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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

HARLAN DOUGLASS and MAXINE H. DOUGLASS,
Plaintiff's/Respondents
vs.
BRYAN J. REILLY
Defendant/Appellant

BRYAN J. REILLY
Third Party Plaintiff/Appellant
vs.
HARLEY DOUGLASS and LISA BONNETT a/k/a MISSY
DOUGLASS and HAYDEN DOUGLASS
Third Party Defendants

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 16-2-00196-8
THE HONORABLE JOHN O. COONEY

BRYAN J. REILLY'S OPENING BRIEF

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I. INTRODUCTION

This appeal is the result of the trial court allowing the jury to speculate as to whether Appellant Bryan Reilly (“Reilly”) converted money alleged to have been in Respondents’ safe on September 25, 2015. There was no evidence presented at trial showing Reilly ever possessed the money Respondents alleged was converted, and there was no evidence showing exactly how much money was alleged to have been converted. Essentially, Respondents were allowed to ask the jury to award \$1,089,000 in damages for conversion against Reilly without ever having to prove they had the money, that Reilly ever possessed the money, and that they never recovered all of the money when it was found three days after it was alleged to have been converted.

The trial court ignored substantial direct evidence showing Reilly could not have converted money from the Respondents’ safe as alleged on September 25, 2015 and allowed the case to proceed to the jury to speculate based solely on circumstantial evidence. Further, the trial court refused to bifurcate unrelated claims into a separate action, causing confusion and substantially prejudicing Reilly from having a fair trial. Finally, the trial court refused to grant a mistrial despite Respondents’ counsel intentionally violating a motion in limine preventing any mention

Reilly had been charged with six felonies in relation to property at issue at trial.

The jury ultimately awarded \$605,000 against Reilly for conversion of money alleged to have been in Respondents' safe on September 25, 2015, between the hours of 2:00 PM and 3:25 PM. The award was found despite the undisputed evidence showing Reilly could not have converted the money at any time on September 25, 2015. This award was found despite the fact there was no evidence or mention of \$605,000 at any point in the trial.

Reilly seeks to have the judgment in the amount of \$605,000 overturned, and to have Respondents' first cause of action, conversion by theft, dismissed. Alternatively, Reilly seeks remand for a new trial where the unrelated claims are bifurcated into a separate action and where Respondents' counsel does not violate the trial court's order in limine.

II. ASSIGNMENTS OF ERROR

A. The Jury's Verdict Awarding \$605,000 for Conversion of Money from Respondents' Safe is not Supported by Substantial Evidence.

B. The Trial Court abused its discretion and erred as a matter of law by allowing the jury to speculate as to whether Bryan Reilly converted money from their safe.

C. The Trial Court abused its discretion by not granting a mistrial when Respondent's counsel intentionally violated the motion in limine preventing any mention Bryan Reilly had been charged with six felonies.

III. ISSUES PRESENTED

1. In a claim for conversion of money, is it necessary to prove actual or constructive possession of property?
2. Is circumstantial evidence alone sufficient to find conversion of money?
3. In a claim for conversion of money, is it necessary to prove what money was converted with certainty?
4. Does an award of damages have to be supported by evidence presented at trial?
5. Whether a mistrial should have been granted as a result of Plaintiffs' violation of motion in limine.

IV. STATEMENT OF THE CASE

Procedural History

On January 15, 2016, Respondents filed their initial complaint for conversion by theft. CP 1-5. In this initial complaint, Respondents alleged that Appellant Bryan Reilly ("Reilly") committed conversion, "[o]n or around the afternoon or evening of September 25 and/or the early morning of September 26, personal property consisting of money and other property was stolen from the home of Plaintiffs." CP 1-5. On June

7, 2016, Respondents Harlan Douglass and Maxine Douglass filed their “First Amended Complaint.” CP 6-14. In their “First Amended Complaint,” Respondents now alleged that “[b]*etween the late afternoon of September 25, 2015 and the early morning hours of September 26, 2015, Reilly stole approximately \$800,000 from Plaintiffs’ home.*” CP 6-14. In this amended complaint, the Respondents also added additional conversion claims related to personal property and money alleged to have occurred in 2013 and 2014. CP 6-14.

On August 26, 2016, Reilly filed a motion for summary judgment seeking to dismiss Respondents’ conversion by theft claim regarding money alleged to have been taken from the safe in their home. CP 64-148; 457-476. Respondents failed to present sufficient evidence showing there was a genuine issue of material fact for trial in support of their conversion claim that Reilly took the money alleged to be in the safe inside Respondents’ home between the late afternoon on September 25, 2015, and the early morning of September 26, 2015. CP 178-456; CP 639-644. In his motion for summary judgment, Reilly was able to present evidence accounting for his whereabouts prior to 2:00 PM on September

25, 2015, and after 3:25 PM on September 25, 2015 through September 26, 2015¹. CP 64-148; 457-476.

On May 15, 2017, the trial court entered an order partially granting and partially denying Reilly's motion for summary judgment. CP 639-644. In its order, the trial court dismissed Respondents' first cause of action, claim for conversion by theft, against Reilly for all times prior to 2:00 PM on September 25, 2015, and for all times after 3:25 PM on September 25, 2015. CP 639-644. The trial court's order left one hour and 25-minutes on September 25, 2015, for Respondents to prove that Reilly converted money from the safe in their home. CP 639-644. Reilly moved the trial court for reconsideration of its summary judgment order partially denying his motion for summary judgment. CP 661-696; CP 697-724. On June 30, 2017, the trial court entered its order denying Reilly's motion for reconsideration. CP 725-726.

On May 22, 2017, after the trial court entered its summary judgment order dismissing the lion's share of Respondents' conversion by theft claim, without leave of court Respondents filed their "Second Amended Complaint." CP 645-660. Because the trial court's order

¹ Reilly was able to show evidence that he was driving alone in his vehicle to Hill's Resort in Priest Lake, Idaho. Reilly presented evidence he left Colbert, Washington at approximately 2:15 PM, and the surveillance video at Hill's Resort showed his vehicle drive into their parking lot at 4:02 PM and another video showed Reilly physically walk into Hill's Resort at 4:04 PM. CP 81-128.

dismissed any claim for conversion by theft against Reilly after 3:25 PM on September 25, 2015, which encompasses the late afternoon on September 25, 2015², Respondents filed their “Second Amended Complaint.” CP645-660. In the “Second Amended Complaint,” Respondents alleged, “[b]etween 2:00 p.m. and 3:25 p.m. on Friday, September 25, 2015-Reilly stole approximately \$1,080,000, four shoeboxes and two manila envelopes from Plaintiffs’ safe in their home.” CP 645-660. Reilly refused to answer the Respondents’ “Second Amended Complaint” because Respondents failed to seek leave of court as required to file this complaint. On November 16, 2017, Respondents filed a motion for default against Reilly for not answering the “Second Amended Complaint,” despite no motion or order being entered by the trial court to allow the filing of this pleading.” CP 1253-1307; CP 1636-1651; CP 1664-1750. The trial court issued an order allowing the Respondents to file the “Second Amended Complaint.” CP 1751.

