No. 23-CV-872

DISTRICT OF COLUMBIA COURT OF APPEALS

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

V.

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

ON APPEAL FROM A JUDGMENT AND ORDERS OF
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

APPELLEES' BRIEF

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Appellees PNC Bank, N.A. and PNC Financial Services Group Inc. (collectively "PNC" or "Appellees"), pursuant to D.C. App. R. 28, submit this Appellees' Brief. As set forth below, there is no merit to the arguments raised in Appellants' Brief, which meanders through the Superior Court's numerous dispositive rulings on meritless claims and discretionary findings with respect to frivolous motions affecting the pleadings and discovery. Appellants' Brief also misstates applicable law, distorts the record, and avoids the fact that Appellants' own actions are to blame for the fate of their transactions with PNC. Accordingly, Appellees respectfully request that the Court affirm the Judgment and Orders of the Superior Court and dismiss the appeal.

INTRODUCTION

Appellants, Lynne M. Schwartz Special Needs Trust, Lynne M. Schwartz Discretionary Trust, Estate of Lynne M. Schwartz, Estate of Frances A. Schwartz, Johanna Schwartz and the International Internship Program, Inc. ("IIP"), commenced this action on April 7, 2022, asserting six claims related to three bank accounts at PNC. Since then, they failed to serve discovery other than two interrogatories, repeatedly filed baseless motions (including those at issue on appeal), opposed summary judgment, and pursued this appeal—despite admitting

the $12,000 cashier's check funds, which form the entire basis of their claims, were "legitimately" escheated to the District of Columbia.[1]

Despite their admission and uncontroverted facts regarding how PNC treated the funds, in their brief, Appellants repeatedly accuse PNC of "stealing" the money and "destroying" the cashier's check, and they refuse to relent in their pursuit of legally insufficient claims, including those clearly barred by the statue of limitations. They pursue this frivolous appeal, without regard to judicial economy or the interests of justice. It is unconscionable, vexatious, and in bad faith.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In their notice of appeal, Appellants seek relief with respect to four (4) orders of the Superior Court. In chronological order, these orders are: first, on August 30, 2022, the Superior Court granted in part and denied in part PNC's motion to dismiss. Then, on April 27, 2023, the Superior Court denied Appellants' motion to compel responses to two interrogatories and Appellants' motion to strike certain paragraphs of PNC's answer to the complaint. Next, on July 28, 2023, Superior Court denied Appellants' motion to amend the complaint and alter the scheduling order. Finally, on September 20, 2023, the Superior Court granted PNC's motion for summary

[1] Appellants also concede that when PNC advised them of the escheat, PNC further advised Appellants that the funds were readily available and could be recovered by filing a simple claim form on the District of Columbia's Unclaimed Property website. *See* https://cfo.dc.gov/page/unclaimed-property-how-reclaim-property. Appellants' Brief, pp. 3, 28-29.

judgment and entered judgment in its favor. At issue is whether the Appellants have met their burden to establish the Superior Court abused its discretion and/or committed reversible error in its rulings.

STATEMENT OF THE CASE

Plaintiffs filed their complaint on April 7, 2022, asserting six causes of action: (1) breach of fiduciary duty; (2) breach of contract; (3) breach of the duty of good faith and fair dealing; (4) breach of the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901 *et seq*. (2001) ("CPPA"); (5) unjust enrichment; and (6) conversion. All six claims were premised on a four-years-old cashier's check in the amount of $12,000 which was dishonored on April 15, 2019 because the funds had escheated to the District of Columbia; one breach of contract claim related to the standard checking account of Johanna Schwartz based on a "unilateral amendment" to impose service charges; and still another breach of contract claim involved an escheat of funds in a non-profit checking account in the name of the International Internship Program, Inc. ("IIP"). App., pp. 361-380.[2]

Following the Superior Court's ruling on the motion to dismiss, only three claims remained: unjust enrichment, conversion, and breach of contract. In their opposition to the motion for summary judgment, Appellants conceded that due to the escheat of funds, the unjust enrichment claim was no longer valid and was not

[2] References herein to the Appendix filed by Appellants will be "App., p. _."

pursued. Accordingly, only the conversion and breach of contract claims are subject to this appeal.

Throughout the entire period of discovery, which included multiple requests to extend and amend the scheduling orders by Appellants, only two interrogatories were served on PNC, seeking the identity of PNC employees who were allegedly involved in the dishonor of the cashier's check. Following PNC's sworn answer that, after a reasonable investigation, it was unable to determine the identity of the persons sought, Appellants filed a motion to compel. At the same time, unsatisfied with the answers of PNC to the allegations in the complaint, Appellants filed a motion to strike on February 24, 2023—nearly four (4) months after it was due under the Rules. These motions were denied by the Superior Court's order entered on April 27, 2023.

In May 2023, PNC informed Appellants that it had discovered that the cashier's check funds had escheated to the District of Columbia on October 25, 2018, and voluntarily provided documents to substantiate the escheat. In response, over a month later and after the close of discovery, Appellants filed a motion to amend the complaint and sought to alter the scheduling order by "re-opening discovery by 45 days." App., p. 248. Because Appellants failed to attach a copy of the proposed amended complaint, the Superior Court denied the motion to amend.

Finally, on July 26, 2023, PNC filed a motion for summary judgment, brief in support, statement of material facts, and appendix of exhibits in support of the motion. App., pp. 158-228. Appellants opposed the motion and, one day later, filed a "praecipe with additional exhibits that were omitted from their [o]pposition through technical error." App., p. 99. Although the exhibits were not produced in response to PNC's discovery requests, the Superior Court permitted them for consideration. App., pp. 15-16. On September 20, 2023, the Superior Court granted the motion for summary judgment, dismissed the remaining claims for conversion and breach of contract, and entered a judgment order in favor of PNC the same day.

STATEMENT OF FACTS

Appellants' statement of facts appears throughout their brief, mostly repeating verbatim the allegations in the complaint, and does not tell the whole story. The following facts are of record and, importantly, unless noted otherwise, undisputed.

A. The Cashier's Check

On April 14, 2015, at the request of Frederic Schwartz, Jr., in his representative capacities, PNC issued a cashier's check in the amount of $12,000 payable to Frances Schwartz. App., pp. 365, 377 (compl., ¶ 16; compl., exhibit A). The remitter on the check was the "LMS[3] Special Needs Trust." *Id*. Frances Schwartz died on May 27, 2013. App., p. 365 (compl., ¶ 18). The LMS Special

[3] "LMS" as referred to on the check and in this brief, means "Lynne M. Schwartz."

Needs Trust premium money market account, from which the funds were drawn, was closed on January 26, 2018. App., pp. 180, 192-94. On October 25, 2018, PNC escheated the $12,000 to the District of Columbia. App., pp. 179-80, 186-91.

Consistent with the District of Columbia Revised Uniform Unclaimed Property Act, D.C. Code §§ 41-151.01 *et seq*., PNC's procedure regarding the escheat of funds provides that certain funds remaining unclaimed for at least three years are presumed abandoned and subject to escheat to the District of Columbia. App., p. 178. This procedure applies to funds held in personal checking accounts, non-profit checking accounts, and cashier's checks which have remained unclaimed or otherwise not cashed or deposited within three years of issuance. *Id*. Prior to the escheat, PNC attempted to locate an address for Frances Schwartz, but the search did not reveal any accounts held at PNC for at least the last seven (7) years. App., p. 180.

