

STATE OF MICHIGAN
IN THE SUPREME COURT

AROMA WINES AND EQUIPMENT,
INC., a Michigan Corporation,

Supreme Court No. 148909

Plaintiff/Appellee/Cross-Appellant,

Court of Appeals No. 311145

v

Lower Court No. 09-11149-CK

COLUMBIAN DISTRIBUTION SERVICES,
INC., a Michigan Corporation,

Defendant/Appellant. *CROSS-Appellee OK*

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... i

SUMMARY OF ALLEGATIONS OF ERROR AND RELIEF SOUGHT iv

QUESTIONS PRESENTED FOR REVIEW vii

STATEMENT OF FACTS 1

ARGUMENT 5

 Standard of Review 5

 I. Statutory conversion does not require elements beyond common law conversion 5

 II. The victim of statutory conversion is entitled to treble damages..... 14

RELIEF REQUESTED 20

EXHIBITS See Exhibits Tab

INDEX OF AUTHORITIES

CASES

<i>Alken-Ziegler, Inc v Hague</i> , 283 Mich App 99, 104 n 6, 767 MW2d 668 (2009)	15
<i>Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc</i> , ___ Mich App ___ (Dec. 17, 2013)	<i>passim</i>
<i>Bailey v United States</i> , 516 US 137, 145, 116 S Ct 501, 133 Led2d 472 (1995).....	17
<i>Burns v Auto-Owners Ins Co.</i> , 88 Mich App 663, 279 NW2d 43 (1979)	19
<i>Campbell v Sullins</i> , 257 Mich App 179, 667 NW2d 887 (2003).....	6
<i>Christie v Fick</i> , unpublished opinion of the Court of Appeals, issued March 2, 2010 (Docket No. 285924).....	13,14
<i>Crowe v City of Detroit</i> , 465 Mich 1, 6, 631 NW2d 293 (2001).....	16
<i>Dep't of Agriculture v Appletree Marketing, LLC</i> , 485 Mich 1, 13, 779 NW2d 237 (2010).....	10
<i>Gillis v Wells Fargo Bank, NA</i> , 875 F Supp 2d 728 (ED Mich 2012).....	12
<i>Halloran v Bham MD</i> , 470 Mich 572, 576, 683 NW2d 129 (2004).....	5
<i>In re Dantone</i> , 477 BR 28 (2012).....	13
<i>J&W Transportation, LLC v Frazier</i> , unpublished opinion of the Court of Appeals, issued June 1, 2010 (Docket No. 289711)	<i>passim</i>
<i>J. Franklin Interests, LLC v Mu Meng</i> , unpublished opinion of the Court of Appeals, issued Sept. 19, 2011 (Docket No. 296525)	11
<i>LMT Corp v Colonel, LLC</i> , unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011 (Docket No. 294063)	15
<i>Manuel v Gill</i> , 481 Mich 637, 650, 753 NW2d 48 (2008).....	16
<i>Marshall Lasser PC v George</i> , 252 Mich App 104, 651 NW2d 158 (2002)	<i>passim</i>
<i>McBrian v Grand Rapids</i> , 56 Mich 95, 22 NW 206 (1885).....	19
<i>McKenzie v Auto Club Ins Ass'n</i> , 458 Mich 214, 580 NW2d 424 (1998).....	15

<i>Murray Hill Publ'ns, Inc. v ABC Commc'ns, Inc</i> , 264 F3d 622, 636-37 (6th Cir. 2001).....	12
<i>New Properties, Inc v George D Newpower, Jr, Inc</i> , 282 Mich App 120, 137; 762 NW2d 178 (2009).....	15
<i>Paul v Paul</i> , unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609).....	<i>passim</i>
<i>People v Thomas</i> , 263 Mich App 70, 73; 687 NW2d 598 (2004).....	5
<i>Poly Bond, Inc v Jen-Tech Corp</i> , unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290429).....	15
<i>Smith v City Comm of Grand Rapids</i> , 281 Mich 235, 274 NW 776 (1937).....	19
<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230, 237, 596 NWd 119 (1999).....	16
<i>Thoma v Tracy Motor Sales, Inc</i> , 360 Mich 434, 104 NW2d 360 (1960).....	<i>passim</i>
<i>Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury</i> , 270 Mich App 539, 546, 716 NW2d 598 (2006).....	7
<i>United States v Rodgers</i> , 461 US 677, 706, 103 S Ct 2132, 2149, 76 Led2d 236 (1983).....	19
<i>Victory Estates, LC v NPB Mortgage, LLC</i> , unpublished opinion of the Court of Appeals, issued Nov. 20, 2012 (Docket No. 307457).....	11