On December 22, 2017, Reilly filed a motion for summary judgment seeking to dismiss Respondents’ claim for conversion by theft

² Respondents “First Amended Complaint” alleged Reilly took money from their safe in the late afternoon on September 25, 2015 and/or the early morning on September 26, 2015. The trial court’s order dismissed all claims of conversion related to the property alleged to have been taken from their safe after 3:25 PM on September 25, 2015, thereby dismissing all claims of conversion by theft occurring in the late afternoon on September 25, 2015; effectively dismissing the Respondents first cause of action in its entirety. CP 6-14; 639-644.

because Respondents could not prove Reilly ever possessed the money they alleged to have been taken from their safe. CP 1311-1425; 1628-1635. In opposition to Reilly's motion, Respondents provided only circumstantial evidence that Reilly had the opportunity to possess the money, but never presented any evidence showing that Reilly actually possessed Respondent's money at any time after it was alleged to have been taken from their safe. CP 1499-1627. On February 2, 2018, the trial court denied Reilly's motion for summary judgment. The trial court found that it was not necessary for the Respondents to prove Reilly possessed the property, but whether he interfered with the property. RP 37-41. The trial found in its ruling that:

It appears there is no evidence in the record that the defendant is in possession of the property. If the Court were to look at each of the allegations provided by the plaintiff, what the plaintiff is alleging and what the record supports creates genuine issue of material fact. Separately, each of these issues alone doesn't create a genuine issue of material fact. I think plaintiff would concede that there's no direct evidence tying the defendant to the interference with the money.

...

The Court has to view the facts in the light most favorable to the plaintiff. And, as stated, if the Court were to consider all of the circumstantial evidence independently, it doesn't appear there would be a genuine issue of material fact as to the willful interference of the property. On the other hand, if the Court looks at each of these facts in relation to the other facts, there does appear to be

sufficient circumstantial evidence to show there is a genuine issue of material fact as to whether Mr. Reilly interfered with the property.

RP 38-40. On February 20, 2018, Reilly filed for reconsideration of the trial court's order denying motion for summary judgment. CP 1752-1798. On March 23, 2018, the trial court issued an order denying Reilly's motion for reconsideration.

On March 16, 2018, after Reilly's motion for summary judgment was denied, despite there being no evidence in the record that Reilly ever possessed the money alleged to have been taken from Respondents' safe, Reilly filed a motion to bifurcate the unrelated conversion claims. CP 1964-2043. Reilly argued that the conversion claim alleged to have occurred between 2:00 PM and 3:25 PM on September 25, 2015, should be bifurcated into a separate trial from the other conversion claims alleged to have occurred on 2013 and 2014, that were in no way related. CP 1964-2043. The trial court denied Reilly's motion to bifurcate the unrelated claims. CP 2044-2045.

On April 6, 2018, the trial court heard argument and considered the parties' motions in limine. RP 72-150. The trial court ruled the Respondents could not inform the jury of the six pending felonies Reilly had been charged with by Spokane Police related to the same property for which Respondents were seeking damages at trial in their second cause of

action, and in turn Reilly could not inform the jury had had never been charged with a crime related to the money being taken from the Respondents safe, which was the subject of Respondents' first cause of action. RP 83-85; RP 238-245; CP 645-660. On the first day of trial, Respondents counsel intentionally violated the motion in limine when he asked Reilly's mother on the witness stand whether she was aware Reilly had been charged with six felonies related to the property at issue in this trial. RP 238-245. Reilly moved the court for a mistrial as a result of the intentional violation of the motion in limine, and Reilly's motion for mistrial was denied. RP 238-245. The trial court instructed the jury to only consider the evidence, and that Mr. Hassing's statement was not evidence. RP 245. The trial court did not instruct the jury Ms. Hassing's statement regarding Reilly being charged with six felonies was untrue. RP 245

On April 30, 2018, at the close of the Respondents case, Reilly moved the trial court for a directed verdict on Respondents first cause of action conversion by theft related to the allegation Reilly took money from their safe on September 25, 2015, between 2:00 PM and 3:25 PM. RP 1985-2023. As was the case at the time of the summary judgment motion, Respondents has failed present any evidence in their case-in-chief that Reilly ever possessed the money alleged to have been taken from the safe,

or that Reilly was even in their home on September 25, 2015, the date they allege the theft occurred. RP 1985-2023. Reilly argued that in order for a case to be based entirely on circumstantial evidence without any direct evidence, the circumstantial evidence has to be tied together and related such that there is only one reasonable conclusion that can be drawn from the circumstantial evidence; otherwise the jury is allowed to speculate as to the result. RP 1986-1991. The trial court denied Reilly's direct verdict. RP 2019-2023.

The case went to the jury, and the jury returned a verdict in favor of the Respondents in the amount of \$800,281.00. CP 2437-2441. Reilly appeals the jury verdict and judgment entered against him in this matter. CP 2451-2475.

Statement of Facts

The Respondents allege that on September 25, 2015, between 2:00 PM and 3:25 PM, Appellant Bryan Reilly ("Reilly") entered their home and took \$1,080,000 from their safe³. CP 645-660. Respondents allege this amount of cash was kept in a large safe in the basement of their home. CP 645-660.

³ Respondents initially alleged Reilly took money from their safe between the afternoon on September 25, 2015 to the early morning of September 26, 2015 in their "First Amended Complaint." The trial court dismissed Respondents claim that

Approximately one year prior to the alleged theft, on August 3, 2014, Jeroline Via and Harlan Douglass counted the money located in Respondents' safe. RP 1284. Ms. Via was Harlan Douglass's girlfriend, and August 3, 2014, Ms. Via's birthday. RP 1283. Ms. Via and Harlan Douglass counted approximately \$500,000 in cash before they became tired and decided to stop counting the money. RP 1270. A tally sheet created by Ms. Via and Harlan Douglass from the day they counted the money showed they had counted \$264,900 in cash. RP 1267-1269; Ex. P-73. The money located in the safe was never counted again prior to the alleged theft on September 25, 2015. RP 1284. After counting the money on August 3, 2014, Harlan Douglass periodically took money out of the safe when he would go on trips. RP 1284.

Approximately one year later, on September 21, 2015, four days before the alleged theft, Ms. Via and Harlan Douglass locked the safe prior to leaving on a trip to Paris, France. RP 1285. Ms. Via turned the dial to the safe to lock it, and she and Harlan Douglass pulled the handle to the safe to ensure it was locked. RP 1285. They also placed a chair up against the safe door, so that if the chair was moved, they would know someone had been in the safe while they were away on their trip to France. RP 1285.

On Friday, September 25, 2015, the day Respondents allege money was taken from their safe, Ms. Via and Harlan Douglass were out of the country in Paris, France. RP 1382. At that time, Harlan Douglass employed a security company to patrol the outside of his home and surrounding property. RP 1313. At 9:52 PM Matthew Dutton, the individual who worked as a security person for Harlan Douglass, arrived at the Respondents' property to conduct his normal patrol. RP 1314-1315.

During this visit at 9:52 PM, Mr. Dutton observed an upstairs bedroom light on, as well as lights on in the basement. RP 1321. Mr. Dutton assumed Harlan Douglass was home, was awake, and did not notice anything to be amiss during his patrol, so he left and went about his business. RP 1326-1329; CP 474-476.

