites several unpublished Courts of Appeals cases, federal district court cases, a bankruptcy case, and a bar journal article, none of which have any binding authority on this Court. Additionally, none of the authority cited by Aroma focus on the ultimate issue in this

appeal: the breadth of the "own use" element of statutory conversion. Just as importantly, however, Aroma has misconstrued this authority, and none of it actually supports the proposition that common law conversion and statutory conversion are identical.

2. Cases cited by Aroma do not support the proposition that common law conversion and statutory conversion are identical.

a. *J&W Transportation.*

Aroma suggests that *J&W Transportation, LLC v Frazier*, unpublished opinion of the Court of Appeals, issued June 1, 2010 (Docket No. 289711), analyzed statutory and common law conversion "with the exact same factors and reasoning." Aroma's Br 9. This misrepresents the holding. In reality, the Court of Appeals concluded its common law conversion analysis and then *explicitly considered the additional factor of conversion to one's own use*: "Having concluded that defendants converted the trucks, the trial court then properly concluded that plaintiffs were entitled to damages under MCL 600.2919a(1)(a) **because defendants had converted plaintiff's property to their own use**." *J & W Transp*, at 15 (defendant used plaintiff's trucks for transporting goods to generate revenue for defendant's own business). That the Court of Appeals considered "own use" to be an additional element above and beyond the elements of common law conversion could not be more clear.

b. Supreme Court Cases.

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

Aroma argues that all conversions to one's own use qualify as common law conversion, and therefore all common law conversions qualify as conversions to one's one use.

This is completely illogical. Common law conversions come in many varieties. Some instances are coupled with behavior that satisfies the "own use" requirement; others are not. The mere fact that some instances of common law conversion do satisfy the "own use" requirement does not mean that all common law conversions satisfy this requirement.

c. *J. Franklin Interests, Victory Estates, and Paul.*

Aroma then cites another batch of unpublished opinions which similarly fail to support its assertion that common law and statutory conversion are identical. In *J. Franklin Interests, LLC v Mu Meng*, unpublished opinion of the Court of Appeals, issued Sept. 19, 2011 (Docket No. 296525), there was no discussion of the use element of statutory conversion because the use in that case was obvious- the landlord converted business assets to his own use by holding them and preparing to sell them. See *J. Franklin*, at 10. In both *Victory Estates LLC v NPB Mortg LLC*, unpublished opinion of the Court of Appeals, issued November 20, 2012 (Docket No. 307457), and *Paul v Paul*, unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609), the element of use was never discussed because the other required elements of statutory conversion were not present, rendering discussion of "own use" moot. See *Victory Estates*, at 2 (because the "defendant lawfully exerted dominion over the proceeds of a foreclosure sale," there was no common law conversion, and thus no statutory conversion); *Paul*, at 3 (plaintiff's complaint failed to state a claim for either common law or statutory conversion because he "did not have an enforceable interest" in the personal property such that defendant could have "wrongfully exerted domain over his personal property").

3. Though convert is defined the same in MCL 600.2919a and at common law, the statute contains the additional requirement of "own use."

Aroma then cites several cases to support the proposition that *converting* in MCL 600.2919a is defined exactly the same as it is at common law: "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." See, e.g., *Gillis v Wells Fargo Bank NA*, 875 F Supp 2d 728 (ED Mich 2012). Columbian agrees and has never disputed that conversion has the same meaning in the statute as at common law. However, the statute adds the words "to the other person's own use," changing the meaning of the entire phrase to mean something more than mere technical conversion. If the legislature meant to say that all common law conversion was subject to treble damages, they could have done so. They did not.

4. The *Michigan Bar Journal* article cited by Aroma contains no relevant authority supporting its assertions.

Just as it did in its own appeal, Aroma cites a *Michigan Bar Journal* article in its Response Brief in this appeal. The excerpted portion of the article cited by Aroma states: "The phrase 'own use' is part of the name of the tort at common law, 'conversion to another's own use'; it is a vestigial remnant of the legal fiction that was the foundation for the tort of conversion." Aroma's Br 14 (citing Adam D. Pavlik, Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation, 93 Mich BJ 34 (March 2014)).

However, the only support for this proposition cited in the article itself is a case from the Federal District Court in the Eastern District of Wisconsin, *Maryland Staffing Services Inc v Manpower Inc*, 936 F Supp 1494, 1507 (ED Wis 1996). The only reference to the phrase "own use" in that case is this innocuous sentence: "Historically, an action for conversion was based on the legal fiction that the plaintiff lost a chattel and that the defendant found it and converted it to

his own use." *Maryland Staffing Servs*, 936 F Supp at 1507. Aside from the fact that this case has absolutely no binding authority on Michigan courts, it offers nothing to suggest that the Michigan legislature would have inserted the words "to the other's own use" as an entirely meaningless tagline when the word "conversion" by itself would have accomplished the same purpose. Indeed, there can be no doubt that a period in the statute after the word "converting" would clearly mean any common law conversion would subject the converter to the potential statutory remedy. That the legislature chose not to do so is dispositive that the use requirement has meaning.