RULES

MCR 3.603(E)	17
--------------------	----

STATUTES

MCL 15.364	17
MCL 324.12114(2).....	17
MCL 500.3105(1).....	15
MCL 555.813.....	17
MCL 565.894(2).....	17
MCL 600.2919a.....	<i>passim</i>



MCL 600.2954.....17

MCL 700.7609.....17

OTHER REFERENCES

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

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

2A Sutherland, Statutory Construction (4th ed.) s 57.03, p. 41519

59 C J pp 1074, 107519

Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, Mich BJ, March 2014*passim*

SUMMARY OF ALLEGATIONS OF ERROR AND RELIEF SOUGHT

Cross-Appellant Aroma also appeals from the published opinion of the Michigan Court of Appeals, *Aroma Wines and Equipment, Inc v Columbia Distribution Services, Inc*, ___ Mich App ___ (Dec. 17, 2013)¹ (**Exhibit A**). This cross-appeal involves two issues of first impression - both interpreting MCL 600.2919a:

1. *Does the phrase "convert to one's own use" require elements beyond that of common law conversion; and*
2. *Does the use of the term "may recover" denote discretionary awarding or is it a term of entitlement to the victim?*

Both issues are ripe for a decision by the Michigan Supreme Court. The response to these issues at the trial courts has been inconsistent. On the exact same day that the decision in this case was issued, a conflicting unpublished decision was decided by an entirely separate panel of the Michigan Court of Appeals. See *Paul v Paul*, unpublished opinion of the Court of Appeals, issued December 17, 2013 (Docket No. 311609). (**Exhibit B**). Appellant is additionally aware of another appeal pending before the Court of Appeals that raises issues that would be directly impacted by this case (see *Israel v Putrus*, Court of Appeals Docket No. 316249). Furthermore, since Columbian's Application for Leave to Appeal was filed, the Michigan Bar Journal published an article which raises the same issues as this cross-appeal. (See **Exhibit M**).² This case presents this Court with the opportunity to resolve conflicting Court of Appeals decisions and provide firm precedence for litigants and courts alike - thereby preserving future judicial resources and legal expenses for litigants.

¹ Appellant's Motion for Reconsideration was denied on January 31, 2014. (See **Exhibit D**).

² The article cites the *Aroma* decision and addresses its inconsistencies with prior Court of Appeals decisions and the legislative intent of the statute.

Less than a decade ago, the Michigan Legislature amended its statutory conversion law - MCL 600.2919a. The purpose of the amendment was to broaden the scope of the statute and address an oversight in the existing law. Since the amendment, a number of cases have made their way to the Michigan Court of Appeals requesting interpretation of the amended statute. In some regards, the published decision in this case directly conflicts with earlier, and concurrent, unpublished decisions of the Michigan Court of Appeals. In this decision, the Court of Appeals has created a much higher burden on the victim of conversion to recover treble damages than the Legislature intended. Accordingly, the issues of statutory interpretation need to be addressed by the Michigan Supreme Court as they involve “legal principles of major significance to the state’s jurisprudence.” MCR 7.302(B)(3). This case presents the opportunity to set state precedence.

The virtue of this appeal is entirely academic. In the trial court, the jury returned a verdict for Cross-Appellant Aroma on the issue of conversion. Yet, Aroma has been unable to recover the treble damages entitled to it through Michigan’s statutory conversion statute. This is due to the erroneous interpretation of the statute at the trial court. The Michigan Court of Appeals decision, while correcting part of the error of the trial court, did not go far enough in its analysis of the statute.