At 3:00 AM, on Saturday, September 26, 2015, Mr. Dutton returned for his second patrol of the Respondents' property. RP 1327; CP 474-476. During his second visit to the property, Mr. Dutton observed that the upstairs bedroom light was now off, the basement lights were still on, and upon closer examination a basement window was open with a screen removed from the window. RP 1326-1329. Mr. Dutton reported his findings to his boss Mel Taylor, head of security for Harlan Douglass, and was instructed to leave the property because Harlan Douglass was home. RP 1329-1330.

The next day, Saturday, September 26, 2015, Mel Taylor, and Deanna Malcome, assistant for Harlan Douglass, arrived at Respondents' property to check out Mr. Dutton's findings. RP 1559-1560. Mr. Taylor and Ms. Malcome entered the home and found the safe located in Respondents' basement to be open. RP 1559. Prior to the police arriving at the home, Harley Douglass and his wife Lisa Douglass happened to be driving by the Respondents' home, notice the gate to the property was open, and drove down the long driveway to further investigate. RP 1559-1560; 1669. Neither Harley nor Lisa Douglass were notified prior to their arrival of a possible break-in to Respondents' home. RP 1560. Harley and Lisa Douglass stayed at the property waiting for the police to arrive, while Mr. Taylor and Ms. Malcome left the property. RP 1559-1563.

When the police arrived Ms. Douglass informed the police she believed \$200,000 in cash was taken from the safe. RP 1632. Ms. Douglass then reported to police that she believed \$250,000, \$400,000, \$750,000 and finally \$1,000,000 was taken from the safe. RP 404; 1632. Ms. Douglass admitted at trial that she increased the amount missing because she believed the police were not treating the theft very seriously. RP 1632-1634. Lisa Douglass had no personal knowledge of how much money was in the safe at the time of the alleged conversion. RP 1627-1628.

Lisa Douglass compiled a list of all the people who were actually at Plaintiffs home on September 25, 2015. RP 1661-1664; Ex. D-230. On September 25, 2015, there were several people at Respondents' home, none of which were Reilly. RP 1662-1664; 1667. There were four individuals inside the home cleaning, there was an individual cleaning the pool, there were multiple people from Mr. Douglass's company working on the property near the home, and there were multiple painters. RP 1663. One of the painters at the property on September 25, 2015 was painting directly outside of the window where Mr. Dutton first noticed the window open and screen removed during his 3:00 AM patrol on September 26, 2015. RP 1663. The being screen removed from the window caused Mr. Dutton to report a possible break-in. RP 1663. Based on her investigation and the list she compiled, Lisa Douglass testified that she had no evidence that Reilly was ever at the Respondents' home on September 25, 2015; the day the money was alleged to have been taken from the safe. RP. 1667.

Detective Mark Newton of the Spokane County Police Department lead the investigation. RP 374-376. Based on his investigation, Detective Newton determined that the break-in occurred sometime between 9:52 PM on Friday, September 25, 2015, and 3:00 AM, Saturday, September 26, 2016, when Mr. Dutton discovered the screen removed from Respondents' basement window. CP 81-128. This same conclusion was reached by

Tanner Haynes, the investigator the Douglass family hired to look into the missing money from their safe. RP 1451. Detective Newton had no evidence whatsoever that the alleged theft occurred between 2:00 PM and 3:25 PM on September 25, 2015. RP 400-401.

Detective Newton actually had direct evidence that showed Reilly could not have been at Respondents home between 2:00 PM and 3:25 PM on September 25, 2015. RP 401. Surveillance video from Hill's Resort in Priest Lake, Idaho showed Reilly arrive at the resort at 4:02 PM on Friday, September 25, 2015. RP 401. Reilly's cell phone records show that at 3:39 PM on September 25, 2015, Reilly's phone was connected to the cell tower of top of Schweitzer Mountain Ski Resort. RP 399-400.

On Sunday, September 27, 2015, Detective Newton attended a meeting called by Harley and Lisa Douglass in which Harley Douglass inquired of Detective Newton whether he had ever been aware of theft where the person stole the property, only to leave it behind to come back and find later. RP 383. Detective Newton informed Harley Douglass that he had no experience with criminals leaving money behind to find later. One day later, on Monday, September 28, 2015, Harley and Lisa Douglass were searching Respondents property for money left behind from the safe, and Reilly discovered a garbage bag full of money. RP 383-384. The garbage bag full of money was found near a trail where Harley and Lisa

Douglass had parked their vehicle. RP 908-911; Ex D-226. Reilly never touched the bag of money, and took pictures clearly showing various denominations of money through the white garbage bag. RP 911-915;1673; Ex. D-227; D-228.

Reilly was on a four-wheel motorcycle at the time he found the money, and he drove ahead on the trail to where Harley and Lisa Douglass were walking to notify them of his find. RP 908-916. When Lisa Douglass saw the garbage bag of money, she immediately ran to the bag and ripped the bag open. RP 912-914. Within minutes, Tanner Haynes, a individual hired by Harley and Lisa Douglass to investigate the alleged break-in, appeared where the bag of money was found. RP 915-916. Mr. Haynes advised they needed to remove the money from location where it was found as soon as possible. RP 915. Mr. Haynes removed all of the money from the white garbage bag that was found by Reilly and put the money into another bag. RP 915; 1434. The new bag of money was given to Hayden Douglass, Harley and Lisa Douglass's son, who had also arrived at the scene, to take back to Harley and Lisa Douglass's home. RP 916-917.

When the money was found, Lisa Douglass notified the police that a garbage bag of money had been found. Before the police arrived at the scene where the money was found, the money had been removed from the

scene by Hayden Douglass. RP 1434. The police took finger prints of the white garbage bag that contained the money when it was found by Reilly, and the only finger prints in the bag were Lisa Douglass's finger prints; Reilly's finger prints were not on the bag. RP 400-401; 1673.

On Monday, September 28, 2015, the money taken to Harley and Lisa Douglass's home was counted by Harley, Lisa and Hayden Douglass and they arrived at \$417,406 as the total. RP 1789. At no time did the Spokane County Police ever see the recovered money, nor did they do anything to verify the amount alleged to have been recovered was accurate. RP 402-403. At no time, including through trial, had the Respondent Harlan Douglass seen the recovered money, counted the recovered money, verified what money was actually recovered, and has never had the money returned to his possession. RP 1407.

When asked about the money being taken from his safe on September 25, 2015, Harlan Douglass testified in his deposition that he was at home in Colbert, Washington, and not in Paris, France at the time he alleges the money was taken from his home. RP 1390-1393. Harlan Douglass testified in his deposition in regard to the time period when the money was taken as follows:

Question: *“Money was missing, and how do you know it was Bryan that took this missy money?”*

Answer: *“Well, I would say it’s early morning hours, and I heard them downstairs, so it was another person. Any I got up, I loaded my shotgun, and I thought it was up on the roof. I went outside, I went out to my front porch, I went further out so I could see up, and it wasn’t there. I didn’t see anybody there. I went to the sides. I didn’t see nobody there. I came back in and I went to bed.”*

RP 1390-1392. Harlan Douglass then testified at trial he did not recall Reilly being at his home in July or August of 2015, only on the night of September 25, 2015 because as Harlan Douglass stated, Finally, Harlan Douglass testified I his deposition that the money was not in his safe at the time it was taken from the home, but rather in a hole in the floor of his home. RP 1406. Harlan Douglass confirmed this testimony at trial. RP 1406.