D. Public Policy Considerations Support Columbian's Position.

1. The remedial nature of MCL 600.2919a does not require nor permit expansion beyond the plain meaning of the statute.

Aroma contests Columbian's assertion that MCL 600.2919a is a punitive statute, apparently arguing that because the statute was remedial - "it is designed to correct an existing oversight in the law" (Aroma's Br 16) – it cannot be punitive. Of course, these are not mutually exclusive. Nothing about the remedial nature of the statute changes the fact that tripling a defendant's liability punishes the defendant. Moreover, it is clear that the legislature intended for the treble damages remedy to apply only to morally culpable violators, and not mere technical violators: those who steal; those who embezzle; those who *knowingly* act as a fence; and those who convert property to their "own use."

2. Courts are well equipped to handle a narrow "own use" requirement.

Aroma raises concerns that interpreting *use* according to its plain meaning of "use for ordinary, intended purposes" will require courts to classify items that have been converted, determine their normal and intended uses, and decide if they have been used accordingly. This is not a legitimate concern. This is precisely the sort of analysis that courts should be engaged in

and are engaged in every day, and requiring this sort of analysis would not "dramatically and unnecessarily" increase the burden on the courts. Aroma's Br 18.

3. A narrow "own use" requirement does not lead to absurd results.

Aroma also argues that interpreting "use" to mean "ordinary, intended use" would lead to absurd results and reward "the craftiness of defendants" (Aroma's Br 18), such as a converter escaping treble damages when she converts flour by using it to bake bread, but then disposing of the bread before eating it. In each of its examples, Aroma applies a contorted meaning of "use" that is much narrower than what Columbian urges this Court to adopt. Columbian has urged this Court to interpret "use" to mean the ordinary, intended use of the property.

In the case of the wine at issue in the case, this would include consumption and sale. See Columbian's Br 11. Wine is intended to be, and ordinarily is, "consumed [and] sold." *Id.* Clearly, moving wine from one warehouse room to another in order to facilitate a re-racking project is not the intended use of wine. This does not cross the line from mere technical conversion to devious conversion to one's own use. As noted above, our courts are more than capable of defining this line and applying treble damages only when a defendant steals or embezzles property or converts property and uses it for its ordinary, intended purposes.

Additionally, any plaintiff who suffers damage as a result of a common law conversion that does not amount to a statutory conversion is not left without a remedy. While treble damages would not be available, such a plaintiff can still recover actual damages. Aroma's concerns about helpless plaintiffs falling victim to crafty defendants are overstated; these plaintiffs will still be made whole if the Court adopts the interpretation of "own use" that Columbian advocates.

4. A narrow "own use" requirement has no adverse consequences on criminal law.

Aroma also argues that a narrow "own use" requirement would "open a slippery slope for criminal convictions." Aroma's Br 19. This concern is also overstated, as courts interpreting criminal statutes have no need to rely on the interpretation of a statute that provides a civil remedy for certain personal property torts. Moreover, the criminal cases Aroma cites would meet the narrow definition of use that Columbian urges this Court to adopt. See *People v Montreuil*, unpublished opinion of the Court of Appeals, issued April 8, 1997 (Docket No. 178759)(converter gave personal property to a third party who used it for the ordinary, intended purpose); *People v Miciek*, 106 Mich App 659; 308 NW2d 603 (1981)(holding that the defendant satisfied the "own use" requirement of the criminal larceny by conversion statute when he "converted the bank's money to the use of the corporation, of which he was president and an employee").

IV. CONCLUSION AND RELIEF REQUESTED

Aroma has failed to show that Columbian used the wine it was storing for Aroma; accordingly, a reasonable jury could not have found that Columbian committed a statutory conversion and therefore a directed verdict on that issue in Columbian's favor was appropriate. Nothing in Aroma's response permits this Court to ignore the plain meaning of MCL 600.2919a(1)(a): treble damages are only available against a converter who puts property to its ordinary, intended use.

Columbian respectfully requests that this Court reverse the Court of Appeals' erroneous decision and reinstate the circuit court's order granting Columbian's motion for a directed verdict on the question of statutory conversion.

Respectfully submitted,
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Dated: January 7, 2014

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