On April 12, 2019, Frederic Schwartz, Jr., endorsed the cashier's check as executor of the Frances Schwartz Estate, and deposited the check into the LMS Discretionary Trust account ending in 2048. App., pp. 184-85, 195-98. On April 15, 2019, PNC issued a notice of dishonor, indicating that the funds were returned (as reflected on the account statement ending in 2048), with a copy of the cashier's check with a stamp indicating that the return reason was "not authorized." App., pp.

195-98, 377. Appellants allege that Frederic Schwartz, Jr., in his representative capacities:

- returned to the bank and complained that "unauthorized" was an improper reason to dishonor the cashier's check without a further description;
- received two voicemails several days thereafter from a Ms. Russell who asked him to return the calls to discuss his complaint;
- did not return the phone calls, but returned to the bank and advised a "senior" branch representative that "the UCC did not deal with 'complaints'" and that a "written response" was required from PNC;
- did not receive a "written response" prior to the date of filing the complaint.

App., pp. 366-67 (compl., ¶¶ 24-29). During its investigation into Appellants' claims in this case, PNC discovered and, in May 2023, provided to Appellants, documentation regarding the escheat of the cashier's check funds. App., pp. 179-80, 186-91.

B. The Standard Checking Account of Johanna Schwartz

Appellants allege that Johanna Schwartz:

- opened a checking account with PNC, that no fees were initially charged, and that monthly statements were issued and reviewed by Frederic J. Schwartz;
- at some point the terms of the banking agreement were amended to provide for a periodic service charge and on supposition, notice of that change was incorporated in a periodic statements;
- when it was discovered, Frederic J. Schwartz, as agent of Johanna Schwartz, demanded a return of the funds and closure of the account;
- PNC required instructions from Johanna Schwartz to close the account;
- PNC improperly refused to accept a power of attorney executed by Johanna Schwartz in London.

App., pp. 367-69 (compl., ¶¶ 32-50).

Appellants produced a copy of a Power of Attorney given by Johanna Schwartz dated July 13, 2017. App., pp. 205-08. A search was conducted for records regarding a standard checking account in the name of Johanna J. Schwartz, account number ending in 4363. App., p. 180. The account was closed and showed a zero-dollar amount as of June 7, 2018. *Id*. During the relevant time period, standard checking account opening documents included a "Consumer Schedule of Service Charges and Fees." App., pp. 180-81, 199-202. The Account Agreement included a provision reserving the right to amend, alter, or impose fees listed in the Consumer Schedule of Service Charges and Fees upon notice to the account holder. Notices regarding changes to fees or other charges and terms applicable to standard checking accounts are included on monthly statements, in the "IMPORTANT ACCOUNT INFORMATION" section of the statement and are typically provided at least thirty (30) days prior to implementation. *Id*.

C. The Non-Profit Checking Account of the IIP

Appellants allege:

- the IIP established a non-profit checking account at PNC;
- subsequently, the IIP moved its offices to a new location;
- IIP notified PNC of a change of address for the account, but the address format which PNC utilized did not allow for the suite number of the IIP's new address even though it was supplied;
- as a result, account statements and other correspondence to the IIP from PNC became undeliverable and were returned to PNC as undeliverable;
- PNC did not attempt to determine the identity of the IIP Director or other appropriate mailing addresses;

- after a period of time the funds in the account escheated to the District of Columbia.

App., pp. 369-70 (compl., ¶¶ 51-62). PNC conducted a search for a non-profit checking account in the name of the "International Internship Program, Inc." but no results were found. App., p. 181.

SUMMARY OF ARGUMENT

Put simply, and as set forth below, the Superior Court did not commit reversible error or abuse its discretion with respect to any of its rulings at issue in this appeal. Appellants have not —and cannot—establish otherwise.

Regarding the dismissal of the claims for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and breach of the District of Columbia CPPA, Appellants simply cling to the liberal pleading standards and liberal review of the allegations in the complaint, but even so, the allegations fail to state a claim, even accepting them as true. Similarly, Appellants fail to establish the Superior Court abused its discretion in denying the unwarranted motion to compel, untimely motion to strike, and untimely motion to amend.

Last, Appellants cannot overcome the record, which overwhelmingly supports the Superior Court's entry of summary judgment in favor of PNC on the claims of conversion and breach of contract. Appellants had the burden of establishing a genuine issue of material fact on each element of each of their claims—and failed to

do so. Accordingly, this Court should dismiss the appeal and affirm the orders and judgment of the Superior Court.

ARGUMENT

A. Standard of Review

Pursuant to D.C. App. R. 28, PNC agrees that the standard of review of a dismissal under Rule 12(b)(6) and an entry of judgment under Rule 56, is *de novo*. PNC further recognizes the Court is aware of the standards applicable to a consideration of a motion to dismiss and a motion for summary judgment in the lower court. The parties also agree the standard of review for the non-dispositive motions to compel, strike, and amend, is an abuse of discretion. *See Phelan v. City of Mt. Rainier*, 805 A.2d 930, 942-43 (D.C. 2002) ("[t]he trial court has broad discretion to weigh the factors in deciding whether discovery should be compelled.") (citation omitted); *United States ex rel. Landis v. Tailwind Sports Corp.*, 308 F.R.D. 1, 4 (D. D.C. 2015) ("The decision to grant or deny a motion to strike is vested in the trial judge's sound discretion," and the decision to strike is considered a "drastic remedy."); *Eagle Wine & Liquor Co. v. Silverberg Elec. Co.*, 402 A.2d 31, 34 (D.C. 1979) ("this Court reviews a denial of a motion to amend for abuse of discretion to determine whether the decision was 'predicated on some valid ground.'").

B. Motion To Dismiss

1. Count I – "Breach of Fiduciary Duty/Breach of Delegated Fiduciary Duty/Breach of Fiduciary Duty of A Trust Protector"

(a) The Superior Court Properly Dismissed Count I

First, the Superior Court did not err in dismissing Count I, titled "breach of fiduciary duty/breach of delegated fiduciary duty/breach of fiduciary duty of a trust protector," based on the allegations in the complaint and as a matter of law. As noted by the Superior Court, "[t]o state a claim for breach of fiduciary duty under District of Columbia law, a plaintiff must allege facts sufficient to establish: (1) the defendant owed plaintiff a fiduciary duty; (2) a breach of that duty; and (3) proximate cause and injury to be inferred from those facts." *Xereas v. Heiss*, 987 F.3d 1124, 1130 (D.C. Cir. 2021) (citations omitted)." App., p. 49. The Superior Court relied upon *Geiger v. Crestar Bank*, 778 A.2d 1085, 1089 (D.C. 2001) wherein the District of Columbia Court of Appeals held: "The bank does not take on fiduciary responsibilities simply because the bank established an account on behalf of a customer who is acting as a fiduciary. Instead, the relationship of the bank and its depositor is purely contractual." App., p. 50. Further, the Superior Court recognized,

> While fiduciary relationships 'may very well exist between contracting parties,' courts in the District of Columbia have traditionally looked for "a 'special confidential relationship' that transcends an ordinary business transaction and requires each party to act with the interests of the other in mind." *Lu v. Lezell*, 919 F. Supp. 2d 1, 6 (D.D.C. 2013) (quoting *High v. McLean Fin. Corp.*, 659 F. Supp. 1561, 1568 (D.D.C 1987)).

App., p. 51. Finding the complaint set forth only conclusory assertions regarding the existence of a fiduciary duty, and failed to state "plausible facts to indicate that a fiduciary relationship, above and beyond a typical contractual banking relationship, existed between the parties," the Superior Court dismissed Count I. *Id*.