The trial court granted Appellant Columbian’s motion for directed verdict and did not allow the statutory conversion claim to go to the jury. The trial court reasoned that in order for statutory conversion to be presented to the jury, Plaintiff must present evidence that Defendant “used” the property. Essentially, the trial court determined that statutory conversion equaled common law conversion plus “use.” It then employed an extremely narrow interpretation of the term “use” and determined that Plaintiff’s evidence could not meet that requirement. Accordingly, it granted a motion for directed verdict on the issue.

The Michigan Court of Appeals resolved the factual issue in its *de novo* review of the trial court's grant of a directed verdict. It determined that Plaintiff presented enough evidence of "use" to allow the statutory conversion issue to go to the jury, and the Court of Appeals remanded to the trial court consistent with its opinion. In doing so, the Court of Appeals reasoned that the trial court had utilized much too narrow a definition of "use." Even though the Court of Appeals diminished the burden on the victim to prove "use," Aroma believes that the Legislature never intended for the statute to create this extra element for statutory conversion. The Court of Appeals also reasoned that application of treble damages was a "permissive" application—an interpretation of the statute that Aroma contends is inconsistent with the context of the statute. Therefore, Cross-Appellant Aroma contends that the Court of Appeals interpreted MCL 600.2919a incorrectly, and respectfully requests this Court to remand to the trial court with the correct standards:

- 1) Treble damages are not permissive for the trier of fact, but they must be awarded when the victim proves conversion; and
- 2) Statutory conversion does not require a plaintiff to prove an extra element of "use" in order to receive treble damages.

QUESTIONS PRESENTED FOR REVIEW

- I. Should this Court grant leave to Appeal where, in a published decision and as a matter of first impression, the Court of Appeals erred in its statutory interpretation that MCL 600.2919a requires an extra element of “use” to recover treble damages for statutory conversion, and, where the Court of Appeals decision entirely contradicts the legislative intent of the statute?

The Court of Appeals would answer “no.”

The Trial Court would answer “no.”

Cross-Appellant answers “yes.”

Appellant answers “yes” but for a different reason.

- II. Should this Court grant leave to Appeal where, in a published decision and as a matter of first impression, the Court of Appeals erred in its statutory interpretation that MCL 600.2919a creates a permissive remedy that is in the hands of the trier of fact, when the syntax of the statute clearly establishes that the discretion belongs to the victim, and the statute does not set a standard for the trier of fact to exercise discretion?

The Court of Appeals would answer “no.”

The Trial Court would answer “no.”

Cross-Appellant answers “yes.”

Appellant presumably answers “no”

FACTUAL BACKGROUND

Introduction

Plaintiff/ Cross-Appellant Aroma Wines and Equipment, Inc. ("Aroma") is a wholesale wine importer and distributor that stored its wine in Defendant/Appellant Columbian Distribution Services, Inc.'s ("Columbian") public warehouse. Plaintiff and Defendant entered a contract for receiving and warehousing wine in temperature controlled storage between 50 - 65 degrees. As a result of problems with a distributor, Aroma fell behind in its storage payment in late 2008. Aroma's President, Christian Pavelescu, was cognizant of Aroma's obligation to make monthly payments and would make small payments whenever he could in attempts to make the account current.

In early 2009, Columbian informed Mr. Pavelescu that unless he brought in at least \$6,109.00, he could not access any of the 8,374 cases of wine stored at its facility. Columbian never assessed the 2% penalty provided for in the contract and wholly failed to follow proper procedures to assert a warehouseman's lien. Despite being told by Aroma that it could not hold the wine and that the wine value greatly exceeded the amount owed, Columbian was steadfast in asserting control over the wine.¹

As of June 2009, Columbian was controlling 8,374 cases of Aroma's wines and most was not in temperature controlled storage as contracted for. These actions subjected the inventory to spoilage. The move was not for Aroma's benefit but allowed Columbian to charge higher prices to third parties for use of the area that Aroma was being charged for - Columbian continued to bill Aroma for the higher price with controlled temperature storage. Furthermore, Columbian used the wine to advance its own purposes of applying pressure to Aroma to pay its bill. These

¹ Columbian did not "threaten to deny Aroma any access to the wine" as it claims, it **in fact** denied Aroma access.

actions are the antithesis of commercially reasonable practices, and what is permitted under the Uniform Commercial Code, and Columbian is liable for statutory conversion.

