DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CV-872

LYNNE M. SCHWARTZ SPECIAL NEEDS TRUST, *et al.*

Appellants

v.

PNC BANK, N.A., *et al.*

Appellees

Appeal from the District of Columbia Superior Court

APPELLANTS' BRIEF

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ISSUES PRESENTED

1. Does Defendants' willful four-year temporary conversion of the right of Appellants to receive $12,000.00 by wrongfully and purposefully concealing that right and refusing to acknowledge its existence give rise to a valid cause of action?

2. Why?

3. Does the *de novo* and abuse of discretion findings of this Court that rulings of the Superior Court were in error or otherwise improper vacate the dismissal of those Counts and require a remand?

4. Is an individual who is both an attorney and an agent for an organization disqualified from subscribing to an affidavit and otherwise testifying to events of which he has personal knowledge under the rule that an attorney's statements are not considered evidence?

STATEMENT OF FACTS AND PROCEDURAL CONTEXT

This Statement of Facts is adopted primarily from those facts considered germane by the Superior Court in her relevant Orders. While the facts are generally agreed to little else is. There are six Appellants: the Lynne M. Schwartz Special Needs Trust; the Lynne M. Schwartz Discretionary Trust; the Estate of Lynne M. Schwartz (in formation); the Estate of Frances A. Schwartz, Deceased; Johanna Schwartz; and the International Internship Program, Inc. The common thread running through each is that Frederic W. Schwartz, Jr., is the attorney and or agent for each in different capacities.

There are two active Appellees: PNC Bank, N.A. and PNC Financial Services Group, Inc., who are addressed collectively as "PNC" in this brief. [1]

While an action involving multiple plaintiffs and multiple defendants is not unusual this case is complicated because the claim of Johanna Schwartz and the claim of the International Internship Program, Inc. are independent of the claims of the other Appellants and must be addressed separately although the Superior Court sometimes utilized blanket grounds for dismissing all the Appellants' specified claims. To facilitate this Court's review of those claims relating to the most significant (and interesting) element of the appeal, a claimed $12,000.00 "not authorized" cashier's check which was drawn on PNC, requested by PNC, dishonored by PNC, destroyed by PNC, and after a number of years determined to have been escheated to the District of Columbia by PNC.

Little by little the Superior Court whittled away the Appellants' claims and the entire case was dismissed on September 20, 2023. The pertinent facts and the appropriate standard of review are addressed along with the relevant segment of the argument. The Appellants propounded different sets of facts claiming different

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[1] Along with the two identified Appellees there were two other "Doe" Defendants who were employed by PNC Bank and who were involved with the questioned transactions. PNC Bank claims it cannot identify these individuals as discussed below. PNC's Greater Washington Regional President was named and served but did not respond. He was dismissed with the acquiesce of the Appellants after Appellants' counsel discussed the matter with Defendants' counsel.

damages under differing theories. All maintained different relationship with PNC. There was one Superior Court Judge who, piece by piece, dismantled Appellants' causes of action. In an effort to minimize confusion the Superior Court's errors will be addresses chronologically, substantively and separately, Order by Order , as applied to each Appellant.

SUMMARY OF ARGUMENT

By the nature and structure of the Argument a Summary would merely confuse. Consequently this Summary of Argument will address those legal principles employed throughout more as an advance warning than a guide.

While the Appellees legitimately, although imperfectly, escheated a $12,000.00 cashiers check they wrongfully and purposefully secreted that fact and misled the Appellants for four years. In doing so they retained and presumably destroyed the actual cashier's check itself after its presentation. This resulted in a temporary conversion for which the Restatement 2d of Torts authorized a cause of action and provided a remedy. The process by which Appellees did so resulted in a breach of Appellees' fiduciary and contractual responsibilities, particularly that of good faith and fair dealings. Similarly the false representations which Appellees publically made, particularly in relation to their honesty, violated the District of Columbia consumer protection laws.

The Superior Court issued a series of Orders favoring the Appellees which erroneously impeded the Appellants' efforts to successfully litigate the matter. She granted in substantial part Appellees' Rule 12(b(6) Motion to Dismiss; denied Appellants' motion to require a responsive Answer; denied Appellants' Motion to Compel responses to the two interrogatories propounded; denied Appellants' Motion to Amend and enlarge discovery after the escheatment was eventually revealed by Appellees, and eventually granted summary judgment against all Appellants for a grab bag of erroneous reasons to be discussed below.

ARGUMENT

I. The claimed $12,000.00 "not authorized" cashier's check

A. Facts

On April 14, 2014 PNC issued a $12,000.00 cashier's check as directed by the LMS Special Needs Trust payable to Frances Schwartz. [2] (Photocopy attached to Complaint and at App. 377 Frances Schwartz was the beneficiary of the Frederic W. Schwartz Residual Trust which was under the absolute management and control of PNC and which dissolved on her death. On or about April 12, 2019, Frederic Schwartz, Jr., in his representative capacity, was told by a senior representative of PNC

[2]Frances Schwartz had died approximately a year earlier on May 27, 2013, and the transfer of funds was likely related to her Estate expenses or the termination of the PNC Financial Services Group, Inc.'s money management responsibilities for bad behavior. Neither the record nor counsel's recollection provide an explanation.

that he had consulted with more senior PNC employees and determined that the appropriate method to deposit the cashier's check was to endorse it as Frederic W. Schwartz, Jr., executor, and to make it payable to the LMS Discretionary Trust.

On or about April 15, 2019 PNC refused to honor the cashier's check, retained it, and issued instead a photocopy of the cashier's check which was prominently stamped "NOT AUTHORIZED" and which set out for the reason it was dishonored the phrase "RETURN REASON-Q NOT AUTHORIZED." [3] Since PNC was the payor its refusal to honor the cashier's check coupled with the notice to all potential holders in due course that the cashier's check was not authorized stripped the photocopy of any value it might have had. *Bollt v. Morgenstein*, 81 A.2d 656, 657 D.C. 1951 (To be a holder in due course party "must have taken the check in good faith and for value and that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it to him.")

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[3]The Oxford English Dictionary traces the term "unauthorized" to R. Hooker, *Of Lawes of Ecclesiasticall Politie* v. lxii. 147 (1597) ("The exercise of unauthorized jurisdiction") and although it appears in OED's current tabulation as typically occurring about three times per million words in modern written English its meaning has remained the same. Here is an edited list of synonyms courtesy of merriam-webster.com: improper, illicit, illegal, unlawful, inappropriate, unacceptable, illegitimate, prohibited, forbidden, impermissible, outlawed, barred, objectionable, refused, rejected, disallowed, revoked, stopped, disapproved, blocked, and ruled out.

PNC refused to provide a written explanation–or for that matter any explanation–for why the cashier's check was "not authorized" and therefore not honored. Consequently on April 7, 2022 PNC was sued.