Because the Respondents’ safe was undamaged upon investigation, Detective Newton concluded that the person who took the money from the Respondents’ safe had to have the combination, or the safe had to have been left open. RP. 379. The only individuals that possessed the combination to Respondents’ safe were Jeri Via, Harlan Douglass, Lisa Douglass, and Harley Douglass. RP 1282. There was no evidence that Reilly ever possessed the combination to Respondents’ safe. RP 385-386; 1294.

There is no evidence supporting the jury’s verdict that Reilly converted Respondents’ money on September 25, 2015. There is no

evidence Reilly ever possessed Respondents money alleged to be in the safe at any time, there is no evidence as to the amount of money that was actually in the safe at the time of the alleged conversion, and the jury's verdict is based on pure speculation. The jury verdict in favor of Respondents' first cause of action, conversion by theft of money alleged to be in Respondents' safe on September 25, 2015, should be overturned. Reilly's motion for directed verdict should have been granted, and Respondents' conversion claim related to the money alleged to be in their safe should be dismissed and the damages awarded should be vacated.

V. ARGUMENT

A. Plaintiffs Failed to Prove that Reilly Ever Possessed the Money Alleged to Have been Converted by Reilly.

To prove their claim for conversion by theft at trial, Respondents had the burden to prove all of the following elements of conversion: (1) an act of willful interference with any chattel; (2) without lawful justification; (3) entitled property; and that Plaintiffs have been (4) deprived of the possession of property. Westview Inv., LTD v. U.S. Bank Nat'l Ass'n., 133 Wn. App. 835, 852, 138 P.3d 638 (2006) (citing PUD of Lewis Cnty. v. WPPSS, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985)). “An essential element of conversion is the taking of possession, actual or constructive, of the chattel.” Repin v. State, 198 Wash. App.

243, 270, 392 P.3d 1174 (Div. III 2017) (citing Martin v. Sikes, 38 Wash.2d 274, 287, 229 P.2d 546 (1951)). “*In an ordinary sense, conversion means to take and keep another’s property.*” Id. In essence, conversion is the dispossession of property from the rightful owner. Id. at 271.

At trial, Respondents failed to present any evidence showing that Reilly ever possessed, or interfered with, the money alleged to have been taken from their safe on September 25, 2015. When asked at trial what evidence supported Reilly being the person who took money from Respondents’ safe on September 25, 2015, none of the witnesses called by Respondents’ witnesses had any evidence other than to testify that Reilly had access to Respondents home.

In regard to access to Respondents’ home, Lisa Douglass compiled a list of all the people who were actually at Plaintiffs home on September 25, 2015. RP 1661-1664; Ex. D-230. On September 25, 2015, there were several people at Respondents’ home, none of which were Reilly. RP 1662-1664; 1667. There were four individuals inside the home cleaning, there was an individual cleaning the pool, there were multiple people from Mr. Douglass’s company working on the property near the home, and there were multiple painters. RP 1663. One of the painters at the property on September 25, 2015 was painting directly

outside of the window where Mr. Dutton first noticed the window open and screen removed during his 3:00 AM patrol on September 26, 2015. RP 1663. The being screen removed from the window caused Mr. Dutton to report a possible break-in. RP 1663. Based on her investigation and the list she compiled, Lisa Douglass testified that she had no evidence that Reilly was ever at the Respondents' home on September 25, 2015; the day the money was alleged to have been taken from the safe. RP. 1667. Lisa Douglass also testified Reilly was never seen with the money or any of the shoeboxes containing the money alleged to have been converted. RP. 1717. In addition to Lisa Douglass's testimony, her husband, Harley Douglass, also testified at trial that he did not have any evidence that Reilly converted Plaintiffs' money, other than his knowledge that Reilly had access to the house. RP. 1799.

When asked at trial why he believed Reilly was the person who took the money in the safe, the Respondent Harlan Douglass told a nonsensical story. RP 1390-1393. Harlan Douglass, who was in Paris, France at the time the alleged conversion occurred, confirmed that he testified in his deposition that he was home on the night the money was alleged to have been converted from his safe, he heard people on his roof and downstairs in his home, grabbed a shotgun to investigate, and eventually went back to bed because he did not find anyone in his home.

RP 1390-1393. When asked directly whether Reilly was in his home on September 25, 2015, Harlan Douglass testified he remembered Reilly in his home because, “*I heard his voice.*” RP 1393. Once again, Harlan Douglass was in Paris, France on September 25, 2015, and could not possibly have heard Reilly’s voice in his home.

Detective Newton testified at trial that after he completed his investigation he did not have evidence that Reilly was the person who converted the money from Respondents’ safe. RP 389; 399-401. Specifically, Detective Newton had no finger prints from Reilly, had no eye witnesses, and had no DNA showing Reilly was at Respondents home on September 25, 2015. RP 400. When asked if there was any evidence at all that Reilly was at Respondents’ home on September 25, 2015, between 2:00 PM and 3:25 PM, Detective Newton stated, “*Yes, nothing. Nothing pinned him down to that address during that time frame.*” RP 400.

In fact, Detective Newton had direct evidence that Reilly was not at Respondents’ home on September 25, 2015 at the time Respondents allege the money was converted from their safe. Based on video taken by Hill’s Resort surveillance cameras, Detective Newton determined that Reilly could not have been the person who took the money because Reilly was at Hill’s Resort. RP 401. Detective Newton also examined

Reilly's cell phone records that he had subpoenaed, and Reilly's cell phone records established that at 3:39 PM Reilly was in the area of Schweitzer Mountain traveling north to Hill's Resort where video evidence shows Reilly arrive at 4:02 PM on September 25, 2015. RP 399. This direct evidence established that Reilly could not have been the person who converted Respondents' money from their safe on September 25, 2015, as alleged. RP 401.

Respondents' expert Donald Vilfer, hired to examine Reilly's cell phone records in relation to his whereabouts on September 25, 2015, testified that he was not able to place Reilly or his cell phone in Respondents' home between 2:00 PM and 3:25 PM on September 25, 2015. RP 1087. Tanner Haynes, an unlicensed investigator with no training or experience, who Respondents paid approximately \$85,000 to investigate who took the money from the safe had no evidence that Reilly ever possessed the money taken from the safe. RP 1435-36; 1463. None of the witnesses called to testify by the Respondents presented any evidence that Reilly ever possessed the money alleged to have been taken from the safe.

