

STATE OF MICHIGAN  
IN THE SUPREME COURT

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AROMA WINES, INC., a Michigan Corporation,

Plaintiff/Appellant,

v

COLUMBIAN DISTRIBUTION SERVICES, INC., a Michigan Corporation,

Defendant/Appellee.

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Supreme Court No. 148907

Court of Appeals No. 311145

Lower Court No. 09-11149-CK

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148907  
reply

**PLAINTIFF/APPELLANT'S REPLY BRIEF**

**EXHIBITS**

**PROOF OF SERVICE**

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

It is not often that adverse parties find common ground, but, in this case, it is clear that both Aroma and Columbian agree that this Court's review is necessary to clarify the proper interpretation of MCL 600.2919a. In an effort to retain at least some contention, Aroma requests that this Court grant review of both questions presented as stated by Aroma in its Application for Leave to Appeal. As explained more below, both issues involve "legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3). Furthermore, both issues require this Court's review in order to clarify conflicting Court of Appeals decisions. MCR 7.302(B)(5). As such, this Court should grant Aroma's Application for Leave to Appeal with respect to both questions presented.

### COUNTER-STATEMENT OF FACTS

Columbian continues to present an argument that was rejected by the jury, and which it never appealed. Despite its assertion that Columbian moved Aroma's wine for the sole purpose of a re-racking project, there are ample proofs that the wine was moved well before the project and not returned after. In short, Columbian's argument was simple a red herring -- it did have a re-racking of very short duration, but it had nothing to do with Columbian's handling of Aroma's wine. Regardless, the jury did not accept Columbian's argument, and it returned a special verdict in favor of Aroma on the issue of conversion. Therefore, the factual argument that Columbian makes does not affect the issues of this appeal in any way.

## ARGUMENT

I. THIS COURT SHOULD GRANT AROMA'S APPLICATION TO CLARIFY THE PROPER INTERPRETATION OF THE STATUTORY CONVERSION STATUTE.

The pertinent issue is not how narrowly or broadly to interpret the term "use," but rather, the issue is whether the extra term "use" is relevant at all to a finding of statutory conversion. As outlined in its Application for Leave to Appeal, it is Aroma's position that the Michigan Legislature never intended to create an added element of "use" in order for a victim to be able to recover treble damages for conversion. To the contrary, the legislative intent of the statute was simply to allow the victim, upon proving conversion, to recover treble damages from the convertor. In essence, common law conversion = statutory conversion.

Columbian asserts that "a plain reading of the [Court of Appeal's] opinion demonstrates that the opinion effectively collapses the distinction between common law and statutory conversion." Columbian's Brf. in Partial Support and Partial Opposition for Lv at 6. In essence, Columbian believes that the Court of Appeal's holding **is exactly what Aroma is requesting this Court to adopt** - that there is no distinction between common law and statutory conversion. Aroma believes that also conforms to the true intent of the Michigan Legislature. Yet, the Court of Appeals did not explicitly hold that. It determined that "[a]t issue in this case is whether plaintiff presented evidence that the conversion was to defendant's 'own use' as required by MCL 600.2919a(1)(a)." While the Court of Appeals did adopt a broader definition of "use" than the trial court, it still remanded for a finding of "use" consistent with its opinion. Essentially, according to the Court of Appeals, Aroma must still prove that Columbian "used" the wine in order to collect the damages it is entitled under MCL 600.2919a.

Since Aroma filed its Application for Leave to Appeal, the Michigan Bar Journal published an article regarding the proper interpretation of MCL 600.2919a. (See **Exhibit 1**). The article raises

the exact issues Aroma did in its Application, while also recognizing that these issues of statutory interpretation have received conflicting answers in the appellate courts. The author reinforces Aroma's position with an exemplary discussion regarding how common law conversion equates to statutory conversion:

To understand subparagraph (a), the key concern is the meaning of the phrase "own use." Defendants who have been sued under subparagraph (a) seek to avoid exposure to treble damages liability by arguing they have not *used* the chattel that was converted. The Michigan Court of Appeals recently validated this analysis by considering the dictionary definition of the word "use" and concluding, "[t]he term 'use' requires only that a person 'employ for some purpose'" the chattel at issue. While setting out the a broad definition of "use," this analysis maintains a distinction between statutory conversion, which requires that the chattel be converted to the tortfeasor's own use, and common law conversion, which does not contain such a requirement.