B. The 12(b)(6) dismissal was error.

As Judge Diehl put it in *Holmes v. District of Columbia*, 267 A.3d 1028, 1032 (D.C. 2022):

> We review the "dismissal of a claim pursuant to a 12(b)(6) motion de novo, 'presuming the complaint's factual allegations to be true and construing them in the light most favorable to [the plaintiff].'" *Calomiris v. Calomiris*, 3 A.3d 1186, 1190 (D.C. 2010) (quoting *Bleck v. Power*, 955 A.2d 712, 715 (D.C. 2008)). "To survive a motion to dismiss, a complaint must set forth sufficient facts to establish the elements of a legally cognizable claim." *Woods v. District of Columbia*, 63 A.3d 551, 552-53 (D.C. 2013). While this pleading standard requires a plaintiff to allege "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," it "does not require 'detailed factual allegations.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Further:

> The District is a notice pleading jurisdiction and "under Super. Ct. Civ. R. 8 (a) and (e), a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him." *Scott v. District of Columbia*, 493 A.2d 319, 323 (D.C. 1985) (citation omitted). Furthermore, "[a] complaint should not be dismissed because the court doubts that a plaintiff will prevail on a claim." *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997) (citation omitted). Nor should a complaint be dismissed under Rule 12 (b)(6) on the ground that no "evidence [has] been offered by Plaintiffs" since we "take the facts alleged in the complaint as true,"*Casco Marina Dev.,L.L.C.,supra*,834 A.2d at 81 (cit. omitted), and the presentation of evidence to counter a Rule 12 (b)(6) motion is not required.*Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 497 (D.C. 2005)

And again:

> "Whether the trial court has subject matter jurisdiction is a question of law which this court reviews *de novo*." We also review "a dismissal for failure to state a claim de novo." "[W]e accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff." "Because '[o]ur rules reject the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome' and 'manifest a preference for resolution of disputes on the merits, not on technicalities of pleading,' we construe pleadings 'as to do substantial justice.'" "The only issue on review of a dismissal made pursuant to Rule 12 (b)(6) is the legal sufficiency of the complaint"; and "a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on [his] claim." "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Grayson v. AT&T Corp*., 15 A.3d 219, 228 (D.C. 2011)

Thus the requirements to uphold a Rule 12(b)(6) dismissal are stringent in light of the relatively liberal requirements of Rule 8 and the relatively lenient requirements of Rule 12(b)(6). In short, the Superior Court judge is not a prognosticator, but rather-–at the Rule 12(b)(6) stage--simply a judge of fair or foul.

C. Standard of review.

This Court's review of both an order granting a motion to dismiss and an order granting summary judgment is *de novo*. *Gordon v. Dist. of Columbia*, 309 A.3d 543, 551-552 (D.C. 2024) *See also Williams v. District of Columbia*, 9 A.3d 484, 488 (D.C. 2010); *Kotsch v. District of Columbia*, 924 A.2d 1040, 1044 (D.C. 2007). The standard of review for a Superior Court Order denying discovery and a motion to amend is abuse of discretion.

D. Dismissal of this part of the Complaint under Rule 12(b)(6) was in error.

On June 22, 2022 Defendants filed their obligatory Rule 26(b)(6) Motion to Dismiss. The Superior Court granted it in part and denied it in part. App. 43 The Superior Court's partial dismissal was in error despite her application of the more-or-less appropriate standard of review described above.

Fiduciary Duties

The Superior Court dismissed Count 65 which claimed Breach of Fiduciary Duty/Breach of Delegated Fiduciary Duty/ Breach of Fiduciary Duty of a Trust Protector.[4] In doing so the Superior Court relied primarily on and quoted from *Geiger v. Crestar Bank*, 778 A.2d 1085, 1089 (D.C. 2001) where this Court held "[t]he bank does not take on fiduciary duties *simply* because the bank established an account on behalf of a customer who is acting as a fiduciary. Instead, the relationship and its depositor is purely contractual." (Emphasis supplied.) In this regard this Court relied on *Miller v. American National Bank* 4 F.3d 518 (7th Cir.) which, after some misgivings and after a consideration of alternatives, determined it was bound by Illinois law to the same effect as the *Geiger* holding. This holding was correct because there was no transactional fiduciary relationship established between the trust beneficiary and the bank. The transaction was solely between the trustee as a depositor and the bank using funds entrusted to the trustee but were no different than they would have

[4]The nomenclature is in flux; the duty is not.

been if they were the proceeds of a very good day at the track. *Geiger* said no different:

> We detect no facts in this case detailing a history of interaction between Mr. Geiger and Crestar which extended their relationship beyond the provisions of the account agreement. On the contrary, Mr. Geiger's deposition shows virtually no interaction between him and the Bank.
>
> Under the account agreement, Crestar readily agreed that, technically, an unauthorized transfer had occurred, and stated its readiness to credit Mr. Geiger's account, provided that he take certain action, including submitting an appropriate affidavit, which Crestar had a right to request under the account agreement. By declining to submit the affidavit, Mr. Geiger, rather than Crestar, breached the account agreement. Thus, he cannot now complain that the Quintel electronic debits were not recredited to the account. *Geiger, supra* at 1095

Geiger is fact-bound however. It, and the Superior Court here, is correct that a bank takes on no special duties or responsibilities merely because the *depositor* has taken on special duties or responsibilities as discussed above. But that does not preclude the existence of fiduciary duties owed to the *depositor* by the bank. The underlying relationship between a depositor and a depository is grounded in contract as the Superior Court recognized. But all relationships which involve the trust of one party in another also create a fiduciary duty which arises not only from the terms of the contract (if there is one), but also by statute or other judicial imposition as well as by the nature of the relationship itself. All three exist in parallel in all cases.

The Superior Court failed to note the general nature of a fiduciary duty. Thus a fiduciary duty can arise by statute. *See, e.g.,* § 47-2853.195 (Fiduciary duties of a property manager). It can also arise by contract. It can arise by the nature of the

general responsibility undertaken (*E.g.* Escrow agents owe a fiduciary duty of care to both buyer and seller in a real estate transaction. *Wagman v. Lee, 457* A.2d 401, 405 (D.C. 1983). This includes "a duty of good faith and candor in affairs connected with the undertaking, including the duty to disclose to the principal 'all matters coming to [the agent's] notice or knowledge concerning the subject [] of the agency, which it is material for the principal to know for his protection or guidance.'" *Aronoff v. Lenkin Co.*, 618 A.2d 669, 687 (D.C. 1992). It can even arise from the non-contractual acts of a housing cooperative board and its current members, but not its past members. *Watergate West, Inc. v. Barclays Bank*, S.A., 759 A.2d 169, 176 (D.C. 2000). In partial summary, one party to a transaction owes to a justifiably relying second party a duty not to take advantage of their relationship to the detriment of the justifiably trusting second party.

If purely contractual *see* § 28:1–304 ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."); *See also* D.C. U.C.C. § 1-103(b)(Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.)

In her holding here the Superior Court rejected *Mobilizegreen, Inc. v. Cmty. Found.*, 267 A.3d 1019, 1026 D.C. 2022) advanced by the Appellants, which held:

> When parties have contracted with one another, the existence of a fiduciary relationship "depend[s] on whether the parties, through the past history of the relationship and their conduct, had extended the relationship beyond the limits of the contractual obligations." *Geiger*, 778 A.2d at 1095 (citation and internal quotation marks omitted); see also *Democracy Partners v. Project Veritas Action Fund*, 453 F. Supp. 3d 261, 279 (D.D.C. 2020) (courts "have traditionally looked for [] a 'special confidential relationship' that transcends an ordinary business transaction") (collecting cases).

Thus to hold there is no fiduciary duty between the depositor and the bank is simply wrong. It is true that there is nothing in the contractual agreement between the parties that prohibits the bank, after funds have been entrusted to it, from stealing those funds, refusing to explain why, and destroying the indicia of the deposit. That was the allegation here. Similarly there is no requirement in civil law and statute which precludes similar events.[5] For the bank to do so, however, is a violation of the bank's fiduciary duty.

In any event the facts here demonstrate that controlling law is set out in *Mobilizegreen* not *Geiger*. The relationship here was not that of a bank and a

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[5]Criminal law differs, but that remedy lies in the D.C. Code § 22-3211 (a) - (b) (2001) which states, in pertinent part:

(a) For the purpose of this section, the term "wrongfully obtains or uses" means: (1) taking or exercising control over property; (2) making an ***unauthorized*** use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception. The term "wrongfully obtains or uses" includes conduct previously known as larceny, larceny by trick, larceny by trust, embezzlement, and false pretenses. *Dobyns v. United States*, 30 A.3d 155, 158 n.3 (D.C. 2011) (Emphasis supplied to note that the bank sought to charge the depositor with this offense.)

depositor. As alleged, the corpus comprising the Lynne M. Schwartz Special Needs Trust and the Lynne M. Schwartz Discretionary Trust was transferred years before to Assets Management Group (AMG), a division of PNC Financial Services Group, Inc., a money manager which maintained full and absolute control over each trust as pled. PNC Bank, N.A., a bank in the *Geiger* sense, was a separate entity from PNC Financial Services Group, Inc. Thus, the guiding principal is clear that AMG is not and was not a bank, but rather a financial advisor and manager.