Trial Court

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

Relevant to the issues raised on appeal, Defendant moved for directed verdict at the close of Plaintiff's proofs. Defendant argued that Plaintiff failed to demonstrate that Defendant converted the wine to its own use and could therefore not recover for statutory conversion. Plaintiff rebutted that Defendant had used the wine for its own purposes by withholding it and using it as leverage against Plaintiff. Nevertheless, the trial court granted Columbian's Motion for Directed Verdict on the issue of statutory conversion based upon its perception that the plain language of the statute required that Defendant should have "used" the wine by drinking it or selling it. Essentially, the trial court created an extra element of "use" in order for a victim to recover treble damages for statutory conversion.

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

Court of Appeals

On appeal, Aroma argued that the trial court should have denied Colombian's motion for directed verdict in regards to its statutory conversion claim. Specifically, Aroma argued that the trial court improperly interpreted MCL 600.2919a. The Michigan Court of Appeals acknowledged that this was an issue of first impression when it pointedly stated that "this Court has never addressed the precise meaning of the phrase 'own use' in the context of the statutory conversion statute."² Accordingly, the Court of Appeals has set its first precedence on the issue in this published decision.

Ultimately, the Michigan Court of Appeals granted Aroma's appeal by reversing the trial court's directed verdict and remanding the case for a decision consistent with the opinion. But, the Court of Appeals has remanded with an incorrect statutory interpretation of MCL 600.2919a for the trial court to follow. While the Court of Appeals was correct in reversing the trial court, its reasoning was not in line with the legislative intent of the statute.

First, the Court of Appeals correctly stated that "whether conversion occurred is not an issue on appeal." It is Aroma's position, as explained below, that the analysis should have ended there. When a victim proves conversion they are entitled to treble damages. MCL 600.2919a was created to provide a remedy, not an extra hurdle to recovery.

Instead, the Court of Appeals determined that "at issue in this case is whether plaintiff presented evidence that conversion was to defendant's 'own use' as required by MCL 600.2919a(1)(a)." Essentially, the court admitted that even though Aroma proved the elements of conversion, it must now prove an extra element of "use." It then embarked on a discussion of statutory interpretation of "to one's own use." The Michigan Court of Appeals concluded that

² However, as indicated below, prior unpublished decisions had equated common law conversion and statutory conversion.

plaintiff submitted enough evidence that defendant converted the wine to its own use to survive a motion for directed verdict, and sent it back for a jury to consider the facts. Aroma argues that, by discussing the added “use” element, the Court of Appeals has strayed from the intent of the Michigan Legislature.

Based on Aroma’s position, and the fact that the jury specifically found defendant liable for conversion, Aroma requested that the Court of Appeals remand to the trial court for entry of treble damages and assessment of attorney fees. The Court of Appeals, on this issue, disagreed. It determined that because the term “may” is included in the statute, it automatically indicates a discretionary activity that is only for the trier of fact. But the Court of Appeals did not consider the syntax of the statute and the position of the word “may.” Believing that the Court of Appeals committed palpable error, Aroma submitted a Motion for Reconsideration. The motion was denied on January 31, 2014. (**Exhibit D**).

Then, on March 14, 2014, Aroma filed an Application for Leave to Appeal in this Court. (See Supreme Ct. No: 148907). On the same day, Columbian also filed an Application for Leave to Appeal. (Supreme Ct No: 148909). In order to preserve the issues raised by Aroma for both Docket numbers, Aroma now files this Cross Appeal to Columbian’s Application. This Cross Appeal raises the same substantive arguments as Aroma’s Application for Leave. However, since both applications were submitted, the Michigan Bar Journal published an article regarding MCL 600.2919a. (See *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation* attached as **Exhibit M**). This Cross Appeal also includes the arguments raised in that article.