In contrast, there was substantial evidence presented at trial that Reilly never possessed the money alleged to have been taken. First, Reilly presented video evidence showing that he arrived at Hill's Resort

in Priest Lake, Idaho at 4:02 PM, walked into the resort at 4:04 PM, and that he was still present at the resort at 7:36 PM on September 25, 2016. RP 1835-1838; Ex. D-207-210. The video evidence also showed Reilly physically still at Hill's Resort at 9:57 AM on the following morning, and his vehicle moved for the first time since its arrival the previous day at 12:07 PM on September 26, 2015. Ex. D-207-210. The video evidence showing Reilly at Hill's Resort was supported by eye witness testimony presented by Craig Hill, co-owner of Hills' Resort, Missy Hill, co-owner of Hill's Resort, and Jake Hill. RP 1836-1838; 1863-1865; 1214-1222. All of these witnesses testified that Reilly was at Hill's Resort as a guest in their home from the afternoon of Friday, September 25, 2015, through Sunday, September 27, 2015. RP 1836-1838; 1863-1865; 1214-1222.

It takes approximately one and one-half hour to one hour and 45-minutes to drive from Colbert, Washington to Hill's Resort. CP 81-128. Reilly testified that he left his parents' home in Colbert, Washington at approximately 2:15 PM on Friday, September 25, 2015, to drive to Hill's Resort for the weekend. RP 899. Reilly's testimony regarding his departure time is supported by the video evidence showing his arrival at Hill's Resort at 4:02 PM on September 25, 2015. Ex. D-207-210. This direct evidence shows Reilly could not have been the person who took the money from Respondents' safe as alleged.

Finally, Detective Newton testified that his investigation concluded that the person who took the money from Respondents' safe had to have the combination to the safe or the safe had to have been left open because there was no damage to the safe whatsoever. RP 379. The only evidence presented at trial showed the safe was locked on September 25, 2015. RP 1285.

Jerri Via, Harlan Douglass's girlfriend at the time, testified that prior to leaving on their trip for Paris, France, she turned the dial to the safe to lock it, and that she and Harlan Douglass pulled the handle to the safe to ensure it was locked. RP 1285. Ms. Via testified that she and Harlan Douglass also placed a chair up against the safe door, so that if the chair was moved they would know someone had been in the safe while they were away on their trip to France. RP 1285. There was no other evidence or testimony presented showing the safe was not locked as Ms. Via described on September 25, 2015.

Because the safe was not left open, the person who took the money had to have the combination to the safe. RP 379. At trial evidence was presented that only four people had the combination to the safe in Respondents' home: (1) Harlan Douglass, (2) Jeri Via, (3) Harley Douglass, and (4) Missy Douglass. RP 1282. There was no evidence presented that Reilly had the combination to the safe, there was only

speculative testimony that Reilly could have had access to the combination because he had access to the Respondents' home.

In order to establish a claim for conversion it is necessary to show the person you are claiming converted your chattel (money) actually or constructively possessed the chattel. Repin v. State, 198 Wash. App. 243, 270, 392 P.3d 1174 (Div. III 2017). “*An essential element of conversion is the taking of possession, actual or constructive, of the chattel.*” Repin, 198 Wash. App. at 270. There is no evidence, direct or circumstantial, showing Reilly ever actually or constructively possessed Respondents' money at any time, therefore the jury's verdict, unsupported by evidence of possession by Reilly and based on speculation, must be overturned. Sortland v. Sandwick, 63 Wash.2d 207, 211, 386 P.2d 103 (1963). Respondents failed to prove the essential element of conversion, that Reilly actually or constructively possessed their money at any time, therefore the jury verdict awarding damages for conversion of the money alleged to be in Respondents' safe on September 25, 2015 must be overturned. This Court should enter judgment in favor of Reilly on Respondents' first cause of action, conversion of money by theft.

B. There was not Sufficient Evidence Supporting Respondents' First Cause of Action, Conversion of Money by Theft, and Reilly's Motion for Directed Verdict Should have been Granted.

At the close of Respondents' case, Reilly moved for a directed verdict pursuant to CR 50(1)(a). "*A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.*" Chaney v. Providence Health Care, 176 Wash.2d 727, 732, 295 P.3d 728 (2013). Reilly argued there was no evidence showing he ever possessed the money alleged to have been converted from Respondents' safe, and that Respondents failed to sufficiently identify what money had been converted. RP 1998-2021. The trial court denied Reilly's motion for directed verdict citing sufficient circumstantial evidence to allow a jury to decide whether Reilly converted the money alleged to have been in the safe. RP 2019-2023.

The trial court recognized the complete absence of direct evidence showing Reilly ever possessed Respondents' money. RP 2021. As the trial court stated in reference to Reilly being in Respondents' home, "[t]here is no direct evidence that he was in there. There's no one that can identify him as being there or seeing him there or anything else..." RP 2021. The trial court, in denying Reilly's motion for directed verdict, indicated that each piece of circumstantial evidence by itself was not enough to establish a claim of conversion, but taken as a whole could "support the possibility that he was in the house on the date and time alleged by the plaintiff." RP 2020-2021.

In applying the circumstantial evidence submitted to prove a fact, that the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.” Stevens v. King County, 36 Wash.2d 738, 747, 220 P.2d 318 (1950). “A verdict cannot be founded on mere theory or speculation.” Sortland v. Sandwick, 63 Wash.2d 207, 211, 386 P.2d 103 (1963). A case based only in circumstantial evidence cannot be based solely on a theory or speculation. As the Supreme Court of Washington stated with regard to circumstantial evidence:

Such evidence may be direct or circumstantial. When reliance is placed upon the latter type of evidence, there must be reasonable inferences to establish the fact to be proved. No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, without further showing that reasonably it could not have happened in any other way. The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred.

Arnold v. Sanstol, 43 Wash. 2d 94, 99, citing, Gardner v. Seymour, 1947, 27 Wash.2d 802, 808, 180 P.2d 564 (1947); Carley v. Allen, 1948, 31 Wash.2d 730, 737, 198 P.2d 827; Stevens v. King County, 1950, 36 Wash.2d 738, 747, 220 P.2d 318.

The trial court acknowledged that there was no direct evidence showing Reilly was in Respondents' home at the time Respondents alleged the money was taken from their safe. RP 2021. The trial court determined there was sufficient circumstantial evidence to proceed to a jury decision because the circumstantial evidence could support the possibility that Reilly converted the money, however, in doing so the trial court ignored all of the direct evidence showing Reilly could not have been the person who converted Respondents' money. RP 2020-2021.

The trial court ignored the video evidence of Reilly at Hill's Resort, the eye witness testimony supporting Reilly being at Hill's Resort, and Reilly's cell phone records showing his phone connected to Schweitzer Mountain traveling north towards Hills' Resort making it impossible for Reilly to be in Respondents' home taking money from their safe. RP 399-400; 1836-1838; 1863-1865; 1214-1222; Ex. D-207-210. The trial court ignored the testimony of Detective Newton stating the person who took the money from the safe had to possess the combination to the safe, and the testimony presented that Reilly did not possess the combination to Respondents' safe. RP 379. The trial court ignored Lisa Douglass's testimony that nine people were present at Respondents' home on September 25, 2015, none of which were Reilly. RP 1663; 1667. The trial court ignored that Reilly's finger prints were not found on the garbage

bag containing the money when it was found, and that only Lisa Douglass's finger prints were found on the bag of money. RP 400-401. Finally, the trial court ignored the fact that not one person testified during the entire trial that Reilly ever possessed the money alleged to have been taken from the safe.