No matter how you slice it there was a violation of a fiduciary duty when PNC retained $12,000.00 of Appellants' funds without right, explanation or excuse. *Cap. River Enters., LLC v. Abod*, 301 A.3d 1234, 1242 (D.C. 2023)

A breach of the covenant of good faith and fair dealings was sufficiently plead and should not have been dismissed.

The Superior Court concluded as well that there was not a breach of the covenant of good faith and fair dealings. This was error, and particularly so at the Rule 12(b)(6) stage. The implied duty of good faith and fair dealings as discussed above imposes an obligation on a contracting party not to "evade[] the spirit of the contract, willfully render[] imperfect performance, or interfere[] with performance by the other party," *Allworth v. Howard Univ*., 890 A.2d 194, 201 (D.C. 2006) (*quoting Paul v. Howard Univ*., 754 A.2d 297, 310 (D.C. 2000)) as set out in *Sibley v. St. Albans Sch*, 134 A.3d 789, 806 (D.C. 2016).

Therefore we start with the premise that all contracts incorporate the requirement of good faith and fair dealings between the parties. The Complaint must, however, contain sufficient factual matter, accepted as true as one must in a Rule 12(b)(6) context, to state a claim for relief that is plausible on its face. Chief Judge Blackburne-Rigsby recently reiterated the requirement this way:

> "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations," *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531 (D.C. 2011) (quoting *Iqbal*, 550 U.S. at 678-79), that allow the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Comer*, 108 A.3d at 371. *Morris v. District of Columbia*, No. 21-CV-0237, Slip. Op at 7 (March 18 2024)

So what were the relevant factual allegations contained in the Complaint but apparently overlooked by the Superior Court after her review? As the Superior Court put it:

> Here, the Court finds that Plaintiffs have not sufficiently pled a claim for a breach of the implied covenant of good faith and fair dealings. The Complaint does not include allegations of bad faith or arbitrary and capricious on behalf of Defendants, *see generally* Compl.[6]
>
> Nor does the opposition clarify or address either of the elements of the claim.... Thus without pleading any facts to plausibly support their claim, Plaintiffs have failed to state a claim for breach of the implied covenant of good faith and fair dealing. App. 53

To the contrary the following facts were pled in support of the breach of the implied duty of good faith and fair dealings claim:

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[6] "Bad faith or arbitrary and capricious behavior" are not usually substituted for "good faith and fair dealing" and stray from the underlying principle of one party taking unfair advantage of another to whom the duty is owed.

The Breaching Defendants:

8. Defendant PNC is a national banking association and a sui juris division of PNC Financial Services Group, Inc.. It operates banks at 25 locations within the District of Columbia. It was both the drawer and the drawee of the cashier's check in question as well as the depository bank .

10. PNC Financial Services Group, Inc.. whose AMG division, on information and belief, is not sui juris.

The Relationship Between the Breaching Defendants and the Appellants:

2. Plaintiff Lynne M. Schwartz Discretionary Trust (LMS Discretionary Trust) is a trust created to provide specified care and maintenance for the personal, household, or family needs of Lynne M. Schwartz, a disabled adult. Its trustee is Frederic W. Schwartz, Jr. The cashier's check in question was presented and negotiated for deposit in the PNC Checking Account for the LMS Discretionary Trust .

3. The LMS Discretionary Trust was managed by Riggs Bank, N.A., prior to its acquisition by PNC, and then by PNC's Assets Management Group (AMG) until the establishment of the LMS Special Needs Trust to which its assets were transferred.

4. Plaintiff Estate of Frances Schwartz was established following her death on May 27, 2013. Frances Schwartz was the beneficiary during her lifetime of the Frederic W. Schwartz Residuary Trust which was managed by Riggs Bank, N.A., prior to its acquisition by PNC, and then by AMG,

65. The trusts and their beneficiaries identified above were dependent on Defendants PNC, PNC FINANCIAL SERVICES GROUP, INC and AMG to carry out the transactions identified in this Complaint because during relevant times Defendants were the custodian of the funds in the LMS Special Needs Trust, the LMS Discretionary Trust, and the Frederic W. Schwartz Residuary Trust; because Defendants exercised dominion and control over the assets of these trusts: because Defendants carried out the day to day investment and disbursement of funds from these trusts; and because Defendants were the only entities authorized to physically issue trust funds to carry out the purposes of the trusts.

The Breach by the Defendants:

, One of those checks was a cashier's check made payable to Frances Schwartz in the amount of Twelve Thousand Dollars ($12,000.00), dated April 14, 2015, and issued by PNC as directed by AMG.

10. The cashier's check in question was issued on the transfer to PNC, N.A. of trust funds managed, controlled and possessed by AMG, a division of PNC.

18. AMG authorized the issuance of the cashier's check in question.

21. On that same day [April 12, 2019]Frederic Schwartz, Jr., in his representative capacities, deposited both checks. He endorsed the cashier's check as the executor of the Frances Schwartz Estate and to the order of the PNC account for the LMS Discretionary Trust as the LMS Special Needs Trust Account had been removed from PNC.

22. On April 15, 2019, PNC Bank issued an advisory which stated that the cashier's check "which you deposited [has]...been returned unpaid.." The stated reason was "UNAUTHORIZED".

23. Notice of dishonor was received by mail on or about April 17, 2019, after the PNC branch where the cashier's check had been deposited had closed.

24. The Notice of Dishonor included a photocopy of the cashier's check with the phrase "NOT AUTHORIZED " surmounting it in a larger type on the document and the phrase "RETURN REASON-Q NOT AUTHORIZED" in a somewhat smaller type face. Attachment A.

25. On or about April 18, 2019, Frederic Schwartz, Jr., in his representative capacity, returned to the PNC branch where the cashier's check had been deposited and advised two senior representatives of PNC, including the one who had advised him of the proper endorsement, that the deposit was improperly returned, that the endorsement was as instructed, that "unauthorized" was an improper reason for dishonor without a further description and that the deposit complied with the District of Columbia version of the UCC.

30. There has been no written response from PNC to the date of this filing.

77. The acts of Defendants, including, but not limited to, dishonoring the cashier's check, the refusal to investigate the circumstances of its issuance and its genuineness prior to and following dishonor, the refusal of defendants to comply with the District of Columbia statutory version of the UCC, the use of an ambiguous explanatory refusal description, the refusal of Defendants to explain its refusal to honor the cashier's check in question, and all other matters throughout the transaction violated their actual, transactional, trust protector responsibilities

and/or de facto fiduciary duties and obligations.

69. At all times relevant Defendants have made the following material representations. and many more of a similar nature, in print and electronic outlets, concerning the characteristics, uses, benefits, standards, quality, grade, style, means of service, and relationship with customers:

Integrity

We are honest, do the right thing, conduct business with the highest ethical standards and enable our colleagues to raise concerns.

and further:

At PNC Bank , we value relationships over transactions. That's why we're always looking for ways to help you achieve more. Backed by the personalized customer care you depend on, our checking and cash flow solutions can make it easier for you to get the most out of every day.

73. The Plaintiffs identified in this Count were induced to have faith, confidence and trust in the Defendants because of the representations of Defendants set out above and the identification of the agents dealing with the transactions as fiduciaries.

75. Defendants knew by the endorsement on the cashier's check in question and by the inspection by its representatives of the Illinois Court Order appointing Frederic Schwartz, Jr. the independent (personal) representative of the Estate of Frances Schwartz, that the transaction was authorized.

As the Superior Court acknowledged a breach of the contractual duty of good faith and fair dealings requires two elements:

1. There must be a contract. Here, as discussed above, the Superior Court found a contractual relationship existed (although in her view not a fiduciary duty).

