

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff/Appellant,

v

COLUMBIAN DISTRIBUTION SERVICES,
INC., a Michigan corporation,

Defendant/Appellee.

Case No. 148907

Lower Court Case No. 09-1149-CK
Honorable Dennis B. Leiber

Michigan Court of Appeals No. 311145

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**DEFENDANT/APPELLEE'S BRIEF IN PARTIAL SUPPORT AND PARTIAL
OPPOSITION FOR LEAVE TO APPEAL**

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**COUNTER-STATEMENT REGARDING THE ORDER
APPEALED FROM AND THE RELIEF SOUGHT**

On December 17, 2013, the Court of Appeals, in a published opinion, reversed the circuit court's decision granting a directed verdict in favor of Defendant, Columbian Distribution Services, Inc. ("Columbian"), with respect to the statutory conversion claim of Plaintiff, Aroma Wines and Equipment, Inc. ("Aroma"). The Court of Appeals also rejected Aroma's request that it remand to the circuit court for entry of treble damages pursuant to MCL 600.2919a, Michigan's statutory conversion provision. See *Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc*, Dkt. No. 311145 (Dec. 17, 2013) ("COA Op"), attached to Columbian's Application for Leave to Appeal at Exhibit A. On January 7, 2014, Aroma moved for reconsideration of that portion of the Court of Appeals' opinion denying its request for an order requiring the entry of treble damages. On January 31, 2014, the Court of Appeals denied Aroma's Motion for Reconsideration. Because the first of the two issues raised by Aroma in its Application involves legal principles of major significance for this State's jurisprudence and on which the Court of Appeals clearly erred in a way that will cause grave, manifest injustice, Columbian supports that portion of Aroma's Application for Leave to Appeal the Court of Appeal's decision pursuant to MCR 7.302(B)(3) & (5). However, on the second issue presented by Aroma, the purported mandatory nature of treble damages under MCL 600.2919A, Columbian requests that this Court deny Aroma's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it read the term "use" in Michigan's statutory conversion provision so broadly as to eviscerate any distinction between statutory and common law conversion and in a way that renders the phrase to one's "own use" in MCL 600.2919a meaningless, subjecting any technical common law converter to treble damages?

Plaintiff says: "No."

Defendant says: "Yes."

The Court of Appeals said: "No."

2. Did the Court of Appeals err when it held that the clear language in MCL 600.2919a, which states that a "person damaged" by conversion "may recover 3 times the amount of actual damages sustained," is discretionary rather than mandatory?

Plaintiff says: "Yes."

Defendant says: "No."

The Court of Appeals said: "No."

**COUNTER-STATEMENT REGARDING GROUNDS
FOR APPELLATE REVIEW**

This case involves the conversion of wine Aroma contracted to store at one of Columbian's warehouses. For the reasons stated in Columbian's Application for Leave to Appeal, filed on the same day as Aroma's Application for Leave to Appeal, this Court should grant review of Aroma's first question presented, though it should do so as articulated in Columbian's Application for Leave to Appeal and its Counter-Statement of the Questions Presented in this brief rather than in the manner articulated by Aroma. That the Court of Appeals' opinion can be read by Aroma to stand for the exact opposite proposition from that which Columbian believes it to stand is all the more reason this Court's review is necessary to clarify the proper construction of Michigan's statutory conversion provision.

With respect to Aroma's second question presented, this Court should deny leave to appeal. Appeals to this Court are appropriate only under very limited circumstances. An applicant for leave to appeal must demonstrate one of the grounds for review set forth in MCR 7.302(B). With respect to its second question presented, Aroma's Application fails to show any of these grounds for appeal. The Court of Appeals' opinion on the question of the permissive nature of treble damages under MCL 600.2919a is not "clearly erroneous," will not cause "material injustice," and does not "conflict[] with a Supreme Court decision or another decision of the Court of Appeals" under MCR 7.302(B)(5). The statutory language is clear that someone who has been damaged by statutory conversion *may*—not must—recover treble damages.

Accordingly, this Court should grant Aroma's Application for Leave to Appeal with respect to its first question presented but deny it with respect to its second question presented as there are no grounds under MCR 7.302(B) justifying such a grant.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Columbian has fully set out the material proceedings and factual background in its Application for Leave to Appeal. The only additional point Columbian makes here is to respond to Aroma's claim—unsupported by any record citation—that Columbian moved Aroma's wine so as to allow "Columbian to charge higher prices to third parties for use of the area that Aroma was being charged for." Aroma's Appl for Lv at 1. As explained in Columbian's Application for Leave to Appeal, in the midst of its dispute with Aroma, Columbian engaged in a re-racking project in the "S" Cooler, where Aroma's wine was stored, to increase its storage capabilities. During that project some of Aroma's wine was removed from the temperature controlled environment. Oct 13, 2011 Trial Tr at 26-27; COA Op at 1. There is no evidence that Columbian moved Aroma's wine so as to use the space in the "S" Cooler to charge other customers higher prices for storage space.