Ultimately, Plaintiff/ Cross-Appellant Aroma requests this Court to consider the issues raised, to remand to the trial court with the correct statutory interpretation of MCL 600.2919a, and order the trial court to enter treble damages and attorney fees.

LAW AND ARGUMENT

Standard of Review.

All issues presented in this application for leave to appeal concern statutory construction. The standard of review the Court should employ in this matter is therefore *de novo*. The standard of review for statutory construction was reviewed in *People v Thomas*, 263 Mich App 70, 73; 687 NW2d 598 (2004), in which the court stated “[t]he question here turns on the interpretation of that statutory phrase, a matter we review *de novo*.” The review is consistent with the standard of review approved by the Michigan Supreme Court where the Court stated “[t]his Court reviews *de novo* issues of statutory interpretation.” *Halloran v Bham MD*, 470 Mich 572, 576, 683 NW2d 129 (2004).

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

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

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

In other words, does statutory conversion contain an extra element that common law conversion does not? The legislative intent, as well as recent unpublished decisions of the Michigan Court of Appeals, seems to point directly at the first theory. But, in this published decision, the Court of Appeals appears to change position³ by analyzing the “use” element. A complete look at the history and progression of MCL 600.2919a more appropriately puts this statute in prospective.

Prior to the amendment of MCL 600.2919a in 2005 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

³ As noted elsewhere, another panel released a conflicting, unpublished opinion on the very same day the Aroma opinion was released. See **Exhibit B**.

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 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); *Campbell v Sullins*, 257 Mich App 179, 667 NW2d 887 (2003). In *Marshall Lasser*, the Michigan Court of Appeals pointed out that, by its clear language, "the statute is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property." *Marshall Lasser, supra* at 112. According to the Court of Appeals, "If the Legislature had meant for the statute to also apply to the thief as well as someone who aids him it could have written the statute to include the thief's action in possessing or concealing the property." *Id.*

In response to the Court of Appeals decisions, the Michigan Legislature endeavored to correct the oversight by amending the statute - it proposed a bill to expand the provision to specify triple damage liability to 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. (**Exhibit E**). See also House Legislative Analysis, HB 4356, May 31, 2005. (**Exhibit F**). The Legislative Analysis indicates a clear intent to provide a statutory cause of action against the converters themselves.⁴ Further, 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.

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

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

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

MCL 600.2919a.

The Legislature's sole purpose in amending the statute and including Section (1)(a) was to allow a victim to recover treble damages from the converter. The term "to one's own use" was never intended as an extra element that must be proven, it was simply clarifying that the statute no longer applied only to aiders and abettors. The author of *Statutory Conversion and Treble*

⁴ "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).

Damages Puzzles of Statutory Interpretation, Adam D. Pavlik, advances an exemplary argument regarding MCL 600.2919a and how common law conversion equates to statutory conversion⁵:

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.

⁵ The discussion directly discusses the *Aroma* decision and the fact that, although the court set out a broad definition of “use,” the interpretation incorrectly creates an element that was already inherent in the definition of common law conversion.

Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, Mich BJ, March 2014, at 34 (citations omitted). (See **Exhibit M**).

Unfortunately, unless the Supreme Court grants leave, the courts have managed to create an extra element through erroneous interpretation of the statute. While professing to follow the rules of statutory construction, the Court of Appeals in *Aroma* managed to stray a significant distance from what the Legislature intended. The phrase “to one’s own use” was simply clarifying that the person liable was the embezzler or convertor, not only the aider and abettor. The Court of Appeals in *Aroma* either complicated or overruled prior panels that addressed this issue.

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) (**Exhibit G**), the court acknowledged that the appeal concerned both common law and statutory conversion, and then proceeded to analyze both with the same factors and reasoning. 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 because the defendants converted the trucks, 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 treble damages under the statute.