2. *There must be, in the Superior Court's view,"bad faith or arbitrary and capricious conduct."* (As discussed above the traditional indicia sets out an obligation on a contracting party not to "evade[] the spirit of the contract, willfully render[] imperfect performance, or interfere[] with performance by the other party,") Here, as discussed above, it is not only alleged that Defendants (1) retained $12,000.00 which was due and owed the Plaintiff, (2) retained and destroyed the indicia of that obligation, and (3) provided only an inexplicable reason for doing so.

It is difficult to understand why in the 12(b)(6) context and in the Superior Court's view the factual allegations set out above are not examples of *"bad faith or arbitrary and capricious conduct*."

In summary the Complaint factually identified and pled the parties and their contractual relationship to each other. In addition the Complaint identified and pled the facts which demonstrate that the PNC had stolen $12,000.00 which was due the Appellants and destroyed the evidence of it having doing so. Rule 12(b)(6) requires no more, and the Superior Court, while suggesting that Appellants have not sufficiently pled a claim for a breach of the implied covenant of good faith and fair dealings, have not suggested what the omission was. There was none.

Count IV – CPPA

It is difficult to understand as well how the Superior Court could be so right in setting out the law in regard to the CPPA and so wrong in applying it. The Superior

Court addressed the Count this way:

> Under the CPPA, "[i]t shall be a violation…for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, including to…misrepresent as to a material fact which has a tendency to mislead; fail to state a material fact if such failure tends to mislead; [and], use innuendo or ambiguity as to a material fact, which has a tendency to mislead[.]" D.C. Code § 28-3904(e), (f), (f-1). "[T]he CPPA does not require much by way of pleading to state a claim...[a]ll that is required is an affirmative or implied misrepresentation that a reasonable consumer would deem misleading." *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 94-95 (D.D.C. 2016) (quotations and citations omitted).
>
> Further guidance is provided by the Superior Court in *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp*., 944 A.2d 1055, 1073-1075 (D.C. 2008) which is cited for that purpose by *McMullen*.
>
> Neither §§ 28-3904 (e) - (f) or -3905 (k)(1) of the CPPA...state that, to be actionable, an alleged misleading statement or omission must be willful or intentional. In *Caulfield v. Stark*, 893 A.2d 970 (D.C. 2006), we observed that "unintentional misrepresentation under the CPPA is still an open question"; we did not decide the issue but "assumed . . . (without deciding) that unintentional misrepresentation claims are available under the CPPA." Id. at 977. In deciding the issue here, we take into account the requirement that we construe and apply the CPPA "liberally to promote its purpose." D.C. Code § 28-3901(c). We also note that, in enacting some paragraphs of § 28-3904 other than paragraphs (e) and (f) with which we are concerned, the Council of the District of Columbia specified that, to violate the statute, the acts described must be done with deceit or with knowledge of the probable adverse impact on the consumer. See, e.g., D.C. Code § 28-3904 (r)(1) - (5), and (t). By contrast, § 28-3904 (e) and (f) describe simple "misrepresent[ation] as to a material fact which has a tendency to mislead" and "fail[ure] to state a material fact if such failure tends to mislead." In light of the plain language of these sections, the ordinary meaning of the words used, and all of the foregoing considerations, we now hold that a condominium owner or condominium owners' association need not allege or prove intentional misrepresentation or failure to disclose to prevail on a claimed violation of § 28-3904 (e) or (f) of the CPPA. *See The Chelsea Condo. Unit Owners Ass'n v. 1815 A St. Condo. Group, LLC, 468* F. Supp. 2d 136, 142 n.6 (D.D.C. 2007) (distinguishing plaintiffs' fraud claims from their CPPA claims).

> Similarly, under D.C. Code § 42-1904.04 (a), consistent with the plain and ordinary meaning of the words used, a plaintiff may merely prove a failure to disclose material information. Once this is done, liability attaches and the plaintiff must prove damages.

The Superior Court went on:

> Defendants argue that Plaintiffs' claim for violation of the CPPA is vague and makes conclusory assertions that Plaintiffs are "consumers" and Defendants are "merchants" under the statute. Mot. at 8. Defendants assert that Plaintiffs fail to properly allege any unfair or deceptive trade practice committed by PNC Bank, nor do Plaintiffs assert any harm warranting the relief sought. *Id*. In their Opposition, Plaintiffs merely assert that they have put the Defendants on notice of the CPPA claim, and refer to paragraphs 1-82 of the Complaint. Opp. at 10. In the Reply, Defendants argue that Plaintiffs have failed to provide any facts to support how any of PNC Bank's conduct constituted false or misleading statements. Reply at 4-5. While not specifically identifying these as misrepresentations, the Complaint sets forth "Defendants' Representations Concerning Their Services," and Plaintiffs include language from print and electronic outlets, wherein Defendants make assertions "concerning the characteristics, uses, benefits, standards, quality, grade, style, means of service, and relationship with customers[.]" Compl. ¶ 63. The Complaint then includes statements about "Values," "Customer Focus," and "Integrity" allegedly made by Defendants, and that PNC Bank publicly claims to be "a [d]iscreet, long-trusted fiduciary" with "[s]ensitivity to complex family matters" and "[e]xtensive trust administration experience." *Id.* However, Plaintiffs fail to plead facts to support that these statements are misleading. While at this stage the Court may not resolve factual disputes, the Court must determine whether the allegations, taken as true, could reasonably be interpreted by a consumer as misleading. Here, Plaintiffs have only set forth general statements Defendants make about PNC Bank's values and customer relations, and conclusory assertions that Defendants "have engaged in unfair or deceptive 'trade practices' under the CPPA," Compl. ¶ 88, that Lynne M. Schwartz relied on PNC Bank to disburse funds, Compl. * * * Plaintiffs do not even specifically identify the representations in Complaint ¶ 63 as misrepresentations. The Court finds that Plaintiffs have failed to plead plausible facts to support a claim under the CPPA, and thus dismisses Count IV.

The Superior Court had a number of problems with the Appellants' CPPA Count. First she seems to adopt the PNC's position that there was no support in the Complaint for designating the Appellants "consumers" and designating PNC "merchants" under the statute and consequently that these designations are vague and conclusory. Appellants did considerably more, however, even citing the specific statutory provision for each.

> 90. All parties to this suit are "persons" as defined in § 28-3901 of the D.C. Consumer Protection Act except for Jill N. Schwartz.
>
> 91. All Plaintiffs except for Jill N. Schwartz are "consumers" as defined in § 28-3901 of the D.C. Consumer Protection Act.
>
> 92. PNC Bank, N.A. and PNC FINANCIAL SERVICES GROUP, INC are "merchant" within the meaning of § 28-3901 of the D.C. Consumer Protection Act as they offer to and do provide both retail banking services directly and, through the PNC AMG, financial portfolio advice, portfolio asset trading, and portfolio management services.
>
> 93. PNC AMG, a division of PNC, and PNC FINANCIAL SERVICES GROUP, INC. are affiliated "merchants" within the meaning of D.C. Code § 28-3901 as they offer to and do provide financial portfolio advice, portfolio asset trading, and portfolio management services.

These are not wild speculations, but factual statements supported by appropriate statutory references.

Next the Superior Court suggests that the Appellants have only set forth general statements which PNC made about its values and customer relations. The Superior Court held that these conclusory statements were insufficient to suggest that Appellees "have engaged in unfair or deceptive 'trade practices' under the CPPA." This too is incorrect. As stated in the Complaint:

> 71. The trusts and their beneficiaries identified above were dependent on Defendants PNC, PNC FINANCIAL SERVICES GROUP, INC and AMG to carry out the transactions identified in this Complaint because during relevant times Defendants were the custodian of the funds in the LMS Special Needs Trust, the LMS Discretionary Trust, and the Frederic W. Schwartz Residuary Trust; because Defendants exercised dominion and control over the assets of these trusts: because Defendants carried out the day to day investment and disbursement of funds from these trusts; and because Defendants were the only entities authorized to physically issue trust funds to carry out the purposes of the trusts.
>
> 73. The Plaintiffs identified in this Count were induced to have faith, confidence and trust in the Defendants because of the representations of Defendants set out above and the identification of the agents dealing with the transactions as fiduciaries.