(b) Appellants' Brief Fails To Establish Error By The Superior Court In Dismissing Count I

Appellants begin their argument by conceding, as they did below, that "[*Geiger*] 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[.]" Appellants' Br., p. 9 (emphasis in original). Appellants then immediately claim: "But that does not preclude the existence of fiduciary duties owed to the *depositor* by the bank." *Id*. Appellants then assert irrelevant and inapposite authority with respect to "the general nature of a fiduciary duty" and refer to fiduciary duties purportedly arising out of statute and other circumstances not present here. *Id*., pp. 9-10.

In their effort to argue that a fiduciary duty existed here between the depositor and the bank, Appellants assert "the controlling law" is set forth in *Mobilizegreen, Inc. v. Cmty. Found.*, 267 A.3d 1019, 1026 (D.C. 2022), also advanced by the Appellants below in opposition to the motion to dismiss, which Appellants summarize as holding:

> 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).

Appellants' Br., p. 11. In circular fashion, Appellants assert,

> 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. For the bank to do so, however, is a violation of the bank's fiduciary duty.

Id. (footnote omitted). Appellants then go on to state that, "[t]he relationship here was not that of a bank and a depositor" and "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.

Appellants' Br., p. 12. Appellants conclude with, "[n]o 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)." *Id*.

(c) The Complaint Fails To Allege Facts To Establish A Fiduciary Duty Owed By PNC To The Parties Involved In The Attempted Deposit Of The Cashier's Check

Initially, Appellants' reliance on *Mobilizegreen, Inc. v. Cmty. Found.*, 267 A.3d 1019 (D.C. 2022), does not save their claim, as it is factually inapposite and does not support a fiduciary duty as they claim. Therein, the defendant Community Foundation served as the fiscal sponsor of Mobilizegreen pursuant to a contract to receive and manage funds from the federal government. *See Mobilizegreen*, 267 A.3d at 1021-22. Mobilizegreen asserted a claim for breach of fiduciary duty based on alleged mismanagement of the funds. *Id*. at 1022. The court affirmed summary judgment on the claim, as the "parties' relationship was fully set forth within the four corners of their contract." *Id.* at 1026-27.

In any event, *Mobilizegreen* is in fact consistent with *Geiger* in that both cases recognize for a fiduciary duty to exist beyond the terms of a contract, there must be facts alleging a special confidential relationship, transcending "an ordinary business transaction." *See Mobilizegreen*, 267 A.3d at 1026; *Geiger*, 778 A.2d at 1095. Not only have Appellants failed to identify the "contract" allegedly giving rise to a fiduciary duty, they also have not alleged any facts in support of a "special confidential relationship" arising out of the attempted deposit of the cashier's check.

Next, Appellants' reliance on allegations regarding the "corpus" of the LMS Special Needs Trust and the LMS Discretionary Trust being transferred to a "money

manager which maintained full and absolute control over each trust as pled" and that there was a relationship between the trusts and a "financial advisor and manager" does not support the breach of fiduciary duty claim, and in fact, the allegations have nothing to do with the claim, which relates solely to the dishonored cashier's check. *See* Appellants' Br., p. 12; *see also* App., pp. 371-72 (compl., ¶¶ 65-68). Simply because the source of the funds for the cashier's check was a trust account for a disabled adult does not create the existence of a fiduciary duty with respect to the attempted deposit—and Appellants offer no authority otherwise. Similarly, there is no support for Appellant's contention that PNC acted as a "delegate" or "designee for the trustee" (i.e., Frederic Schwartz, Jr.) and somehow became a fiduciary under the facts alleged. *Id*. Indeed, the complaint contains no allegations regarding an alleged breach of fiduciary duty with respect to the management, control, or advice provided in relation to any trust funds or trust accounts. *See* App., pp. 361-380 (summons and complaint).

Tellingly, in their Brief, Appellants avoid any reference to their allegations in the complaint which purport to state a claim for breach of fiduciary duty. Again, these allegations relate only to the events surrounding the issuance, attempted deposit, and dishonor of the cashier's check. App., p. 372 (compl., ¶ 71). Appellants' final reliance on *Cap. River Enters., LLC v. Abod*, 301 A.3d 1234 (D.C. 2023) is wholly off the mark. There, the Court reversed summary judgment on a

negligence claim based on an alleged breach of fiduciary duty owed by an escrow agent to its principal in a real estate transaction. The Court held that allegations that the escrow agent had knowledge that an operating agreement submitted in support of loan transactions was forged, yet failed to disclose such fact to its principal, were sufficient to state a claim for negligence. *Id*. at 1243-44. The case could not be more opposite to the allegations here.

In sum, on its face, the claim for "breach of fiduciary duty/breach of delegated fiduciary duty/breach of fiduciary duty of a trust protector" fails to assert facts sufficient to establish plausible relief that a fiduciary duty was owed and breached. Rather, the purported claim arises solely from an ordinary business transaction involving a cashier's check. Accordingly, this Court should affirm the dismissal of count I of the complaint.

2. Count III – Breach of the Duty of Good Faith and Fair Dealing

(a) The Superior Court Properly Dismissed Count III

Next, the Superior Court did not err in dismissing count III, breach of the duty of good faith and fair dealing, because the allegations in the complaint fail to state a claim for relief that is plausible on its face. The Superior Court explained, "'[i]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied

covenant of good faith and fair dealing.'" *Abdelrhman v. Ackerman*, 76 A.3d 883, 891 (D.C. 2013) (quoting *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988) (alterations omitted)). App., p. 53.

Further, "'[t]o state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege either bad faith or conduct that is arbitrary and capricious.'" *Id.* at 891-92 (quoting *Wright v. Howard Univ.*, 60 A.3d 749, 754 (D.C. 2013)). *Id*. The Superior Court ruled that "the complaint does not include allegations of bad faith or arbitrary and capricious conduct on behalf of [PNC] . . . nor does the Opposition clarify or address either of the elements of the claim." App., p. 54. Because the complaint failed to plead "any facts to plausibly support their claim," the Superior Court granted the motion to dismiss count III. *Id*.

(b) <u>Appellants' Brief Fails To Establish Error By The Superior Court In Dismissing Count III</u>

Appellants recognize that to state a claim for breach of the duty of good faith and fair dealing, "there must be a contract" and "bad faith or arbitrary and capricious conduct" which equates to "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)." Appellants' Br., p. 12.

Regarding the first element, Appellants assert, "the Superior Court found a contractual relationship existed (although in her view not a fiduciary duty)." *Id*., p. 16. Next, Appellants simply recite certain allegations in the complaint regarding the parties and the alleged events surrounding the issuance of the cashier's check, deposit and return thereof, which are the same allegations as those relied upon in support of the breach of fiduciary duty claim. *Id*., pp. 14-16. Appellants also cite to an allegation in the compliant which purports to quote certain "material representations" made by PNC in print and electronic media regarding service and relationships with customers. *Id*., p. 16. Then, in the same conclusory fashion as the allegations in the complaint, Appellants argue, "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" and "provided only an inexplicable reason for doing so" and that these allegations constitute "examples of bad faith or arbitrary and capricious conduct" sufficient to state a claim for breach of the duty of good faith and fair dealing. Appellants' Br., p. 17.