ARGUMENT

I. THIS COURT SHOULD GRANT THE APPLICATION TO CLARIFY THE PROPER READING OF THE TERM "USE" IN THE STATUTORY CONVERSION STATUTE

The relevant portion of the Michigan conversion statute states:

(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 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.

MCL 600.2919a (emphasis added). As Columbian argued in its Application for Leave to Appeal the proper construction of the phrase "to the other person's own use" in MCL 600.2919a plainly requires that the use be related to the intended purpose of the property. This requires something above and beyond mere technical common law conversion. The Court of Appeals disagreed, however, and accepted Aroma's argument that the term "use" should be read to mean "use or benefit."¹

¹ The Court of Appeals concluded that Aroma "submitted sufficient evidence that defendant converted the wine to its own use in order to survive" the motion for directed verdict. COA Op at 4. The Court of Appeals stated that the "term 'use' requires only that a person 'employ for some purpose, and clearly, drinking or selling the wine are not the only ways that defendant could employ plaintiff's wine to its own purposes." *Id.* (internal citation omitted). Indeed, the Court of Appeals added that "construing the statutory conversion statute's 'use' element to mean only consumption or sale would essentially require proof of larceny, which is characterized by an intent to permanently deprive the owner of possession, rather than mere use inconsistent with the owner's rights." *Id.* at 4 n.1.

Despite having prevailed below on the question of the proper interpretation of "use," Aroma now argues in its Application for Leave to Appeal that the Court of Appeals erred by adding an extra element to statutory conversion beyond the elements of common law conversion. See Aroma Appl for Lv at 5. Aroma contends that because the Court of Appeals added an extra element to statutory conversion not required by MCL 600.2919a, this Court must grant its application and review the question.

While Columbian disagrees vehemently with Aroma's interpretation of the Court of Appeals' opinion—and a plain reading of the opinion demonstrates that the opinion effectively collapses the distinction between common law and statutory conversion—Aroma's interpretation points to an additional reason—beyond those articulated in Columbian's Application for Leave to Appeal—why this Court should grant leave to entertain this question. If the Court of Appeals' opinion is subject to such contradictory interpretations—one party believing that the opinion eviscerates the distinction between common law conversion and statutory conversion and the other believing it adds an element beyond that required by the statute's plain language—then this Court's clarification is necessary. Moreover, Aroma's claim that statutory conversion and common law conversion are the exact same—the interpretation Columbian submits the Court of Appeals effectively adopted—is substantively wrong for all the reasons stated in Columbian's Application for Leave to Appeal.

Despite Aroma's misreading of the Court of Appeals' opinion, if this Court does not grant leave to appeal on this issue and correct the Court of Appeals' error, it will have serious and harmful consequences for the law of conversion in the State of Michigan and subject anyone who commits a technical common law conversion to treble damages. Accordingly, this Court

should grant application on Aroma's first question presented though framed as presented in Columbian's Application.

II. THE COURT OF APPEALS PROPERLY REJECTED AROMA'S CONTENTION THAT MCL 600.2919a's TREBLE DAMAGES ARE MANDATORY RATHER THAN PERMISSIVE

Clearly, Michigan's conversion statute allows the recovery of treble damages. This is not in dispute. Aroma, however, claims that this recovery is mandatory once a party proves that it was damaged as a result of any of the actions in either subpart (a) or (b) of the statute. Aroma argues that "based on the sentence structure of the statute, the permissiveness [in MCL 600.2919a] belongs to the victim." Aroma's Appl for Lv at 15. According to Aroma, once a party proves liability under either of the subparts of MCL 600.2919a, it "is entitled to treble damages." *Id.* at 16.² Aroma's argument fails and this Court should decline to review Aroma's second question presented.

Aroma's construction of the treble damages provision of MCL 600.2919a is a nonsensical reading of the plain language of the statute. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature" which is done "by examining the plain language of the statute." *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 485; 679 NW2d (2004). "Under the plain meaning rule, courts must give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as shown by other statutory language or by reading the statute as a whole." *Id.* As this Court has regularly recognized the Legislature's use of the term "'may' denotes permissive action." *Wilcoxon v City of Detroit Election Com'n*, 301 Mich App 619, 631-632; 838 NW2d 183 (2013).

² While Aroma did not raise this issue in its appellate brief below, the Court of Appeals did entertain and reject the argument in its opinion and then again rejected it in its order denying Aroma's Motion for Reconsideration.

Here, Aroma has failed to demonstrate that the Legislature intended anything but the ordinary meaning of "may" in this statutory provision or that giving "may" its ordinary meaning would frustrate legislative intent.