Two of the Defendants' specific representations were particularly relevant as they connoted honesty in general and attention to checking and cash flow solutions in particular.

> *Integrity*
>
> *We are honest, do the right thing, conduct business with the highest ethical standards and enable our colleagues to raise concerns.*

and further:

> *Backed by the personalized customer care you depend on, our checking and cash flow solutions can make it easier for you to get the most out of every day.*

It was fully reasonable for these Appellants to entrust the entirety of their banking, money management, and financial transaction responsibilities to PNC based on these representations. And what was the result? As described above:

> **Defendants stole $12,000.00 which was due to the Appellants and destroyed the evidence of doing so.**

If PNC had acted in error it would have explained why it did so. Instead PNC offered no explanation for why it did so aside from the fact that the cashier's check was

unauthorized which offers either no explanation or a myriad of them; your choice. All of this was pled yet the Superior Court concluded that "Appellants fail to plead facts to support that these statements are misleading" These acts and representations were contrary to PNC's claim of honesty and the Superior Court was simply wrong in concluding to the contrary.

Taken together the representations of the PNC suggest an honest financial institution which can be trusted and will provide services to clients at the highest level. The refusal of PNC to account for the characterization of the cashier's check as not "authorized" suggests quite clearly that the underlying $12,000.00 was embezzled, stolen, purloined, knowingly converted to the use of another without authority, sold, conveyed, disposed of, conveyed or otherwise disposed of contrary to the right of the Appellants (Larceny after Trust) and that its act or acts is inconsistent with the representations of PNC set out above. The refusal of PNC to explain the reason for its dishonoring the cashier's check is likewise inconsistent with PNC's representations set out above. In the context of a Rule 12(b)(6) review the Superior Court's inability to understand the role of the dishonored cashier's check and PNC's representations is difficult to understand. In any event the statute provides that "[I]t shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby...." Appellees are statutory "persons" and Appellants are statutory "consumers." ¶ 7, ¶ 14.

The Superior Court unwittingly aids the Appellees in hoisting their own petard.

1. The Back Story (as adopted from the pleading and the Docket Sheet in light of the page limitation mandated by the Rules). PNC is free to complain.

A rescheduled Scheduling Conference was held after the resolution of PNC's Motion to Dismiss. PNC's initial motion counsel withdrew after the Superior Court had issued her Rule 12(b)(6) decision and left the firm. New counsel entered her appearance just before the Scheduling Conference. PNC was given an extension of time to Answer.

PNC answered in a manner which failed at every juncture to answer the allegations of the Complaint even though that is the function of the Answer and Rule 11 so require. As is also required by the Civil Rules, the Rules of Professional Conduct, and the D.C. Bar Voluntary Standards of Civility in Professional Conduct Appellants' counsel contacted PNC's then current counsel about the deficiencies. Appellants' counsel spoke by telephone on a number of occasions with PNC's then current counsel and PNC's prospective replacement counsel. On each occasion they declined to take corrective action in relation to their Answer despite being advised that the matter would be referred to the Court.

The Legal Context of the Motion to Strike and the Relief Requested.

Motions practice regarding the Motion to Strike was extensive. See Attachment A. Nonetheless the Superior Court did not reach the merits, but instead denied Appellants' Motion to Strike as untimely.

Appellants' Motion was not untimely and, in any event, the Superior Court had the authority to independently review the appropriateness of the Answer.

Rule 12(f) states:

> (f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
> (1) on its own; or
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

PNC countered that Rule 12(f) provides that a motion to strike may be filed by a party within 21 days and that "may" means "must." This is incorrect. *Compare* Super. Ct. Civ. R. 16 and its varied use of "may" and "must."

In any event Civil Rule 6(b) provides: 1

> (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if the request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Thus the Superior Court on motion or on its own initiative may extend the time to file a Motion to Strike. There is also a third circumstance where the 21 day period is not imposed. As explained to the Court in Appellants' parallel Motion to Revise Scheduling Order their counsel has been advised by PNC's then current counsel that she was only a place keeper (not a pinch hitter) until permanent counsel could be obtained. PNC unopposed *pro hac vice* motion for replacement counsel confirmed

those circumstances and counsel accepted that statement on face value although PNC's counsel now suggests that it was not as broad as Appellants' counsel believed. In any event, Appellants' counsel concluded that an immediately timely motion to strike would be met with a justified request for an extension of time until permanent replacement counsel could enter her appearance. Perhaps foolishly believing that the time for PNC to obtain permanent replacement counsel would be considerably shorter Appellants' counsel chose to avoid unnecessary motion's practice. The Superior Court was advised of these circumstances, acknowledged them, but found them of no effect.

The Superior Court concluded that in any event the Defendants had broad discretion to craft their Answer. (Attached as Appendix A for the convenience of the Court is a reproduction of that part of the Record which sets out the deficient Answers and that part of the Complaint they purport to Answer. This Court will note that the escheatment which is PNC's primary defense appears nowhere.)

III. Relief Requested in the Superior Court and upon remand if granted.

While denominated in the Superior Court as a Motion to Strike, the desire of Courts to provide a full opportunity for a resolution on the merits makes clear that an immediate and draconian resolution would not survive review by this Court This is true even though a refusal to answer in a meaningful way is the dominant theme of PNC's Answer and is coupled with the PNC's refusal to respond to Appellants' cornerstone interrogatories as discussed below. On remand, if granted, PNC should be

given the opportunity to do some weeding of their response. Appellants will then reply. The Superior Court will then determine which answers, if any, should be struck or amended and will require PNC to do so within 14 days. If they fail to do so timely the offending portion of the Answers will be struck. While somewhat presumptuous in its articulation this has been the practice in the past.

The Superior Court erroneously denied Appellants' Motion to Compel Response to Interrogatories.

Finding PNC less than forthcoming Appellants propounded two interrogatories meant to elicit the identities of the PNC's employees who were involved in the rejection of the $12,000,99 cashiers check.

> **Interrogatory 1**. Identify the person who designated the cashier's check which is the subject of this suit as unauthorized.
>
> **Defendants' Response**. Defendants object to this Interrogatory on the grounds that it is vague and ambiguous. Defendants further object to this Interrogatory on the grounds that the information it seeks is not relevant to the claims or defenses made in this action and the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to and without waiver of the foregoing objections and Defendants' General Objections, Defendants state as follows: Defendants have conducted a reasonable investigation into determining a response to this Interrogatory but have yet to identify the person who designated the cashier's check as unauthorized. Defendants will supplement this Answer if the information becomes available.
>
> **Interrogatory 2**. Identify the person who refused to respond in writing to the challenge to the designation of the cashier's check which is the subject of this suit as "unauthorized."

Defendants' Response. Defendants object to this Interrogatory on the grounds that it is vague and ambiguous and assumes facts not in evidence, particularly that someone "refused to respond in writing" to Plaintiff's "challenge" to the designation of the cashier's check as unauthorized. Defendants further object to this Interrogatory on the grounds that the information it seeks is not relevant to the claims or defenses made in this action, particularly the remaining claims of unjust enrichment and conversion, and the burden or expense of the proposed discovery outweighs its likely benefit, considering the remaining claims, the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Defendants further object to this Interrogatory to the extent it seeks information that is subject to the attorney-client privilege, work-product doctrine or any other applicable privilege, doctrine or immunity. Subject to and without waiver of the foregoing objections and Defendants' General Objections, Defendants state as follows: Defendants have conducted a reasonable investigation into determining a response to this Interrogatory but have yet to identify the person who designated the cashier's check as unauthorized. Defendants will supplement this Answer if the information becomes available. Defendants further state that the information sought relates to Count IV Breach of District of Columbia Consumer Protection Act, which has been dismissed

The rejected cashiers check had a number of codes, dates and other means of identification on its face. Since it was drawn in the amount of $12,000.00 it was a discretionary reportable fraudulent transaction to Treasury and there are comprehensive FDIC authorizing and record-keeping requirements in relation to cashiers checks of that amount. In addition records relating to the cashier's check being dishonored should have been subject to preservation since a claim was made within days of the refusal to honor the check and Appellants' counsel assumes that some sort of file was opened. Paragraph 17 of the Complaint identified a "Ms. Russell" employed by Defendant PNC during April 20, 2019, who has knowledge of the transaction. The

PNC account records for the date in question, easily downloaded, indicates that a Leiberman was involved with additional identifying codes. Thus PNC's claim that they were unable to respond is improper. Appellants also noted that the verification was by an attorney.