This interpretation, however, disregards that the phrase "own use" is a term of art. As has been observed in the past, the conversion statute does not define the word "convert," so the common law definition of "conversion" is incorporated into the statute by reference. The phrase "own use" is part of the name of the tort at common law, "conversion to another's own use"; it is a vestigial remnant of the legal fiction that was the foundation for the tort of conversion. Because the legislature is presumed to be aware of the common law and legislate in light of it, and innovations on the common law are narrowly construed, treating the phrase "own use" as having independent meaning appears to overlook the provenance of the phrase. While it is true that "common law conversion does not necessarily require a determination regarding conversion to one's own use," this is because "own use" is not an element of the tort but part of the name of the tort itself; it is simply a rote legal formula with no independent meaning that satisfies antiquated requirements of the common law.

While courts continue to recognize common law and statutory conversion as separate causes of action, this distinction is predicated on investing the phrase "own use" with meaning which its common law heritage indicates it does not have - an argument the appellate courts have yet to confront.

The current interpretation of MCL 600.2919a may have overlooked the common law origins of the phrase "own use." The statute can be interpreted as an enhancement of the remedy available for the common law tort of conversion and is thus incorporated in any complaint for conversion simply as a measure of relief without needing to plead it separately.

Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, 93 Mich BJ 34 (March 2014) (citations omitted).

Aroma adamantly believes that the Court of Appeal's decision should be clarified in a manner that explicitly recognizes that statutory conversion is identical to common law conversion. More specifically, this Court should determine that statutory conversion does not require a plaintiff to prove an added element of "use," regardless of how broadly or narrowly that term is defined.

II. THIS COURT SHOULD GRANT THE APPLICATION TO CLARIFY THAT TREBLE DAMAGES UNDER MCL 600.2919a ARE MANDATORY RATHER THAN PERMISSIVE.

In its published opinion in *Aroma*, the Michigan Court of Appeals disagreed with Appellant's position that treble damages are mandatory. 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. Again, as the first published opinion that directly addresses this issue in the context of MCL 600.2919a, it is imperative to set correct precedence. The Court of Appeal's determination that treble damages are purely discretionary, and a question for the trier of fact, is clearly erroneous and needs to be addressed.

In support of its decision, the Court of Appeals cited *LMT Corp v Colonel, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011 (Docket No. 294063) (See Aroma's Appl for Lv **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) (See Aroma's Appl for Lv **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*, 93 Mich BJ, March 2014, at 34. Again, this Court has the opportunity to set firm precedence on this issue.

The author of the statutory conversion article in the March 2014 publication of the Michigan Bar Journal advances Aroma’s 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.

[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 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.

With respect to treble damages, the best reading of MCL 600.2919a is that it entitles the plaintiff to treble damages.

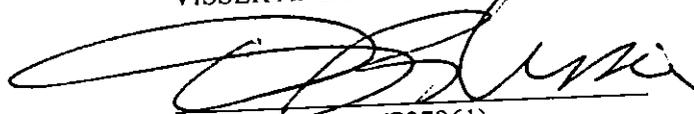
Adam D. Pavlik, *Statutory Conversion and Treble Damages Puzzles of Statutory Interpretation*, Mich BJ, 93 March 2014, at 34 (citations omitted).

**CONCLUSION**

Wherefore, Appellant respectfully requests this Honorable Court to grant leave to appeal on both issues as presented by Aroma in its Application for Leave to Appeal. For the reasons stated in Aroma's Application for Leave, this Court should determine that statutory conversion does not require elements beyond common law conversion, and that treble damages are mandatory under the statutory conversion statute.

Dated: April 25, 2014

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