The jury was allowed to speculate that Reilly was the person who converted Respondents' money based upon an unsupported theory. Merely a theory that Reilly could possibly have been the person that converted Respondents' money was not enough to allow the jury to determine whether Reilly converted Respondents' money. Arnold, 43 Wash. 2d at 99. Reilly's directed verdict should have been granted, and Respondents' claim for conversion by theft relating to the money alleged to have been taken from their safe on September 25, 2015, should have been dismissed.

C. The Jury's Damage Award against Reilly for the Money Alleged to have been Converted from Respondents' Safe was not Supported by the Evidence Presented at Trial.

"The goal of awarding money damages is to compensate for losses that are actually suffered." ESCA Corp. v. Seattle-First National Bank, 86 Wash. App. 628, 639, 939 P.2d 1228 (1998). The judgment in the amount of \$605,000 awarded against Reilly for the money alleged to

have been taken from the Respondents safe is based on pure speculation and is not supported by the evidence at trial.

In order to make a prima facie case in conversion, the burden is on the plaintiff to prove a right to possess the property converted.” Bloedel Timberlands Development, Inc. v. Timber Industries, Inc., 28 Wash. App. 669, 679, 626 P.2d 30 (1981). “The burden is on the plaintiff to establish ownership and a right to possession of the converted property.” Meyers Way Development Limited Partnership v. University Savings Bank, 80 Wash. App. 655, 675, 910 P.2d 1308 (1996). In order to maintain a conversion action in Washington, the plaintiff must establish a property interest in the goods allegedly converted. Id. at 675.

Money, under certain circumstances, may become the subject of conversion, “[h]owever there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it.” Public Utility Dist No. 1 of Lewis County v. Washington Power Supply System, 104 Wash.2d 353, 378, 705 P.2d 1195 (1985). To have a claim for conversion, it requires that the Respondents have a possessory interest in the chattel, and “it treats money as a chattel if the defendant wrongfully received the money or was under obligation to return the specific money to the party claiming it.” Davenport v.

Washington Educ. Ass'n, 147 Wash. App. 704, 722, 197 P.3d 686 (2008)(internal quotation omitted).

The Respondents never established at trial exactly what money was taken from their safe, and therefore failed to prove a possessory interest in the chattel as required by Washington law. Id.

With regard to the amount of money alleged to have been converted from the safe, Lisa Douglass testified that she had no personal knowledge how much money was in the safe on September 25, 2015, when Respondents alleged their money was converted. RP 1627-1628. Lisa Douglass admitted that she initially informed police that \$250,000 was taken from the safe, and then \$400,000, then \$750,000, and finally \$1,000,000. RP 1632. Lisa Douglass admitted she intentionally increased the amount of money that was missing and she “*had numbers flying all over*” when she was reporting the missing money to the police in order to get the attention of the police because she did not think the police were taking the matter serious. RP 1632-1634. Lisa Douglass admitted that when the money was found in the garbage bag on September 28, 2015, three days after it was alleged to have been taken, there was no way to tell whether all the money was recovered. RP 1631. Lisa Douglass also admitted that the total amount of money was “*left for speculation.*” RP 1635.

Jeri Via testified at trial that she and Harlan Douglass counted the money alleged to have been converted from the safe on August 3, 2014, which was Ms. Via's birthday. RP 1283. As Ms. Via and Harlan Douglass counted the money, Harlan wrote the amount of money counted on a piece of paper. RP 1267-1269; Ex. P-72. The tally sheet was recovered in the garbage bag of money found on September 28, 2015, and it showed \$264,900 was counted. RP 1269. When they finished counting, Ms. Via estimated the total was \$500,00, but admitted they did not count all the money. RP 1270-1271. The money counted by Ms. Via and Harlan Douglass was in different denominations. RP 1271-1272. The money was never counted again after being counted on August 3, 2014; more than a year prior to the alleged conversion on September 25, 2015. RP 1284. Throughout year prior to the alleged conversion, Harlan Douglass would take money from the shoeboxes when he would go on trips. RP 1284. There was no evidence, Harlan Douglass ever put any more money back in the shoeboxes once he took money out. RP 1284.

After the money was found in the garbage bag on Monday, September 28, 2015, Harley, Lisa and Hayden Douglass counted the money at their home. RP 1777. Initially their count totaled \$417,406. RP 1779. During the limited discovery that Reilly was allowed to obtain during litigation, Harley Douglass produced bank records showing

deposits during the relevant time period in the amount of \$417,261; nearly the identical amount Harley Douglass said was in the bag of money found on September 28, 2015. RP 1789-1795.

At trial the Respondents were coincidentally seeking to recover \$1,080,000 from Reilly as a result of the money converted from the safe, when on May 5, 2015, the Court of Appeals affirmed a judgment entered against his business Harley C. Douglass, Inc. in the amount of \$1,089,000. CP 645-660; Ex. D-231; RP 1782-1784. On September 18, 2015, a motion for a supersedes bond was filed in Spokane County Superior Court requesting Harley Douglass to pay an additional \$475,000 toward the bond. RP 1286-1287; Ex. D-233. On October 22, 2015, Harley Douglass stipulated to release the money to pay the judgment, about the same time Detective Newton determined no one would be charged in relation to the money being taken from the safe. RP 389; 1787.

Neither the police nor Respondent Harlan Douglass ever saw the recovered money. RP 402; 1407. During the entire litigation through the time of trial, the recovered money alleged to have been taken from the Respondents' safe was never returned to Harlan Douglass. RP 1407.

“The burden is on the plaintiff to establish ownership and a right to possession of the converted property.” Meyers Way Development

Limited Partnership v. University Savings Bank, 80 Wash. App. 655, 675, 910 P.2d 1308 (1996). Further, an award of damages must be for losses actually suffered. ESCA Corp. v. Seattle-First National Bank, 86 Wash. App. 628, 639, 939 P.2d 1228 (1998). At trial, the Respondents failed to show what property (money) was taken from their safe. There is only speculation as to what amount of money was in the safe at the time of the alleged conversion on September 25, 2015.

Respondent Harlan Douglass testify that the money was not in the safe at all, but rather in the floor somewhere in his home at the time the conversion allegedly occurred. It is Harlan Douglass's burden of proof, and he does not know what money was in the safe or what money was recovered. Harlan Douglass has never seen the money found in the garbage bag on September 28, 2015, he has never counted the money, and the money has never been returned to his possession. Harlan Douglass has no personal knowledge of whether all of the money alleged to be missing was in fact found on September 28, 2015.

Because Respondents failed to show a property interest in the money, because they failed to establish what property as converted, they failed to meet their burden to prove conversion. Further, there is no evidence in the record supporting the jury's award of \$605,000 against Reilly. Therefore, the jury's verdict in the amount of \$605,000 must be

overturned. Reilly's motion for directed verdict should have been granted and Respondents' claim for conversion related to the safe should have been dismissed. At the very least, the jury's verdict needs to be reduced to conform to the evidence, if that is possible.

D. Reilly Motion to Bifurcate the Conversion of Money from the Safe from the Other Conversion Claims Should have been Granted.