The Superior Court brushed aside Appellants' arguments holding:

> As Defendants have asserted under oath that they conducted a reasonable investigation and have not been able to determine the identities of the individuals that plaintiff seek, and Plaintiffs have not shown that Defendants have abrogated their responsibilities in conducting an adequate search in responding to Plaintiff's discovery requests, the Court denies Plaintiffs' Motion to Compel. App 8

This is a remarkable conclusion for two reasons. First PNC neither defined "reasonable" nor set out any elements of their "reasonable search." Second the Superior Court placed on the *Appellants* the burden of proving that PNC's claim of a "reasonable search" was not reasonable which could not be accomplished since PNC was not obligated by the Superior Court to define "reasonable" or state the elements of their "reasonable search." *See supra*

The Great Reveal (Order 10/3/23)

On May 26, 2023 PNC's Counsel provided to Appellant's Counsel documents purporting to show that PNC escheated to the District of Columbia the $12,000.00 value of the cashier's check the actual cashier's check having presumably been destroyed. PNC's Counsel advised that in PNC's view the Appellants should be able to recover the value of the cashier's check from the District of Columbia. PNC's Counsel

advised Appellants' counsel that in PNC's view they had no liability in regard to the cashiers check now that its whereabouts have been disclosed. In light of PNC's previously hidden admissions and defenses, and the need of the Appellants to move to amend and correct the Complaint as well as to reopen discovery in relation to the new revelations as trial and cross motions for summary judgment were imminent Appellants moved to Amend their now seriously inaccurate Complaint.

Civ. Rule 15(a) provides in pertinent part:

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS BEFORE TRIAL. * * *

(3) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Rule 15 gives trial courts discretion to allow Appellants to amend their complaints after the time to file an amendment as of right has passed. Super. Ct. Civ. R. 15(a)(3); *see also Crowley v. N. Am. Telecomms. Ass'n, 691 A.2d 1169, 1174 (D.C. 1997)*. The Rule states that permission to amend should be granted "freely . . . when justice so requires." Super. Ct. Civ. R. 15(a)(3). This Court review a trial court's denial of a motion to amend for abuse of discretion to determine whether the decision was "predicated on some valid ground." *Eagle Wine & Liquor Co. v. Silverberg Elec. Co.*, 402 A.2d 31, 34 (D.C. 1979). "Factors affecting the court's discretion include: (1) the number of requests to amend; (2) the length of time that the case has been pending; (3)

the presence of bad faith . . . ; (4) the merit of the proffered amended pleading; and (5) any prejudice to the non-moving party." *Pannell v. District of Columbia*, 829 A.2d 474, 477 (D.C. 2003) (internal quotation marks omitted). *Edwards v. Safeway, Inc.,* 216 A.3d 17, 19-20 (D.C. 2019) Most recently this Court in *Andrews v. D.C. Housing Author.*, No. 21-CV-0545, P. 5-6 (D.C. June 6, 2024)(Virtual presumption that leave to amend should be granted unless there is are sound reasons for denying it); *cf Gant v. Sixteenth St. Heights Dev.,* No. 23-CV-0281, P. 6 (D.C. March 12, 2024)(Cannot amend a complaint which no longer exists.)

The Superior Court abused its discretion by denying Plaintiff's motion even though she acknowledged that "there is a virtual presumption that leave to amend should be granted." First she apparently concluded that amendment would be "futile." Amending factually inaccurate claims, adding causes of action based upon defenses which had been suppressed by Defendants, and revamping the *ad damnum* clause would not be futile acts but rather adding honesty to the Complaint as this Court will see below. To leave the Complaint unamended would also be in violation of Rule 11 as there is a continuing obligation to meet its requirement. The Superior Court also found herself at a loss to understand the need suggesting that the actual amended Complaint was required but not presented. App. _____ There is no requirements in the Rule that this be done. More important Appellants advised the Court that they were caught unawares and needed further discovery and review to determine precisely how the

Complaint should be recast. The amendment would not have been futile and yet inexplicable as the Superior Court found. Denial of the motion to amend was error.

The Coup de Grace

1. Summary Judgment was improper.

Having narrowed the playing field and sent Appellants' major players to the penalty box the Superior Court invited summary judgment to administer the *coup de grâce*. She was not disappointed. Initially the Superior Court cited to decisions setting out how and when Summary Judgment was appropriate. She seemingly failed to understand the nuances of Summary Judgment however.

For the underlying guidelines the Superior Court skimmed over several paragraphs from *Wash. Invest. Partners of Del, LCC v. Sec. House, K.S.C.C.C. ,* 28 A. 3d 566, 573 (D.C. 2011) which found summary judgment appropriate since in that decision the contractual language was clear as a matter of law. The Superior Court then cited *Mixon v. Washington Metropolitan Area Transit Authority ,* 959 A. 2d 55, 58 (D.C. 2008) and *Doe v. Safeway, Inc.*, 88 A.3rd 131, 133 (D.C. 2014) for the proposition that summary judgment is a preferable, even "vital, " result in current jurisprudence. The Superior Court went on to suggest that the burden is on the non-moving party to counter with admissible evidence which she would accept opposing the moving party's claims.

In précis, however, summary judgment is no easier to obtain or to avoid than it

was during the last Century. If the requirements are met, however, it is not to be avoided for fear of reversal in this Court. If they are not met reversal is inevitable.;

In this appeal the Superior Court accepted most of PNC's evidence and its implications while rejecting most of the Appellants' discrediting facts as not being sufficiently pled. Fortunately PNC had hoist itself with *its* own petard with its new defenses even without an amended Complaint.

Where we are procedurally.

As to the $12,000.00 cashiers' check PNC's last minute revelation that it had been escheated to the District moots the claim of unjust enrichment. In addition the

Superior Court's prior dismissal of the claims for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealings, and violation of the District of Columbia Consumer Protection Procedures removed them from consideration in the motion for summary judgment under review here and thereafter. Thus the only claim under review here, and the most interesting one, is the claim of conversion.

Only Conversion Remained.

Both the Superior Court and PNC believed that escheatment of the $12,000.00 in lieu of the cashier's check, regardless when it occurred, absolved PNC of liability for conversion. They were wrong. "It is true, as the Appellate Division has said, that

generally the unauthorized transfer of bailed property, for whatever purpose even for a temporary period, is a conversion. *"Procter & Gamble Distributing Co. v. Lawrence American Field Warehousing Corp.,* 266 N.Y.S.2d 785, 799 (1965) cited in *Fotos v. Firemen's Ins. Co.,* 533 A.2d 1264 (D.C. 1987); "[C]onversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him." *Even-Heat Co. v. Wade Elec. Prods. Co.* 336 Mich. 564, 58 N.W.2d 923 (Mich. 1953); *Cf First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 319 (1987)

A conversion can be temporary or permanent. In this instance Appellants do not argue that there was a permanent conversion, but rather only a temporary conversion which ran from April 15, 2019 when the $12,000.00 cashier's check was dishonored as unauthorized until May 26, 2023 when PNC provided evidence to Appellants' counsel that its prior statements were untrue and that had escheated $12,000.00 to the District in its stead. Consequently damages associated with the period of deprivation remain and are sought.