As further evidence of Aroma's position, the court's discussion of "use" was enveloped in its discussion of conversion.⁶ The court had reasoned that conversion occurs when a party *uses* personal property in their possession without the authority to do so. *Id.* at *13 (emphasis added); citing *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 104 NW2d 360 (1960). In *Thoma*, this Court adopted the Restatement of Torts definitions of conversion. *Thoma, supra* at 438. In citing the Restatement of Torts, this Court deemed that common law 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) Misdelaying 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.

⁶ Notably, *J&W* points out the anomaly that 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.

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). (**Exhibit H**). 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.⁷ *Id.* at *8. The Court reasoned that when defendants changed the lock on plaintiff's building and refused plaintiff access to his belongings, the conversion had been fully accomplished. *Id.* It then granted treble damages for statutory conversion without any further discussion. *Id.*

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

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

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.

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).⁸ (See **Exhibit B**). It claimed that “plaintiff was required to show that defendants wrongfully exerted domain over his personal property in denial of his rights to sustain both his common-law and statutory conversion claims.” *Id.* at *2.

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

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

⁸ 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.

the owner's rights constituted conversion.⁹ *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 initial preclusion decision, the 6th 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 - **those are supplied by common law.** *Id.* at 38 (emphasis added).

While Aroma contends that the Court of Appeals in *Aroma* should not have added another element of “use” to the definition of statutory conversion, it also contends that it was not necessary for the Court to do so to resolve the appeal before it. Columbian is also liable for statutory conversion under the provisions of MCL 600.2919a(1)(b) – a provision that imposes liability for the “possessor” of converted property. This subsection contains no reference to the term “use.”

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

⁹ Again, “use” was analyzed as a factor of common law conversion. Requiring litigants who claim treble damages to prove “use” as an added elements is redundant.

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

It does not appear that subsections (1)(a) and (1)(b) are mutually exclusive. Arguably, according to *Christie*, Aroma is entitled to treble damages either because Columbian converted the property under subsection (a) or because it possessed and concealed the property as under subsection (b). Columbian possessed Aroma’s wine prior to trial, during trial, and after trial. Columbian’s wrongful possession continues to this day.

II. The victim of statutory conversion is entitled to treble damages.

In its published opinion in *Aroma*, the Michigan Court of Appeals disagreed with Plaintiff/ Cross-Appellant Aroma’s position that because the jury specifically found defendant liable for conversion the case could simply be remanded to the trial court for entry of treble damages and assessment of attorney fees under MCL 600.2919a. The court reasoned that, pursuant to the language of the statute and the inclusion of the term “may,” the award of treble damages and attorney fees are discretionary. The court held that the issues of treble damages and attorney fees are for the trier of fact, and cannot be ordered simply upon a finding of conversion. Aroma respectfully disagrees.

In support of its decision, the court cited *LMT Corp v Colonel, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011 (Docket No. 294063) (**Exhibit K**) and *Poly Bond, Inc v Jen-Tech Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290429) (**Exhibit L**). While both discuss the discretionary nature of MCL 600.2919a, both are unpublished decisions and are not precedentially binding. Furthermore, earlier published decisions of the Court of Appeals have claimed that an injured party is **entitled** to treble damages. See *Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 104 n 6, 767 MW2d 668 (2009) (stating “plaintiff’s right to recover 3 times the amount of actual damages”); *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 137; 762 NW2d 178 (2009). “While one can imagine arguments related to whether the remarks about a *right* to treble damages or being *entitled* to treble damages were the holdings of the earlier cases or mere dicta, the more recent discretionary opinions have not made this analysis nor otherwise distinguished the earlier entitlement cases.” Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, Mich BJ, March 2014, at 34. Again, this Court has the opportunity to set firm precedence on this issue.

In *McKenzie v Auto Club Ins Ass’n*, 458 Mich 214, 580 NW2d 424 (1998), the Michigan Supreme Court interpreted a provision of the No-Fault Act, specifically MCL 500.3105(1), in a manner that abrogated many of its prior decisions regarding that statute. In doing so, this Court noted that, “We have acted in accord with venerable norms of statutory construction by focusing on the language and syntax of the statute and then painstakingly endeavoring to be faithful to it even on pain of having to overrule some of our previous opinions.” *Id.* at fn. 8. Aroma respectfully requests this Court to conduct an equally painstaking review of the language and syntax of MCL 600.2919a.