Prior to the start of trial, Reilly moved the trial court pursuant to CR 42(b) to bifurcate the Respondents first cause of action alleging Reilly converted money from their safe from the other conversion claims pertaining to other personal property and money. CP 1964-1978. Respondents alleged that Reilly converted the money in their safe on September 25, 2015, however Respondents' other conversion claims relating to jewelry, watches and money occurred in 2013 and 2014, and were in no way related to the incident regarding the money alleged to have been taken from the safe. Reilly argued to allow the unrelated conversion claims to proceed in the same trial as the claim for conversion of the money alleged to be in the safe highly prejudicial to Reilly. Despite Reilly argument for bifurcation of the claims, the trial court denied Reilly's motion.

CR 42(b) states:

[T]he court, in the furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order separate trials of any claims, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right to trial by jury.

CR 42(b) grants a trial court wide latitude in determining whether to allow for separate trials in a particular case. Myers v. Boeing Co., 115 Wash. 2d 123, 140 (1990). The Myers court reasserted the policy that separate trials, or bifurcation, is not to be done liberally, but within the particular trial courts discretion. Id. at 140. Moreover, a trial court's decision to bifurcate a trial is review based on an abuse of discretion standard. See Probert v. Am. Gypsum Div. of Susquehanna Corp., 3 Wash. App. 112, 472 P.2d 604 (1970).

In deciding whether to order separate trials, courts balance the savings in terms of expedition and economy against the possible inconvenience, delay, or prejudice to the parties. Brown v. Gen. Motors Corp., 67 Wash. 2d 278, 283 (1965). If a trial court is inclined to grant a motion to bifurcate, unless a party opposing the bifurcation can show prejudice there can be no abuse of discretion. Slipper v. Briggs, 66 Wash. 2d 1, 3 (1964), adhered to, 401 P.2d 216 (Wash. 1965).

The trial court abused its discretion in denying Reilly's motion to bifurcate the unrelated conversion claims. The Respondent were allowed present unrelated, irrelevant, prejudicial, misleading and confusing evidence regarding conversion claims completely unrelated to the conversion alleged to have occurred on September 25, 2015.

In a standard conversion action, there is no dispute as to who is in possession of the property, the dispute in a conversion action is whether the person in possession of the property is depriving the owner of its right to possession of their property. Wash. State Bank v. Medalia Healthcare L.L.C., 96 Wash. App. 547, 984 P.2d 1041 (1999) (bank claimed its security interest in property was converted when purchased by third-party Medalia); Repin, 198 Wn. App. at 270 (dog owner claimed veterinarian's gross negligence in euthanizing his dog amounted to conversion of his dog); Consulting Overseas Mgmt., Ltd. V. Shitikel, 105 Wn. App. 80, 18 P.3d 1144 (2001) (plaintiff sued for conversion as a result of a failure to pay outstanding loan); Davin v. Dowling, 146 Wash. 137, 262 P. 123 (1927) (land purchaser of foreclosed property sued bank for conversion as a result of the sale of hay and alfalfa from the acquired property by prior possessor of the land); Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 239 P.3d 803 (2010) (guardian for an elderly woman sued the woman's son and Wells Fargo Bank for conversion of proceeds resulting

from the son's misappropriation of funds while acting as the power of attorney for his mother); Grays Harbor Cnty. v. Bay City Lumber Co., 47 Wn.2d 879, 289 P.2d 975 (1955) (Grays Harbor County sued two loggers and the company they sold logs to for conversion as a result of the loggers trespassing passing on county land, harvesting trees and selling the logs).

Respondents alleged Reilly converted two Rolex watches, two rings, gold coins, gold bullion, and money from the Respondents from 2013 through 2014. CP 645-660. With regard to these allegations, Reilly never denied he had the property alleged to have been converted, Reilly believed he was in rightful possession of the alleged property. Therefore, there was an issue as to whether Reilly had rightful possession of the aforementioned property, or whether Reilly had converted the Respondents' property as alleged.

Allowing the jury to decide the unrelated claims for conversion was highly prejudicial to Reilly and ultimately influenced the jury decision in this case. As shown at length above, there is no evidence showing Reilly ever possessed the money alleged to have been taken from Respondents' safe, how much money was taken from the safe, or that Reilly was ever at Respondents' home the day the money was allegedly taken. Despite a complete lack of evidence, and despite Respondents' failure to prove the necessary elements of conversion regarding the money

alleged to have been taken from the safe, the jury returned a verdict in favor of Respondents. The only reasonable explanation is that the jury was prejudiced by the evidence supporting the prior unrelated conversion claims.

ER 404(b) and ER 609 exist specifically to prevent the exact prejudice Reilly suffered as a result of the trial court denying Reilly's motion to bifurcate the conversion claims into separate actions. ER 404(b) states in pertinent part, "*other crimes, wrongs, or acts is not admissible to prove the character of a person in order to action in conformity therewith...*" ER 404(b). ER 609(a) prevents the attack of a defendant's credibility in a civil case by prohibiting the admission of the fact a person was *convicted* of a crime unless certain factors are met. ER 609(a). At the time of trial, and until this day, Reilly has never been convicted of any crime.

Respondents called witnesses to testify regarding possession of the property, to testify that Reilly sold Respondents' property, and that Reilly purchased various assets. RP 231-235; 285-324; 1118-1200; 1308-1312; RP (4-19-18), 37-84. All of these transactions occurred at least six months prior to the alleged conversion of money from Respondents' safe. None of the evidence or testimony regarding the prior transactions were in any

way related or relevant to the alleged conversion from the safe on September 25, 2015.

Based on the jury's verdict in this case, they were prejudiced and/or confused by the evidence presented in arriving at their verdict that Reilly converted the money alleged to have been in the safe. In denying Reilly's directed verdict, the trial court itself was confused and when it considered unrelated and prejudicial circumstantial evidence:

But if you go through and start adding together all the circumstantial evidence, meaning access to the house, there's issue about polygraph being taken, finding the money, and looking at the banking records, it looks like a four-month period in 2015, which is obviously before the theft occurred, Mr. Reilly deposited \$37,700 in cash into his account, and he testifies that came from Mr. Douglass, it came from doing odd jobs and detailing boats and different things, which is a substantial amount of money.

RP 2020. Clearly the unrelated evidence caused confusion or was improperly used to show Reilly converted the money alleged to be in Respondents' safe. Detective Newton even had to explain that he conducted two separate investigations and that the bank records subpoenaed were not related to Respondents' claim regarding the money being converted from the safe on September 25, 2015. RP 415-416.

We know the unrelated evidence was prejudicial to Reilly because the judge and jury both disregarded all the direct evidence showing it was

impossible for Reilly to have been the person who converted the money from the safe in reaching the result that it was Reilly who converted the money in the safe.

Reilly's motion to bifurcate the September 25, 2015, conversion claim related to the money in the safe from the unrelated conversion claims occurring in 2013 and 2014 should have been granted to prevent the prejudice that resulted. As stated above, Respondents failed to prove the September 25, 2015 conversion claim and a directed verdict should have been granted. Reilly asks that the trial court's decision be overturned, and his directed verdict granted, and if not, that this matter be remanded for a new trial with the conversion claims bifurcated into separate actions.