For a conversion regardless of its duration PNC is subject to liability to one who at the time was entitled to immediate possession of the chattel. Restat. 2d of Torts, § 225 *See* § 226 Conversion by Destruction or Alteration. § 242. Conversion of Documents and Intangible Rights is also relevant in these circumstances. "Where there

is conversion of a document in which intangible rights are merged, the damages include the value of such rights. One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted."

Thus PNC's argument that it did not convert the cashier's check since it simply escheated the $12,000.00 face value to the District of Columbia in 2018 as required by law is flawed.

Further PNC argues that the $12,000.00 can be recovered by Appellants by application to the District. PNC's argument that the transfer of $12,000.00 to the District prior to Appellants' demand cleanses it of its conversion shows an unsophisticated understanding of the tort of conversion and the damages which arise.

There are two strings to this bow. First PNC failed to comply with the stringent statutory requirements to notify the Appellants as owners prior to escheatment so they could negotiate the cashiers' check before being escheated. Second, and more important, PNC's purposeful, wrongful and untruthful misdirection despite demand over four years resulted in what the Courts (including the Supreme Court) and the Restatement have found resulted in damages.

"Conversion has generally [including here] been defined as any unlawful exercise of ownership, dominion or control over the personal property of another in denial or repudiation of his rights thereto." *Duggan v. Keto,* 554 A.2d 1126, 1137 (D.C.

1989) The initial task, therefore, is to undertake a careful review of the actual language of the provision. The Superior Court did not find this to be necessary, but Appellants do.

We start with a determination of what was transferred. Appellants' transferred "right" was their right to receive $12,000.00 upon application to PNC. Subsequently that "right" to receive $12,000.00 upon application was transferred to the District of Columbia subject to recovery although in cash.

PNC argues that it had an obligation to transfer the right to obtain $12,000.00 to the District and it is correct. What PNC did not have was the right to exercise "dominion and control" over the location, methodology and means to exercise that right. Thus the Appellants were as deprived of their $12,000.00 as they would have been if the $12,000.00 had been in cash in PNC's vault.

But there was also evidence that PNC's intent was to deprive Appellants of that right permanently although the reason for doing so is not clear. First PNC kept and presumably destroyed the actual cashier's check. Further, as only a lawyer would truly understand, PNC forged ahead with litigation requiring an estimated cost of at least $100,000.00 to each party and a Record of at least 381 pages, or at least that was Appellants' lawyer's tally, even though the realistic initial *ad damnum* was approximately $15,000. A discussion with the clients was ethically required. The only explanation for doing so would be the expectation that Appellants would be forced to

throw in the towel earlier still believing that the cashier's check was "unauthorized" and never recover the proceeds.[7]

As PNC points out, it was required by statute to lawfully exercise ownership or control over the $12,000.00 in order to escheat it to the District. §§ 41-151.01 *et seq.* PNC's actual transfer, however, was and continued to be in violation of law to the detriment of the Appellants. PNC failed to correct the error when numerous opportunities to do so arose. *See* D.C. Code § 41-156.05. Recovery of property by holder from Administrator. Consequently the transfer was no longer excused, but rather was a conversion. The allegations of the original Complaint were sufficient. "To be sure, complaints need not plead law or match facts to every element of a legal theory." *Krieger v. Fadely,* 211 F.3d 134, 136 (2000) as long as the pleader set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1357, at 683 (2004) Even if this distinction is ignored the Court is not bound by the Appellants' characterization of the

[7]Appellants note that in 2016, just before the events leading up to this suit, "PNC Executive Management found that PNC failed to waive Fees since at least 2001 for some qualified consumer banking customers and since at least 2002 for some qualified business banking customers, and [presumably with some embarrassment and resignations] reported its findings to the OCC and PNC's Board of Directors." The Comptroller ordered that PNC "make payment of a civil money penalty in the amount of fifteen million dollars ($15,000,000)." Consent Order #2018-031

action. The Restatement 2d of Torts provide a remarkably helpful primer rebutting PNC's and the Superior Court's arguments. "An excused violation of a legislative enactment or administrative regulation is not negligence...[if the actor] is unable after reasonable diligence or care to comply." Rest. 2d Torts § 288A.[12] In this instance the District has set out these requirements before escheatment occurs. However, the Restatement makes clear that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions. Rest. 2d of Torts, § 288C The Comment to this Restatement provision explains that: "[w]here there are no such special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion; but if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so."

Signs of reasonable compliance are missing at every turn. For example the Superior Court adopted the simple statement from Defendants' agent, Ms. Loperfito, that she did what she thought was sufficient and dispositive. This was insufficient. For example the contrary evidence, which the Superior Court ignored, demonstrated Ms. Loperfito's failings. She states in her Declaration that a search for Frances Schwartz,

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[12] The Restatement is cited herein and hereafter as the jurisdictions which have adopted it are varied and not all cited in the District although the principles are.

the stated designated payee, found no records. ¶¶ 9 & 10. Ms. Loperfito makes no such claim for the LMS Special Needs Trust premium money market account which she notes was closed on January 26, 2018. ¶¶ 8 Thus its records were in existence while the required escheat search was (or wasn't) being carried out. ¶ 9 A further search of PNC's records would have discovered the Trust itself which was associated with the premium PNC money market account. In addition, Ms. Loperfito would have discovered PNC Defendants had managed the Trust for decades including the completion of the annual IRS 1099 which indicated that Frederic Schwartz was the Trustee. The first page of the 39 page 2017 1099 LMS Special Needs Trust IMA prepared by Defendants was attached as an exhibit. As Ms. Loperfito (sort of) points out records relating to this account were required to be retained for 7 years. Loperfito Declaration ¶ 9

The Declaration of Ms. Loperfito is careful to suggest that a search for "any accounts held in the name "Frances Schwartz" over a seven year period did not identify any accounts although a check issued by a Frances Schwartz with an address in Chicago appears in PNC's Exhibit 2. Dispositively while Frances Schwartz was an apparent owner, there were two other apparent owners indicated in PNC's Property History. The additional owner #1 was the "LMS Special Needs Trust" and so identified in the Defendants' records. Loperfito Declaration Exhibit C The LMS Special Needs Trust identified Frederic Schwartz as Trustee. There is no indication

that the required search by Ms. Loperfito, as Vice President and Senior Operations Manager of the Escheat Processing Department, or a minion, met the stringent statutory requirement. There is also no indication that Ms. Loperfito, as a senior and experienced PNC employee, thought to enquire of PNC's general or District of Columbia Trust Departments whether the name of the Trust rang a bell.

The Restatement goes on: An actor is not relieved of liability to another for trespass to a chattel or for conversion his belief, because of a mistake of law or fact not induced by the other, that he (a) has possession of the chattel or is entitled to its immediate possession, or (b) has the consent of the other or of one with power to consent for him, or (c) is otherwise privileged to act. Restat. 2d of Torts, § 244

Of particular statutory concern here are those provisions requiring PNC to demonstrate that the cashier's check was both abandoned and that its owner had the opportunity to rescue it before escheatment. The Statute Provides:

> § 41-155.01. Notice to apparent owner by holder.
>
> Subject to subsection (b) of this section, the holder of property presumed abandoned shall send to the apparent owner notice by first-class United States mail that complies with § 41-155.01 in a format acceptable to the Administrator not more than 180 days nor less than 60 days before filing the report under § 41-154.01 if: The holder has in its records an address for the apparent owner which the holder's records do not disclose to be invalid and is sufficient to direct the delivery of first-class United States mail to the apparent owner; § 41-154.01. Report required by holder.
> (a) A holder of property presumed abandoned and subject to the custody of the Administrator shall report in a record to the Administrator concerning the property. The Administrator may not require a holder to file a paper report.
> (b)* * *

> Whether or not a holder contracts with a third party under subsection (b) of this section, the holder is responsible: (1) For the complete, accurate, and timely reporting of property presumed abandoned to the Administrator and [f]or paying or delivering to the Administrator property described in the report.