(c) <u>The Claim For Breach of The Duty of Good Faith And Fair Dealing Fails As A Matter Of Law And The Complaint Falls Woefully Short Of Alleging Facts Sufficient To Establish Bad Faith or Arbitrary And Capricious Conduct</u>

Initially, while the Superior Court found Appellants had pled a breach of contract claim based on the allegations related to the checking account of Johanna

Schwartz, it did not find a breach of contract claim existed with respect to the cashier's check transactions. *See* App., pp. 43-58. Nor do Appellants identify the existence of such a contract. Rather, they make a single allegation that, "[t]o the extent that the relationship between PNC BANK, N.A. and PNC FINANCIAL SERVICES GROUP, INC. and any or all Plaintiffs herein is proven or deemed to be contractual, the duty of good faith and fair dealing in relation to any and all such transaction between them was breached and in violation of that duty." App., pp. 373-74 (compl., ¶ 81). Notably, Appellants' brief does not include argument in support of a claim on behalf of Johanna Schwartz for breach of the duty of good faith and fair dealing. As an implied duty premised upon a valid contract, the Court should affirm the dismissal on this basis alone.

In any event, Appellants' allegations regarding the issuance, deposit, return of funds and dishonor of the cashier's check as "unauthorized" do not equate to bad faith or arbitrary and capricious conduct. Appellants accuse PNC of "stealing" the funds and "destroying evidence," yet these contentions do not appear in the complaint. Appellants' Br., p. 17; App., 361-80. The funds were issued from an LMS Special Needs Trust account on April 14, 2015. Appellants conveniently omit the fact that Frederic Schwartz, Jr. held onto the cashier's check after its issuance for over four years before attempting to deposit the funds. When he did so, PNC initially accepted the funds for deposit, but three days later issued a notice of

dishonor and returned a copy of the check. Appellants only allege Frederic Schwartz, Jr.'s disagreement and dissatisfaction with the response and explanation from the bank regarding the dishonor, but those allegations fall far short of alleging bad faith or arbitrary and capricious conduct. App., pp. 366-67 (compl., ¶¶ 24, 28).

In sum, none of the allegations amount to "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, [or] interference with or failure to cooperate in the other party's performance." *Allworth v. Howard Univ*., 890 A.2d 194, 202 (D.C. 2006) (citation omitted). Similarly, the explanation for the dishonor of the four-year-old cashier's check as "not authorized" was reasonable under the facts and circumstances alleged, constituting "fair dealing" and therefore not arbitrary or capricious. *See id*. (citation omitted). Appellants offer no support otherwise. For these reasons, the Court should affirm.

3. Count IV – Breach of the District of Columbia Consumer Protection Procedures Act ("CPPA")

(a) The Superior Court Properly Dismissed Count IV

Finally, the Superior Court did not err in dismissing Count IV, breach of the District of Columbia Consumer Protection Procedures Act ("CPPA"), which makes it unlawful "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). App., p. 54. The Superior Court explained, "[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). *Id*.

The Superior Court reasoned,

> 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.

App., p. 55. Further, in determining whether the allegations, taken as true, could reasonably be interpreted by a consumer as misleading, the Superior Court further reasoned,

> 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. ¶ 89, that Ms. Johanna Schwartz

> utilized her PNC account to obtain funds, Compl. ¶ 90, and assert a general description of IIP, Compl. ¶ 91, all while failing to identify what unfair or deceptive trade practices have been committed by Defendants. Plaintiffs do not even specifically identify the representations in Complaint ¶ 63 as misrepresentations.

App., p. 55. Accordingly, the Superior Court concluded that the complaint failed to plead plausible facts to support a claim under the CPPA, and thus dismissed Count IV. *Id*.

(b) Appellants Fail To Establish Error By The Superior Court In Dismissing Count IV

Appellants boldly begin by claiming, "[i]t 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." Appellants' Br., p. 17. Appellants then quote the Superior Court's recitation of the CPPA and its reasoning as it applied to the allegations in the complaint (as set forth above). *Id*., pp. 18-19. Appellants also cite authority which requires factual allegations of a "material misrepresentation"—even if it is unintentional—to state a claim. *Id*.

Appellants then mistakenly claim that the Superior Court determined that there was no support in the complaint for designating the Appellants as "consumers" and designating PNC as "merchants." *Id*., p. 20. There is no such finding in the Court's order. App., pp. 54-55. To support their conclusory assertions that PNC engaged in "unfair or deceptive trade practices," Appellants merely repeat the same allegations in the complaint which were rejected by the Superior Court, including

allegations specific to the breach of fiduciary duty claim regarding the "trust beneficiaries" being "dependent" on PNC to carry out transactions and Appellants' alleged "inducement" to have "faith, confidence and trust" in PNC "because of the representations" made to the general public in print and electronic media "connot[ing] honesty in general and attention to checking and cash flow solutions in particular." Appellants' Br., pp. 20-21.

To argue a breach of the CPPA, Appellants go back to the well and once again accuse PNC of theft:

> 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.

Id., p. 22. In short, Appellants argue that PNC's alleged conduct in dishonoring the cashier's check was "contrary to PNC's claim of honesty and the Superior Court was simply wrong in concluding to the contrary." *Id*.

(c) <u>The Complaint Fails To State A Claim Under the CPPA</u>

Even under liberal pleading standards, the complaint fails to state a claim under the CPPA. Appellants conclusively alleged PNC "engaged in unfair or deceptive trade practices" by dishonoring the cashier's check and providing an unsatisfactory explanation for doing so in their view. App., p. 374 (compl., ¶ 88).

While Appellants allege "material representations" by PNC with respect to its values and service to customers, the Superior Court correctly noted that the complaint does not identify the representations as "misrepresentations." Further, the complaint does not connect the dots and allege facts to plausibly support an inference that a reasonable consumer would deem such representations misleading. Appellants' subjective belief that PNC "stole" the cashier's check does not suffice to state a claim that PNC engaged in unfair or deceptive trade practices by simply dishonoring a four-year-old cashier's check. For these reasons, the Court should affirm the dismissal of count IV.

C. Motion to Strike

Appellants next challenge the Superior Court's denial of their motion to strike PNC's answers to 34 paragraphs of what were the remaining 79 operative allegations in the complaint (following the ruling on the motion to dismiss). The Superior Court denied the motion to strike as untimely. App., pp. 33-40. Appellants argue, as they did below, that the motion "was not untimely and, in any event, the Superior Court had the authority to independently review the appropriateness of the Answer." Appellants' Br., p. 24; App., pp. 254-59. Appellants repeat, verbatim, the three arguments raised below to support that the motion was not untimely.

First, Appellants quote Rule 12(f) of the District of Columbia Superior Court Rules of Civil Procedure which provides that, "[t]he 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." D.C. R. Civ. P. Rule 12(f). Appellants argue that the court "may" act on a motion to strike but the rule does not include a mandate that it "must" act within a specified time. Appellants' Br., p. 24; App., pp. 254-59.

Second, Appellants rely on Rule 6(b), which provides:

> (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, Appellants contend, "the Court on motion or on its own initiative may extend the time to file a Motion to Strike." *Id*.

Third, and finally, presumably in an effort to establish excusable neglect for their own delay, Appellants argue that "the 21 day period" should not be imposed because "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[,]" as counsel for PNC was in the process of obtaining admission *pro hac vice*, and so he decided not to file a timely motion "to avoid unnecessary motion's practice." *Id*.