While there are no published decisions specifically addressing this issue in the context of MCL 600.2919a, the Michigan Supreme Court has addressed similar construction issues before and reached contrary results. Aroma recognizes that Michigan courts have generally held that the term “may” is permissive and indicates a discretionary activity, but it disagrees that MCL 600.2919a gives that discretion to the trier of fact. To reach this conclusion, it is imperative to note the sentence structure of the statute. Again, the language of the relevant statute, MCL 600.2919a, is as follows:

(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 adding 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.

MCL 600.2919a (emphasis added).

As a general rule of statutory construction, a word or phrase is given meaning by its context or setting. *Crowe v City of Detroit*, 465 Mich 1, 6, 631 NW2d 293 (2001). Furthermore, a court does not construe the meaning of statutory terms in a vacuum, rather, words are interpreted “in their context and with a view to their place in the overall statutory scheme.” *Manuel v Gill*, 481 Mich 637, 650, 753 NW2d 48 (2008). And, while the court must consider the plain meaning of the critical word or phrase, it must also consider “its placement and purpose in the statutory scheme.” *Sun Valley Foods Co v Ward*, 460 Mich 230, 237, 596 NWd 119 (1999),

quoting *Bailey v United States*, 516 US 137, 145, 116 S Ct 501, 133 Led2d 472 (1995). As a matter of English syntax, it is clear from MCL 600.2919a that the verb “may” is a word that modifies “the person damaged.” Essentially, based on the sentence structure of the statute, the permissiveness belongs to the victim. “A person damaged ... may recover.” MCL 600.2919a.

Many statutes are worded so as to give the court discretion in granting certain awards. These statutes include the language “the court may award.” See MCL 324.12114(2), MCL 15.364, MCR 3.603(E), MCL 565.894(2). Undoubtedly, in those instances, the Legislature intended to put the discretion in the hands of the court, and made that clear by the language of the statutes. But, there are also many statutes in which the Legislature put the discretion in the hands of another. See MCL 555.813 (“the trustee may decide which action or combination of actions to take”), MCL 700.7609 (“the claimant may commence a proceeding”), MCL 600.2954 (“the victim may maintain a civil action”). Similarly, in MCL 600.2919a, the discretion is given to the person damaged. Simply including the word “may” does not automatically create a discretionary activity for the trier of fact, but oftentimes it gives discretion to another party, as it does in MCL 600.2919a.

Again, the author of the statutory conversion article in the March 2014 publication of the Michigan Bar Journal advances this argument:

The better reading of MCL 600.2919a is that an injured party is entitled to treble damages. One problem with the discretionary reading of the statute is that it ignores to whom the permission runs. If the statute said the *court may award* treble damages, the discretionary reasoning would be much stronger. But the statute actually says the plaintiff “may recover” treble damages. In the absence of the statute, “only one recovery for a single injury is allowed under Michigan law.” The statute, then, gives permission *to the plaintiff* to be compensated in excess of ordinary damages, which, if not authorized by statute, would be rejected out of hand as a matter of law. While it is true that the statute says the injured party “may recover” treble damages rather than “shall recover” them, this is most sensibly interpreted as the legislature *permitting* (rather than *requiring*) the plaintiff to pursue the case. Had the statute read “shall recover,” that would

implicitly be an absurd requirement that no one whose property was converted could let the injury pass.

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

It is also worth noting that the Michigan Legislature did not set out a standard for when a victim of conversion is entitled to treble damages.¹⁰ Arguably, the statute gives the right of treble damages to the victim upon proving they were damaged as a result of:

- (a) Another's 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. Upon proving the elements of either crime, the person damaged is entitled to treble damages.