The District of Columbia Instructions For Preparing Unclaimed Property Reports states:

RETURNING MONEY TO ITS RIGHTFUL OWNER.
Proactive steps are in place to allow our staff to find owners prior to the annual newspaper advertisement. If you have any questions, comments, or suggestions on how to improve the reporting process, please feel free to contact one of the Unclaimed Property Staff at (202) 442-8181. REGARDING OWNERS We encourage you to make reasonable efforts to locate owners when an account first becomes inactive, or a check remains uncashed. Most individuals and companies can be found if an attempt to locate them is made during the first six months following a change of address.

Defendants pledge to their customers and clients in a description of its Escheatment policy including brokerage accounts [such as the LMS Special Needs Trust]: "Before a brokerage account can be considered abandoned or unclaimed, the firm must make a diligent effort to try to locate the account owner."

It is not easy to get into trouble. However the dereliction penalized here, as with the cited decision, represents "such an extreme and knowing deviation from the ordinary standard of care as to support a finding of wanton, willful, and reckless disregard or conscious indifference for the rights of Appellants...." *District Cablevision Ltd Partnership v. Bassin,* 828 A.2d 714, 725 (D.C. 2003); *District of Columbia v. Walker,* 689 A.2d 40, 44 (D.C. 1997)(emphasis supplied). PNC can not claim Ms. Loperfito was merely mistaken as discussed above in relation to § 244 or Effect of Mistake.

Conversion of the actual cashier's check.

Then there is the actual cashier's check which Defendants confiscated and substituted a worthless photocopy which stated on its face that it was worthless. A document is a chattel and is, therefore, itself property. As such, it may be the subject of a conversion which makes the actor liable under the rules stated in Restat. 2d of Torts §§ 223-241 for its value. *See* Restat. 2d of Torts, § 242

One who intentionally destroys a chattel or so materially alters its physical condition as to change its identity or character, as PNC did, is subject to liability for conversion to another who is in possession of the chattel or entitled to its immediate possession. Restat. 2d of Torts, § 226

The appropriate designation on the cashier's check would have been "escheated". By stating that the issuance of the cashier's check was "unauthorized" Appellants' agent's attention and efforts were directed to an "unauthorized" causes. The agent then attempted to resolve the matter with PNC's employees who refused to respond orally or in writing.

And what does this mean in relation to the tort of conversion. From April 15, 2019 until May 26, 2023, a period of more than four years, PNC deprived Appellants of the proceeds of the $12,000.00 cashier's check, a conversion. Equally important, if PNC's litigation effort had been successful at any point prior to May 26, 2023 Appellants would have been permanently deprived of the $12,000.00 escheated funds

as Appellants would have had no reason to assume that the etiology of the deprivation was not the "unauthorized" basis of the check but instead escheatment. Finally Appellants' counsel was required to incur significantly more than 278 hours of time in the recovery effort because of PNC's conversion. *Boiseau v. Morrissette,* 78 A.2d 777 (D.C. 1951); *Morrissette v. Boiseau,* 91 A.2d 130 (D.C. 1952); *Isr. Disc. Bank of N.Y. v. First State Depository Co., LLC,* 2013 Del. Ch. LEXIS 136: *See generally* Restatement of the Law, Torts 2d Remedies Chapter 47§ 927 Conversion or Destruction of a Thing or of a Legally Protected Interest in it. Restat 2d of Torts, § 927 As a general matter of takings law, the subsequent return of property confiscated by the government does not extinguish the earlier taking; it simply converts a permanent taking to a temporary one, altering the appropriate measure of damages as discussed above. *See, e.g. First English Lutheran Church of Glendale v. Los Angeles Cty., Cal.,* 482 U.S. 304, 319 (1987) (after a government regulation effected a taking, but was later invalidated, the taking became temporary rather than permanent); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."). "Damages for conversion and trespass to chattels may be based on the market value of property that is permanently converted, the diminution in market value as a result of a temporary conversion or trespass, or damages associated with the loss of use of personal property." *Sherwood v. Farber,* 266 A.3d 663, *6 (Pa. Super. Ct.

2021), § 278 Liability for Abuse of Privilege: One who exercises any privilege to commit an act which would otherwise be a trespass to a chattel or a conversion is subject to liability for any harm to the interest of another in the chattel caused by any dealing with it in a manner which is in excess of the privilege or not reasonably necessary to accomplish the purpose for which it is given. One who properly exercises such a privilege, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original privileged acts. As the COMMENTS point out in relation to Subsection (1): The rule stated in this Section subjects to liability an actor who has abused any of the privileges stated in §§ 252-266 A by dealing with the chattel in a manner not reasonably necessary to accomplish the purpose for which the privilege is given. The statement in this Subsection makes the actor liable only for harm to the chattel caused by so much of his dealing with it as is in excess of the privilege. He is not liable for harm accidentally caused to the chattel before his abusive acts.

§ 550 Liability for Fraudulent Concealment

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

> The rule stated in this Section is commonly applied in two types of situations, although it is not limited to them. * * *
>
> (c) The second situation occurs when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or when the defendant frustrates an investigation.
>
> Sending one in search of information in a direction where it cannot be obtained is a typical illustration of frustration. Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do not exist or cannot be discovered. § 551 Liability for Nondisclosure One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Which is not to say that Appellants will not be put to their proof on remand, but only that they are entitled to do so.

Miscellaneous errors of the Superior Court requiring remand.

This Court steadfastly limits opening Briefs to 50 page, and is likely glad of it, so Appellants are obligated to present the other issues in this appeal in relatively summary form.

Johanna Schwartz

The Superior Court, after a careful mathematical exercise, determined that the statute of limitations had passed in Johanna Schwartz' claim against PNC. In doing so she appears to have made several errors. It would appear that the covid tolling order expired on June 10, 2022 not March 30, 2021 as the Superior Court concluded. *See* ORDER BY CHIEF JUDGE JOSEY-HERRING Amended 7/29/2022 In addition when there is a continuing breach of contract with multiple payments as here the statute begins to run at the last breach. *See Keefe Co. v. Americable Int'l, Inc.,* 755 A.2d 469 (D.C. 2000) for a fulsome discussion of the question. *See Doolin v. Environmental Power, Ltd*., 360 A.2d 49 (1976) Finally Johanna Schwartz brings an action after rejection of a right preserved under a document under seal which would have a 12 year statute of limitation.

IIP

The Superior Court first seeks to disqualify the claim because it partially sounded in tort which was not pled. IIP sought to amend the Complaint but was not allowed to by the Superior Court after the escheatment was revealed. This is easily

remedied in a remand. The Superior Court also concluded that IIP is unable to determine when the funds were actually escheated and thus cannot determine precisely when the Statute began to run. PNC in fact has that information since it has accumulated three years of returned monthly statement prior to escheatment. Further each returned statement carries with it the account number and other identifying information. PNC ignored these documents Even without this information and PNC's inaction IIP's agent (and attorney) in his affidavit stated that the escheatment was discovered within "the past several years" thereby placing it within the statutory period.

In any event the Superior Court considered this statement concerning the discovery date to be an inadmissible statement of counsel. The cited authority dealt with statements of counsel in relation to what others did or found. Here the statement of material facts was signed by Frederic Schwartz as the agent of the IIP or, in the alternative, an individual who was both the agent and the attorney for the IIP. He was more importantly the individual who personally discovered the escheatment. Thus there would be no disqualification. Further, as Rule 11 puts it:

> [A] a pleading need not be verified or accompanied by an affidavit. * * * By presenting to the court a pleading, written motion, or other paper * * * —whether by signing, filing, submitting, or later advocating it—an attorney* * * certifies that to the best of the person's knowledge, information, and belief * * * the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery....

CONCLUSION

Appellants respectfully request that this matter be remanded to the Superior Court for trial in accordance with this Court's holdings and instructions as set out in its Decision.

Respectfully,

/s/ Frederic W. Schwartz, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was retransmitted to counsel of record this 20th day of June 2024 utilizing this Court's electronic filing system in accordance with the Rules of this Court.

/s/ Frederic W. Schwartz, Jr.