The Superior Court rejected each of the foregoing arguments and denied the motion as untimely. First, regarding Appellants' reliance on Rule 12(f), the Superior Court reasoned:

> As Plaintiffs seek to strike responses in the Answer, which contains no counterclaims, Plaintiffs are not afforded a response to the Answer, and thus Plaintiffs' Motion to Strike was required "within 21 days after being served with the pleading." Super. Ct. Civ. R. 12(f)(2). Defendants filed the Answer on October 4, 2022, *see* Dkt., which would render any motion to strike by Plaintiffs due by October 25, 2022. *See* Super. Ct. Civ. R. 12(f). Plaintiffs did not move to extend the deadlines for filing the motion to strike, and subsequently filed the instant motion on February 24, 2023, *see* Dkt., nearly four months after the date by which Plaintiffs were required to move to strike.

App., p. 37. Second, with respect to Rule 6(b), the Superior Court correctly explained:

> While Superior Court Civil Rule 6(b) permits the Court to extend a deadline "with or without motion if the court acts…*before* the original time or its extension expires," *see* Super. Ct. Civ. R. 6(b)(1)(A) (emphasis added), once the time to act has expired, the deadline may only be extended "on motion…if the party failed to act because of excusable neglect." Super. Ct. Civ. R. 6(b)(1)(B). Here, Plaintiffs failed to seek additional time to move to strike before the deadline passed, and the Court does not have the discretion to act without a motion to extend the deadline once the deadline has passed.

Id. Appellants offer no support otherwise. Finally, not only had Appellants failed to file a timely motion to extend the time to file a motion to strike, but the Superior Court also determined that Appellants had "not demonstrated excusable neglect for their failure to timely act." *Id*. Specifically,

> While Plaintiffs assumed that Defendants' substitution of counsel would have led Defendants to seek additional time to oppose a timely motion to strike filed by Plaintiffs, Plaintiffs' assumption does not excuse Plaintiffs' own failure to timely act as any potential request for more time to respond would have no impact on Plaintiffs' ability to comply with the requisite deadlines.

Id. The Superior Court appropriately followed the rules as stated.

In sum, Appellants' arguments to justify filing an untimely motion to strike by nearly four months have no merit or support in the rules or applicable law. Appellants also fail to establish that the Superior Court abused its discretion or otherwise erred in any way in its interpretation of the plain language of the applicable rules. Accordingly, the Court should affirm the denial of the motion to strike.[4]

D. Motion to Compel

Up next in Appellants' litany of alleged errors committed by the Superior Court is the denial of their motion to compel answers to two interrogatories. These interrogatories requested that PNC: (1) Identify the person who designated the cashier's check which is the subject of this suit as unauthorized; and (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." Appellants' Br.,

[4] Notably, with respect to the Superior Court's denial of the motion to strike and motion to compel, in light of the valid escheat of the funds, Appellants have sustained no harm and any remand would be futile. *See*, *e.g.*, *McDonald v. D.C. Bd. of Zoning Adjustment*, 291 A.3d 1109, 1115 (D.C. 2023) (noting, "we will not remand where the law dictates a particular outcome such that remand would be futile.") (citations omitted).

p. 26. PNC responded to each interrogatory with objections and averred that it "conducted a reasonable investigation into determining a response [] but have yet to identify the person" who designated the cashier's check as unauthorized and/or who "refused to respond in writing" to Frederic Schwartz Jr.'s alleged "challenge" to such designation. *Id*.

Appellants again assert, verbatim, the same arguments raised below. Namely, Appellants pontificate and speculate that PNC's "claim that they were unable to respond is improper" because:

> The rejected cashiers check has a number of codes, dates and other means of identification on its face. Since it is drawn in the amount of $12,000.00 it is 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 it being dishonored should have been subject to preservation since a claim was made within days of the refusal to honor the check and Plaintiff 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.

Appellants' Br., pp. 27-28. Unpersuaded, the Superior Court denied the motion to compel, reasoning:

> 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 Plaintiffs seek, and Plaintiffs have not shown that Defendants have abdicated their responsibility in conducting an adequate search in responding to Plaintiffs' discovery requests, the Court denies Plaintiffs' Motion to Compel.

Id., p. 28; App., pp. 38-40.

Appellants argue that the Superior Court's conclusion is "remarkable" for two reasons. Appellants' Br., p. 28. First, Appellants contend, "PNC neither defined 'reasonable' nor set out any elements of their 'reasonable search.'" *Id*. Appellants offer no legal authority for their contention that PNC was somehow required to describe its search efforts and/or why they were reasonable. In fact, the Superior Court rejected Appellants' contention (raised below but not presently), that "the Court should apply a FOIA ["Freedom of Information Act"] analysis to determine the adequacy of the search conducted" as lacking support. App., p. 39.

Second, Appellants argue that 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."

Appellants' Br., p. 28. Appellants misstate the Superior Court's ruling and take it out of context. In rejecting Appellants' request to apply a FOIA analysis to determine the adequacy of the search, the Superior Court reasoned, "in civil discovery, '[i]t is not the court's role to dictate how a party should search for relevant information absent a showing that the party has abdicated its responsibility.' *Prasad v. George Wash. Univ.*, 323 F.R.D. 88, 94 (D.D.C. 2017) (citations and quotations omitted)." App., p. 39. In the context of this authority, the Superior Court determined that Appellants' speculation regarding records, codes, and presumed

files being opened was "insufficient for [Appellants] to meet their burden to overcome the sworn representation that a search for the information was conducted." *Id.* In short, the Superior Court concluded, "if in fact there is no responsive information presently available to [PNC], there is nothing for the Court to compel." *Id.* (footnote omitted).

At bottom, Appellants have failed to show an abuse of discretion by the Superior Court in denying the motion to compel. Rather, they simply disagree with decision and misrepresent the reasoning applied by the Superior Court. Again, in light of subsequent undisputed facts regarding the "legitimate" escheat of the funds, Appellants have not been harmed by the Superior Court's ruling such that any remand would be futile. *See infra*, p. 27, fn. 4. As such, this Court should affirm.

E. Motion to Amend

The last of the non-dispositive motions denied by the Superior Court and challenged on appeal is Appellants' motion to amend the complaint. The basis of the motion was that, "[o]n May 26, 2023, [PNC] provided [] documents purporting to show that [PNC] escheated to the District of Columbia the $12,000.00 [c]ashier[']s check the handling of which forms a significant part of this suit." Appellants' Br., p. 28; App., pp. 247-49. In their motion below, Appellants argued, "[t]hese newly provided arguments [from PNC counsel] and just discovered facts require an amendment to the Complaint and reopening discovery for 45 days[.]"

App., p. 248. They further argued, "the amendment would [not] be accompanied by undue delay, bad faith or dilatory motive [] or undue prejudice" to PNC. *Id.* They did not, however, attach a copy of the proposed amended complaint to their motion or otherwise indicate the substance of the proposed amendment.

The Superior Court recognized:

> While leave to amend is freely granted, and there is a "virtual presumption" that leave to amend should be granted unless there are sound reasons to deny it, *Pannell v. District of Columbia*, 829 A.2d 474, 477 (D.C. 2003), leave to amend may be denied where the amendment would be futile. *Miller-McGee v. Wash. Hosp. Ctr.*, 920 A.2d 430, 436 (D.C. 2007). "An amended complaint is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory or could not withstand a motion to dismiss." *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002).