Indeed, with respect to this very statute the Michigan Court of Appeals and other courts have recognized the permissive nature of the treble damages provision. In *Poly Bond, Inc v Jen-Tech Corp*, 2010 WL 2925428 (Mich App July 27, 2010), attached as **Exhibit A**, the plaintiffs argued that because the jury had awarded them actual damages for conversion the circuit court was required to award it statutory treble damages. Reading MCL 600.2919a, the Court of Appeals held that the "phrase 'may recover' . . . indicates that treble damages are permissive." *Poly Bond*, 2010 WL 2925428, at *4 (emphasis added). "Thus, a trier of fact has discretion to decide whether to award them when a person has sustained actual damages as a result of another person converting property, for example." *Id.* Likewise, in *LMT Corp v Colonel, LLC*, 2011 WL 1492589, at *3 (Mich App April 11, 2011), attached as **Exhibit B**, this Court held that under MCL 600.2919a "the trier of fact has the discretion to decide whether to award treble damages . . . when actual damages are sustained." The United States Bankruptcy Court for the Eastern District of Michigan, in reading MCL 600.2919a has also reached the same conclusion. It held that "[t]rebling isn't automatic; it is within the Court's discretion based on what is fair under the circumstances." *In re Stewart*, 499 BR 557, 570 (Bankr ED Mich 2013); see also *In re Anton*, 2013 WL 1747907, at *9-10 (Bankr ED Mich April 12, 2013) (holding that under MCL 600.2919a "it is within the Court's discretion to grant treble damages" and that "[t]rebling is not automatic, but rather, is left to the exercise of judicial discretion"), attached as **Exhibit C**.

While it is true that none of these cases is binding on this Court, these cases certainly are persuasive. Moreover, they are the straightforward and commonsensical reading of the statute.

While Aroma suggests that the term "may" can, in some contexts, "indicate a mandatory action," it is unable to point to any case that suggests that "may," as used in the manner employed here, has ever been read as mandatory. Aroma does cite generally to cases standing for the proposition that, in certain contexts, the term "may" can be mandatory. Aroma Appl for Lv at 4. Nevertheless, none of the cases Aroma cites involves language such as that at issue here and, thus, none of those cases suggests that MCL 600.2919a should be read differently from its plain meaning or the manner in which courts have read it before.³

Nor does Aroma's citation of statutes that employ the phrase "the court may award," change this conclusion. Aroma Appl for Lv at 3. That some statutes spell out that a court may award damages or fees says nothing about *this* statute. It certainly does not suggest, as Aroma contends, that the party claiming it was damaged by means of conversion is given discretion to determine whether it is entitled to treble damages. Aroma cites to nothing standing for this proposition.

Given all this, it is clear that the Court of Appeals did not err in construing MCL 600.2919a's treble damages provision as permissive rather than mandatory. Accordingly, this Court should deny Aroma's application for leave on this issue.⁴

³ Aroma notes that it "has a great deal of trepidation regarding how trial courts are going to provide juries with instruction" on how to award damages under MCL 600.2919a. Aroma Appl for Lv at 15 n.8. Judges and juries, as the fact finders, are charged with determining damages routinely. These determinations obviously involve an amount of discretion. In fact, *this* statute routinely has been viewed as discretionary, and judges and juries have been making *discretionary* damage determinations under it for years without issue.

⁴ There is an additional reason this Court should decline to grant leave to review this issue. Aroma, in its second amended complaint, alleged a claim that Columbian violated the Uniform Commercial Code and was liable for breach of contract. See Second Amended Compl at ¶¶ 22-31. Columbian, in turn, asserted an affirmative defense that Aroma's statutory conversion tort claim was barred by the economic loss doctrine. Defendant's Answer to Plaintiff's Second Amended Complaint at 16. Under that doctrine, where the "UCC already [has] addressed" a plaintiff's concerns, such a plaintiff cannot "pursue an independent tort claim."

RELIEF REQUESTED

Columbian respectfully requests that this Court grant Aroma's Application for Leave to Appeal with respect to its first issue presented and deny its Application with respect to the second issue presented. For the reasons stated in Columbian's Application for Leave to Appeal, with respect to the first issue presented, this Court should reverse the Court of Appeal's erroneous decision reversing the circuit court's grant of Columbian's motion for a directed verdict, 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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Huron Tool and Engineering Co v Precision Consulting Services, Inc, 209 Mich App 365, 369-370; 532 NW2d 541 (1995). In other words, the "economic loss doctrine" prohibits "tort recovery and limits remedies to those available under the Uniform Commercial Code where . . . losses incurred are purely economic." *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 515; 486 NW2d 612 (1992). Because Columbian prevailed on its motion for a directed verdict as to the statutory conversion count, the question of whether the economic loss doctrine prohibited or barred Aroma from recovering treble damages for the statutory tort of conversion never was addressed by the trial court. This was not raised at trial or post-verdict because Columbian won the statutory conversion issue on directed verdict. Granting Aroma's Application for Leave to Appeal on this issue would thus be improper at this stage. Instead, the trial court should be able to address the economic loss doctrine question as an initial matter.