E. Plaintiffs Willfully Violated Court's Motion in Limine Precluding Any Mention of Reilly's Criminal Charges, Resulting in Prejudice that Required a Mistrial be Granted.

On the first day of trial, counsel for Plaintiffs, Steve Hassing, purposely violated the trial court's order in limine preventing any mention by the Plaintiffs that Reilly had been charged with a crime, and also prevented Reilly from any mention that he had not been charged with a crime. RP 83-85; RP 238-245. Specifically, the Plaintiffs were prevented by order of the trial court from mentioning that Reilly had been charged by Spokane County with six felonies in relation to the same property

Plaintiffs were seeking damages for at trial. RP 83-85; RP 239-240. Reilly was prevented by order of the trial court from mentioning that he was never even charged with a crime in relation to the money Plaintiffs alleged was taken from their safe by Reilly. RP 83-85; RP 240.

“The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.” State v. Sullivan, 69 Wash. App. 167, 170, 847 P.2d 953 (1993). On the first day of trial, Mr. Hassing asked the following question to Reilly’s mother Christie Reilly:

Now, you’re aware, are you not, that your son has been charged by the – Spokane County with six felonies associated with the theft of property from, Harlan and Maxine Douglass, correct?

RP. 238. Reilly’s counsel immediately objected, and out of the presence of the jury requested a mistrial. RP. 238-245.

In support of his motion in limine, Reilly cited ER 404(b) and ER 609 to preclude any mention of the pending criminal charges related to the same property at issue in trial. RP 82. *“Our rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes.”* State v. Escalona, 49 Wash. App. 251, 255, 742 P.2d 190 (1987) (citing ER 609; ER 404(b)).

Based on ER 404(b) and ER 609, the trial court granted Reilly's motion in limine.

“The trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion.” State v. Thompson, 90 Wash. App. 41, 45, 950 P.2d 977 (1998). A mistrial is appropriate where the *“defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be tried fairly.”* Id. In determining whether a trial irregularity warrants a new trial, the Appellate Court considers, *“(1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction to disregard the remark, an instruction a jury is presumed to follow.”* Escalona, 49 Wash. App. at 254.

The seriousness of Mr. Hassing's question in direct violation of the motion in limine cannot be denied. At issue in the civil trial was whether the Plaintiff should be awarded damages for conversion of their property by Reilly. As the Plaintiffs, they have the burden to prove all elements of their claim. By making the statement in the presence of the jury that Reilly had been charged with six felonies by Spokane County Police in relation to the property subject to Plaintiffs' conversion claim, it made it clear to the jury that the authorities had already determined viewed the

evidence and conducted an investigation that lead Reilly to be charged with taking the property.

The statement by Mr. Hassing that Reilly had been charged with six felonies in relation to the property at issue in trial was not cumulative evidence of other properly admitted evidence. The intent of Mr. Hassing's statement was to inform the jury that the Spokane County Police believed Reilly took the property from the Plaintiffs, so the jury should come to the same conclusion. Further, despite the fact Mr. Hassing intentionally violated the motion in limine preventing any mention that Reilly had been charged in relation to the property at issue at trial, *the trial court refused to level the playing field by allowing Reilly to illicit testimony or present evidence that Reilly had not been charged with any crime in relation to the money alleged to have been taken from Plaintiffs' safe; despite the fact a full investigation was performed by Spokane County and Reilly was never charged with a crime.*

Mr. Hassing's statement unfairly cast an unfavorable light upon Reilly and the issue for the jury to decide, which no limiting instruction could cure. When the jury returned, the trial court simply reminded the jury that they were only to consider evidence presented, and not to consider the statements of counsel as evidence. RP 244-245. This

instruction did nothing to instruct the jury that Reilly was not charged with the six felonies related to the property at issue.

In Escalona, the Appellate Court found the trial court abused its discretion by not granting a mistrial where a witness violated a motion in limine not to mention the defendant's stabbing, which was similar to the charge before the jury. Escalona, 49 Wash. App. at 256-257. The trial court struck the statement and instructed the jury to disregard the witness's statement. Id. at 253. In this matter, it was not a witness who inadvertently violated a motion in limine in response to question, but rather an intentional violation of the motion in limine by Plaintiffs' counsel to prejudice the jury.

To view the significance of Mr. Hassing's statement on the first day of trial, the Court must look at the surrounding circumstances and the overall trial. The Plaintiffs had no evidence and did not present any evidence that Reilly ever possessed the money alleged to have been taken from their safe. Because there was a complete lack of evidence in proving Reilly took the money from their safe, the Plaintiffs only chance of proving their claim was to cast Reilly in a negative light with regard to unrelated events making the jury think that since the police charged Reilly with the property crime, he must have been the person who took the money from the safe as well.

As shown above, there is no evidence to support Reilly converted Plaintiffs' money from their safe. There is no evidence to show he ever possessed the money, there is no evidence as to how much money was at issue, or that all the money alleged to have been taken from the safe was not in fact recovered. Yet, the jury came to conclusion that Reilly took the money from the safe when he is shown on video at Hill's Resort, in Priest Lake, Idaho during the time the conversion allegedly occurred making it impossible for him to have been the person who converted the money. Yet, the jury found Reilly, without possession, without proof of what was taken, without proof of what money was recovered, and without a shred of direct evidence to be the person who converted Plaintiffs' money. The only logical conclusion, therefore, is that the jury was so swayed by the fact Reilly had been charged with six felonies by Spokane County Police, that despite all deficiencies and lack of proof, he had to be the person.

F. Requests For Attorney Fees and Costs.

Pursuant to RCW 4.84.185. Reilly requests and award of attorney fees and costs as a result of the Respondents' frivolous claim for conversion of money from their safe. There is no and was no evidence to support this claim, and yet Respondents proceeded with the claim against Reilly. Because Respondents' claim should have been bifurcated into its

own action, the entire claim is frivolous, and the award of fees and costs are proper. Biggs v. Vail, 119 Wash.2d 129, 830 P.2d 350 (1992).

VI. CONCLUSION

Based on the evidence and argument set forth above, Reilly asks that Respondents' first cause of action, conversion by theft of the money alleged to be in Respondents' safe, be dismissed and the award of \$605,000 be vacated. There is no evidence supporting this claim and the jury's verdict is not supported by substantial evidence. Alternatively, Reilly seeks remand for a new trial with the unrelated conversion claims bifurcated into separate actions.

DATED this 23rd day of April, 2019.

ROBERTS | FREEBOURN, PLLC

s/ Chad Freebourn
CHAD FREEBOURN, WSBA #35624
Attorney for Bryan Reilly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of April, 2019, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|----------------|--|
| <input type="checkbox"/> | HAND DELIVERY | Steven J. Hassing |
| <input checked="" type="checkbox"/> | U.S. MAIL | 425 Calabria Court |
| <input type="checkbox"/> | OVERNIGHT MAIL | Roseville, CA 95747 |
| <input checked="" type="checkbox"/> | EMAIL | sjh@hassinglaw.com |

s/ Chad Freebourn
CHAD FREEBOURN

ROBERTS FREEBOURN

April 24, 2019 - 10:47 AM

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