App., pp. 30-31. Ultimately, however, the Superior Court denied relief because Appellants had "not provided a proposed amended complaint, or even articulated how they wish to amend their pleading, thus rendering the Court unable to assess whether leave to amend should be granted." *Id*. (citing *See Taylor v. D.C. Water & Sewer Auth.*, 957 A.2d 45, 51 (D.C. 2008) ("In determining whether 'justice so requires' the grant of a motion to amend," the court should consider, *inter alia* "the merit of the proffered pleading"). Thus, the Superior Court concluded, Appellants "failed to meet their burden, even under the lenient standards afforded requests to amend." *Id.*

In their Brief, Appellants argue that the Superior Court abused its discretion in two ways. First, by "apparently conclud[ing] that amendment would be "futile." There is no merit to this argument, as the Superior Court did not base its decision on futility. Rather, the Superior Court very clearly explained that it could not assess whether leave to amend should be granted (or perhaps would be futile) without seeing the proposed amendment. App., pp. 30-31. On this point, Appellants assert their second argument why the Superior Court abused its discretion:

> The Superior Court also found herself at a loss to understand the need suggesting that the actual amended Complaint was required but not presented. [] There is no requirements in the Rule that this be done.

Appellants' Br., p. 30. Again, there is no merit to this argument, and it is even contrary to the law cited in Appellants' own brief. *See id*., pp. 29-30 ("Factors affecting the court's discretion include: [] the merit of the proffered amended pleading[.] *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)."); *see also Bennett v. Fun & Fitness of Silver Hill*, 434 A.2d 476, 478-79 (D.C.1981) (in deciding whether to grant leave to file an amended complaint, the court should also consider the merits of the amended pleading). In short, Appellants are hoisted on their own petard by failing to provide the proposed amendment with their motion to amend.

Finally, Appellants also proclaim that they "advised the Court that they were caught unawares and needed further discovery and review to determine precisely how the Complaint should be recast." Appellants' Br., pp. 30-31. Notably, however, Appellants inconspicuously fail to represent to the Court that PNC voluntarily provided the information and documents related to the escheat of funds and that they could have "discovered" such information through discovery requests, but, since the filing of the complaint on April 7, 2022, they failed to do so. In any event, the escheat of the funds in accordance with the Unclaimed Property Act does not create a cause of action under any circumstances—a fact which Appellants cannot avoid and provide no support otherwise. For these reasons, the Court should affirm.

F. Motion for Summary Judgment

Appellants' gripes culminate with the so-called "Coup de Grace" whereby the Superior Court granted summary judgment on the remaining claims of unjust enrichment, conversion, and breach of contract. Appellants' Br., p. 31. On appeal and below, Appellants conceded that, "[a]s to the $12,000.00 cashier[']s check[,] PNC's last minute revelation that it had been escheated to the District moots the claim of unjust enrichment." *Id*., p. 32. Thus, according to Appellants, "the only claim under review [] is the claim of conversion." *Id*.

1. The Superior Court Did Not Err In Granting Summary Judgment In Favor Of PNC On the Conversion Claim

As noted by the Superior Court,

> "Conversion has generally 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) (citation omitted); *see also Poola v. Howard Univ.*, 147 A.3d 267, 284 n.17 (D.C. 2016) ("The elements of the tort of conversion are '[1] an unlawful exercise, [2] of ownership, dominion, and control, [3] over the personalty of another, [4] in denial or repudiation of his right to such property.'"). "Conversion is a tort based on the theory that the defendant 'has in some way treated the goods as if they were his own…'" *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1064 (D.C. 2014).

App., p. 20. First, the Superior Court summarized the District of Columbia Uniform Disposition of Unclaimed Property Act of 1980, D.C. Code §§ 41-151.01 *et seq*. (hereinafter, "Unclaimed Property Act" or "Escheat Act"), which provides that certain "property is presumed abandoned if it is unclaimed by the apparent owner during the [statutorily specified] period." D.C. Code § 41-152.01. "Property not specified in [D.C. Code § 41-152.01]" is presumed abandoned "the earlier of 3 years after the owner first has a right to demand the property and 3 years after the obligation to pay or distribute the property arises." D.C. Code § 41-152.01(13). *Id*. at 21.

The Superior Court acknowledged the Declaration of Ann M. Loperfito ("Ms. Loperfito"), Vice President, Senior Operations Manager, Escheat Processing Department at PNC Bank, who attested that PNC's "procedure regarding the escheat of funds is consistent with the District of Columbia Revised Uniform Unclaimed Property Act." Mot. Summ. J. Ex. 1 (Loperfito Decl.) ¶ 3. Further, Ms. Loperfito

attested that certain funds in "personal checking accounts, non-profit checking accounts, and cashier's checks which have remained unclaimed or otherwise not cashed or deposited within three years of issuance" are subject to escheat to the District of Columbia. *Id*.

The Superior Court further noted the following undisputed facts:

> Here, on April 14, 2015, PNC Bank issued a cashier's check made payable to Frances Schwartz. *See* Def. SMF ¶ 1. Over three years later, on October 25, 2018, the funds escheated to the District of Columbia. *See id*. ¶ 2. Then on April 15, 2019, Frederic Schwartz endorsed the four-years-old cashier's check. *See id*. ¶ 8. While the deposit was initially accepted, the funds were deducted because PNC Bank no longer held the funds to allow the deposit. *See id*.

App., pp. 21-22. The Superior Court then concluded:

> The Court finds that based on this record, it is undisputed that PNC Bank did not "treat the [$12,000] as if [it was PNC Bank's] own." *Greenpeace*, A.3d at 1064. Indeed, PNC Bank did not take "dominion or control over [Plaintiffs'] personal property in denial of or inconsistent with [Plaintiffs'] possessory right to the property." *Poola*, 147 A.3d at 284 n. 17. Rather, PNC Bank issued a check for $12,000 on April 14, 2015, for which they held access to the funds until October 25, 2018. Def. SMF ¶¶ 1-2. Only after three years, and pursuant to the Unclaimed Property Act and PNC Bank Policies, did PNC Bank escheat the funds to the District of Columbia. *See* D.C. Code §§ 41-151.01 *et seq*.

Id., p. 22. As Appellants could not establish an essential element of their claim as a matter of law and fact, the Superior Court accordingly granted summary judgment in favor of PNC. *Id.*, p. 23.

(a) <u>Appellants' Brief Fails To Establish Error By The Superior Court</u>

Appellants once again raise the same legally and factually deficient arguments as set forth below. Appellants argue that a claim for "temporary conversion" somehow existed under the circumstances,

> 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.

Appellants' Br., p. 33. Appellants offer only general references to inapplicable sections of the Restatement of Torts, but no authority for this unprecedented contention. Appellants also argue that their claim for conversion is supported by (1) PNC's alleged failure to "comply with the stringent statutory requirements to notify the Appellants as owners prior to escheatment; and (2) "PNC's purposeful, wrongful and untruthful misdirection" regarding its designation of the cashier's check as "not authorized" and "presumed destruction" of the cashier's check. *Id*., pp. 34-35. Neither argument has merit nor saves the claim of conversion.

First, Appellants contend that PNC failed to comply with the notice provisions of the Unclaimed Property Act. More particularly, Appellants claim the search was inadequate and, in their view, PNC should have done more to attempt to locate Frances Schwartz and/or the LMS Special Needs Trust, as the "apparent owners" of the cashier's check. *Id*., pp. 37-39. To support their subjective contention that the search was inadequate, Appellants refer to a 2014 personal check issued by a Frances

Schwartz with an address in Chicago and a "2017 1099 LMS Special Needs Trust IMA" document. *Id*. Appellants also argue that PNC should have attempted to locate "the Trust itself" by "enquir[ing] of Defendants' District of Columbia Trust Department whether the name of the Trust rang a bell." *Id*., p. 39.