[This] interpretation also avoids the strange conclusion that the legislature intended to vest the fact-finder with discretion but did not articulate how or in what circumstances that discretion should be exercised. Tellingly, none of the discretionary cases has filled this gap by articulating a judge-made standard. One said that "the trial court must determine if treble damages are appropriate" with

¹⁰ The Cross-Appellant has a great deal of trepidation regarding how trial courts are going to provide juries with instruction on "discretion" under the existing *Aroma* decision. If the Legislature had intended "discretion" in awarding treble damages it would have provided standards as it did in MCL 600.2919 (also a treble damage statute). In MCL 600.2919, the Legislature describes the specific standards where treble damages are not to be awarded:

If upon the trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that the wood, trees, or timber taken were taken for the purpose of making or repairing any public road or bridge judgment shall be given for the amount of single damages only.

MCL 600.2919a does not have any such standards. Clearly, the Legislature was aware that it could indicate qualifications in MCL 600.2919a for awarding treble damages -- the intentional exclusion of qualifications indicates the intent that treble damages be mandatory. Any contrary conclusion would have to assume that the legislature meant to leave the trier of fact with unlimited (or arbitrary) discretion, a concept which the law abhors. This Court must interpret the statute in a way that makes it constitutional -- the obvious solution is to deem the remedy mandatory.

no further explanation of how to make that appropriateness determination. Another said that “whether to award treble damages is a question of fact for the trier of fact” without explaining which fact must be found to award them. It seems unlikely that the legislature would put the fact-finder in the strange position of needing to invent its own standard for applying its discretion.

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

Ordinarily, use of the word “shall” indicates that something is mandatory, while use of the word “may” grants discretion, but this is not always the case. In the context of particular statutes the term “may” has been held to indicate a mandatory action. *McBrian v Grand Rapids*, 56 Mich 95, 22 NW 206 (1885), *Smith v City Comm of Grand Rapids*, 281 Mich 235, 274 NW 776 (1937), *Burns v Auto-Owners Ins Co.*, 88 Mich App 663, 279 NW2d 43 (1979). While the verb used in a statute is an important consideration of whether a statute is mandatory or directory, “it is not the sole determinate and what it naturally connotes can be overcome by other considerations.” 2A Sutherland, *Statutory Construction* (4th ed.) s 57.03, p. 415. The word “may,” when used in a statute, usually implies some discretion, but that principle of statutory construction “can be defeated by indications of legislative intent to the contrary or by obvious inference from the structure and purpose of the statute.” *United States v Rodgers*, 461 US 677, 706, 103 S Ct 2132, 2149, 76 Led2d 236 (1983).

“When some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory.” *Smith*, at 242; quoting 59 C J pp 1074, 1075. MCL 600.2919a requires a person to prove that they were damaged as a result of the actions in either subpart (a) or (b). Upon performance of the requisite conditions, the victim is entitled to treble damages. The treble damages become mandatory.

Finally, Aroma would note that MCL 600.2919a(2) provides that it is remedial. The Legislature provided that these “rights” were in addition to any other “right” or remedies available to the victim. A right of additional recovery that is only permissive may well turn out to be an illusory right that a victim cannot realize on despite being awarded that right by the Legislature. “With respect to treble damages, the best reading of MCL 600.2919a is that it entitles the plaintiff to treble damages.” Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, Mich BJ, March 2014, at 34.

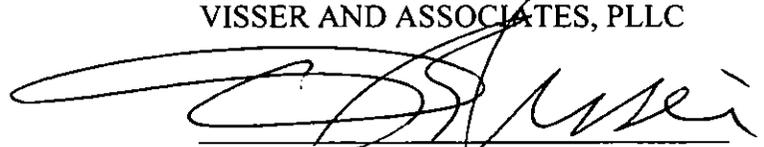
RELIEF REQUESTED

In order to recover treble damages for statutory conversion, Plaintiff is not required to prove an extra element of “use.” Statutory conversion is equivalent to common law conversion. Given that Plaintiff has already received a jury verdict for common law conversion, it is therefore entitled to the remedy provided for in MCL 600.2919a. Furthermore, treble damages under MCL 600.2919a is a mandatory remedy awarded to the victim of statutory conversion.

Should this Court agree with Aroma on both issues, Aroma respectfully requests this Court to remand to the trial court with instructions to enter a judgment for Aroma for treble damages and attorney fees.

Dated: April 9, 2014

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