Second, Appellants contend PNC should be liable for conversion of "the actual cashier's check which [PNC] confiscated and substituted a worthless photocopy which stated on its face that it was worthless." *Id*., p. 42. By issuing the notice of dishonor and returning a copy of the cashier's check with a "not authorized" stamp, Appellants assert that PNC "intentionally destroy[ed] a chattel or so materially alter[ed] its physical condition as to change its identity or character" and is therefore liable. *Id.* According to Appellants, "[t]he appropriate designation on the cashier's check would have been 'escheated.'" *Id.* In sum, by dishonoring the cashier's check, Appellants claim that, "[f]rom 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." *Id*.

(b) <u>The Conversion Claim Fails As A Matter Of Law Because PNC Did Not Act "Unlawfully" And Appellants Have Failed To Raise A Genuine Issue Of Material Fact Otherwise</u>

Throughout Appellants' 10-plus pages devoted to this issue, replete with citations to the Restatement and other inapplicable law, they omit a major detail: they must prove that PNC ***unlawfully or wrongfully possessed*** the $12,000 cashier's

check funds. They have not and cannot do so, however, because PNC did not unlawfully exercise ownership or control over the funds, but instead, it guaranteed to draw from its funds if and when Frances Schwartz, as payee, decided to cash or deposit the check. However, when the check was not negotiated for over three years, PNC properly and lawfully escheated the funds to the District of Columbia.

Initially, Appellants offer no legal authority for their contention that a "temporary conversion" existed "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 [] [PNC] had escheated [the] $12,000.00 to the District." Notably, under Appellants' theory, any bank or financial institution would be subject to liability for conversion every time money is escheated to the state. Clearly, the law does not support or intend such an absurd result. In any event, as the Superior Court aptly explained:

> Here, it is undisputed that Frederic Schwartz held the cashier's check in excess of three years, and thus between April 14, 2015 and October 25, 2018, he had the right to retrieve the funds. While the funds were unavailable from Defendants after October 25, 2018, Defendants did not maintain control or dominion over the funds because the funds escheated to the District of Columbia, and thus Defendants did not deny or repudiate Plaintiffs' rights to the funds.

App., p. 22. Appellants' purported claim for relief after October 25, 2018, when PNC no longer held the funds, is wholly without merit.

Similarly, Appellants fail to explain how (or provide support for) their contention that an alleged deviation in providing notice of the escheat somehow supports their conversion claim. This argument is flawed for several reasons. First, PNC in fact complied with the Unclaimed Property Act, which requires, in relevant part, that "the holder of property presumed abandoned shall send to the ***apparent owner***" notice that the property will escheat to the District of Columbia "***if*** the holder has in its records ***an address for the apparent owner*** which the holder's records do not disclose to be invalid[.]" D.C. Code § 41-155.01(a)(1) (emphasis added). The Declaration of Ms. Loperfito provided undisputed evidence of compliance.

Appellants' attempt to discredit the search is belied by the record and legally deficient. Regarding the "check issued by a Frances Schwartz with an address in Chicago," as counsel for Appellants well knows but deceitfully omits, the check was ***produced by Appellants*** in response to discovery requests from PNC. For Appellants to suggest that the personal check of Frances Schwartz, who had a Chicago address, payable from an account held at Delaware Place Bank, located in Chicago, and dated May 28, 2014, came from PNC's records, or was otherwise contained therein at the time PNC searched for an address for "Frances Schwartz" is absurd and disingenuous. Moreover, Appellants offered no evidence that Frances Schwartz was ever an account holder at PNC, such that it may have in its records

"an address for the ***apparent owner*** which the holder's records do not disclose to be invalid[.]" D.C. Code § 41-155.01(a)(1) (emphasis added).

Regarding a search for "the trust itself," Appellants' reliance on a 2017 tax information statement for the LMS Special Needs Trust Investment Management Account, ending in 5573, which "indicated that Frederic Schwartz was the trustee" is similarly misleading. The LMS Special Needs Trust Investment Management Account ending in 5573 has nothing to do with the conversion claim in this case, because the $12,000 cashier's check funds came from an LMS Special Needs Trust premium money market account ending in 2021. In any event, once the funds were withdrawn from the LMS Special Needs Trust premium money market account, as remitter of the cashier's check, the LMS Special Needs Trust was no longer an "owner" or "apparent owner" of the $12,000 as a matter of law, and Plaintiffs provide no legal support to the contrary.

In sum, PNC in fact complied with the Unclaimed Property Act, and whether their compliance was reasonable does not create a question of fact for the conversion claim, which is an intentional tort and, as such, the issue is one of intent and not reasonableness. *See* App., p. 23. Again, as the Superior Court summarized, "the undisputed facts demonstrate that PNC's control of the funds was lawful, and that PNC did not deny [Appellants] of any rights to the funds. *Id*.

Finally, Appellants' argument—again without legal support—that PNC should be held liable for conversion for indicating *on a copy* of the cashier's check that it was "not unauthorized" similarly fails. Appellants offer no support other than their subject belief that "[t]he appropriate designation [] would have been 'escheated'." Appellants' Br., p. 42. In any event, as explained by the Superior Court in rejecting this argument,

> PNC Bank did not assume unlawful possession or ownership of the $12,000 check. It undisputed that Frederic Schwartz voluntarily relinquished the actual check to PNC, and thus PNC's control of the check cannot be deemed unlawful. Def. SMF ¶ 8. Moreover, there are no facts to support that PNC unlawfully exercised control of the funds that were related to the check.

App., p. 23. Along these lines, there is no dispute that Frederic Schwartz, Jr., as trustee, held onto the cashier's check in excess of three years—i.e., from its issuance on April 14, 2015, to his attempted deposit on April 12, 2019. In the interim, the cash funds escheated to the District of Columbia in accordance with the Unclaimed Property Act. Once the funds were properly escheated to the District of Columbia, the cashier's check and/or any copy thereof became valueless as a matter of law, and Appellants provide so support to the contrary. Accordingly, the Superior Court committed no error by granting PNC's motion for summary judgment on the claim for conversion. This Court should affirm.

2. The Superior Court Did Not Err In Granting Summary Judgment On The Breach Of Contract Claim Of Johanna Schwartz

"To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009) (citation omitted). The statute of limitations for breach of contract, express or implied, is three years. *See* D.C. Code § 12-301(7). "A cause of action for breach of contract accrues, and the statute of limitations begins to run, at the time of the breach." *Van Yerrell v. EMJ Realty Co*., 281 A.3d 594, 599 (D.C. 2022) (citation omitted). "Under the 'discovery rule,' however, a breach of contract claim does not accrue, and the statute of limitations period does not begin to run, until the plaintiff knows, or in the exercise of reasonable diligence should know, of the injury.' *Id*. (citation omitted).

The Superior Court granted summary judgment because it determined that the statute of limitations had expired and, on the merits, Appellants failed to present any evidence to establish the elements for Johanna Schwartz's breach of contract claim. In analyzing the statute of limitations, the Superior Court found that the statute began to run three years after Johanna Schwartz knew "or in the exercise of reasonable diligence should [have] known" of a new service charge—or the alleged breach—i.e., on or before she executed the Power of Attorney on July 13, 2017 in order to close the account. App., pp. 23-26. Recognizing that the numerous Administrative Orders issued by the Chief Judges of the Superior Court for the District of Columbia

in response to the COVID-19 public health emergency applied to toll the statute of limitations, the Superior Court determined that the statute of limitations began to run on July 13, 2017, and that the complaint, filed on April 7, 2022, was time-barred. *Id*.

In any event, since Appellants failed to present any evidence to establish the elements for the claim, the Superior Court granted summary judgment in favor of PNC. The Superior Court reasoned,

> [w]hile Plaintiffs allege that Johanna Schwartz established an account at PNC Bank, that initially "[n]o fee was charged for the account," and that at some point, "the terms…were amended to provide for a periodic service charge," Compl. ¶¶ 30-34, Plaintiffs have not produced evidence of any alleged contract, its terms, or the breach.

App., p. 26. The Superior Court further noted that Appellants did not address the merits of Johanna Schwartz's breach of contract claim or provide any evidence in support of the claim in their Opposition. *Id.*

In close, the Superior Court, explained,

> [m]oreover, according to Ms. Loperfito's declaration, "[d]uring the relevant time period, standard checking account opening documents included a 'Consumer Schedule of Service Charges and Fees,'" Mot. Summ. J. Ex. 1 (Loperfits Decl.) ¶ 13, and "[n]otices regarding changes to fees or other charges and terms…are included on monthly statements" which are "typically provided at least thirty (30) days prior to implementation," *id*. ¶ 14.

As such, the Superior Court found that PNC had demonstrated entitlement to summary judgment as to Johanna Schwartz's claim for breach of contract.

3. Appellants Have Waived Review Of Johanna Schwartz's Breach Of Contract Claim

In their Brief, as they did below, Appellants address only the statute of limitations on the breach of contract claim. Appellants' Br., p. 46. Thus, regardless of whether the Superior Court's calculation of the statute of limitations was correct, Appellants have waived any review on the merits of the entry of summary judgment. *See Fells v. Service Emps. Int'l Union*, 281 A.3d 572, 579 n.3 (D.C. 2002) (holding that appellant "waived" argument by failing to raise it "in his opening brief") (citing *Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997)); *see also Mahmood Nawaz v. Bloom Residential, LLC*, 308 A.3d 1215, 1231-32 (D.C. 2024) ("In our adversarial system we rely on parties, particularly when they are represented by counsel, to preserve the arguments that may bring them relief and press them on appeal.") (citing *Oparaugo v. Watts*, 884 A.2d 63, 75 (D.C. 2005) (explaining that "[p]oints not raised and preserved in the trial court [generally] will not be considered on appeal"); *Rose v. United States*, 629 A.2d 526, 536-37 (D.C. 1993) ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived.")).

In any event, under the standard of review, Johanna Schwartz was not permitted to rely on her pleadings alone, but she must have presented evidence to establish the prima facie elements of her claim. She utterly failed to do so. Johanna Schwartz did not produce the alleged contract, its terms, how it was breached, or evidence of her alleged damages. Rather, she produced one statement regarding the

account, for the period 12/07/2017 to 03/06/2018. App., pp. 181, 199-202. On the record, the Superior Court properly granted summary judgment and this Court should affirm.

4. The Superior Court Did Not Err In Dismissing The IIP's Breach Of Contract Claim

Finally, putting aside whether a breach of contract claim of the IIP remained in the case following the Superior Court's Order granting in part the motion to dismiss, Appellants again failed to present evidence in support of the claim, or establish its timeliness. As PNC pointed out below, the IIP produced no documents in response to discovery to establish the contract, its breach, or damages. App., pp. 211, 225-26. Similarly, PNC conducted a search for a non-profit checking account in the name of the "International Internship Program, Inc." and no results or records were found. *Id*. Further, in answers to interrogatories, IIP swore under oath that it "[does] not know" the date the funds in the IIP's account escheated to the District of Columbia and "[does] not know" the date on which the IIP, or its United States Director, learned that the funds escheated to the District of Columbia. *Id*. As such, the IIP could not establish that its purported claim was filed within the applicable three-year statute of limitations.

In opposition, Appellants argued that they "alleged that through negligence and subsequently in violation of the Escheat Act [PNC] utilized an insufficient address to communicate with the [IIP] which resulted in the escheatment of the PNC

funds in their account." App., p. 127. Appellants also attached two monthly statements for the non-profit account at issue (which were not produced in discovery), the most recent of which was for the period 09/29/2007 to 10/31/2007. App., pp. 103-06.[5] To support their argument that the claim accrued "when the head of IIP discovered the breach of contract[,]" Appellants attached a "Statement of Material Facts" which included a statement from counsel that, "IIP discovered the breach of contract during a period no greater than a year before the filing of this cause of action." App., pp. 128-29.

The Superior Court noted, as an initial matter, that Appellants "did not plead negligence in the Complaint; as such, there is no basis for any claim of negligence." App., p. 27; citing *Cf. Hall v. Admin. Office of the United States Courts*, 496 F. Supp. 2d 203, 207 n. 4 (D.D.C. 2007) ("It is axiomatic that a complaint may not be amended by the briefs in opposition" to a dispositive motion.) (citations omitted). Regarding the statute of limitations, the Superior Court found that the IIP could not establish that the claim was filed within the applicable three-year statute of limitations because it "admit[ted] that [it] "do[es] not know" when IIP, or its Director, learned that the funds escheated. *Id*., pp. 27-28. Further, with respect to the contradictory statement by counsel that, "IIP discovered the breach of contract

[5] Appellants also attached a monthly statement from 2008 for an IIP premium money market account which is not part of their claim, which is based on the non-profit account according to the complaint. App., pp. 107-08.

during a period no greater than a year before the filing of this cause of action" the Superior Court explained that it "failed to create a factual dispute insofar as it is a statement of counsel, which is not evidence. *See, e.g., Johnston v. Hundley*, 987 A.2d 1123, 1129 (D.C. 2010)." *Id*., p. 28. Importantly, the Superior Court also noted that Appellants "ha[d] not supported this statement with any record or documentary evidence. *See Wallace,* 57 A.3d at 950-51 (the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion *specific facts* showing that there is a genuine issue for trial.") (emphasis added)." *Id*. Finding that Appellants had not satisfied their burden to establish that there is an issue of material fact with respect to the statute of limitations, the Superior Court granted summary judgment in favor of PNC.

On appeal, as below, Appellants fail to address the merits of the alleged breach of contract claim, including but not limited to identifying the contract, its terms, breach, or damages. Instead, they claim that they intended to amend the complaint to assert negligence but the motion to amend was denied. Appellants' Br., p. 46. In short, as with the breach of contract claim of Johanna Schwartz, Appellants have waived any review on the merits of the entry of summary judgment on the IIP's purported breach of contract claim. *See infra*, p. 44. This Court should affirm on this basis alone.

In response to the finding that Appellants have not met their burden to establish the timeliness of the claim, they speculate that "PNC in fact has that information" and "PNC ignored" returned monthly account statements. Appellants' Br., p. 47. Relying on Rule 11, Appellants argue the Superior Court should have accepted the statement of "IIP's agent (and attorney)" that "the escheatment was discovered within 'the past several years' thereby placing it within the statutory period." *Id*. Even if the statement of counsel was considered, Appellants ignore the Superior Court's further reasoning that it was insufficient to create an issue of fact because it failed to offer "*specific facts* showing that there is a genuine issue." App., p. 28. In sum, the Superior Court correctly held that Appellants had not met their burden and this Court should affirm.

CONCLUSION

For the reasons set forth above, this Court should affirm all orders of the Superior Court and dismiss the appeal.

August 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 16, 2024, a true and correct copy of the foregoing Appellees' Brief was served via the Court's e-mail notification of service to Appellants' counsel of record.

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