73190-4

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NO. 73190-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHARLES V. MCCLAIN III,
Appellant,

v.

1ST SECURITY BANK OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal represents the continuing efforts of Appellant Charles McClain ("McClain") to profit from a fraudulent scheme culminating in funds being erroneously diverted into his bank account. Respondent 1st Security Bank of Washington ("1st Security"), discovered the fraudulent transactions and returned the funds to the rightful owners. McClain sued 1st Security alleging conversion, violation of due process and breach of fiduciary duty. The Snohomish County Superior Court dismissed each of McClain's claims on summary judgment.

McClain's legal arguments are confusing and difficult to untangle. A serial pro se litigant in trial and appeals court, he nevertheless demonstrates a fundamental misunderstanding of the civil and appellate rules, how summary judgment is decided, what comprises admissible evidence and the body of law governing the claims he asserts in this lawsuit. McClain inappropriately attempts to expand his legal claims and factual record on appeal. He also submits documents in the appellate record that are not properly considered in this appeal.

The trial court did not err when it dismissed McClain's claims. He is unable to establish even one of the three required elements of conversion. He fails to prove entitlement to the erroneously deposited funds and presents no admissible evidence in support of his fanciful story

suggesting otherwise. 1st Security's actions in returning the funds to the defrauded owners thereof were entirely justified.

As for his claims for violation of due process and breach of fiduciary duty, McClain has essentially abandoned them. He presents no facts or argument in support of his appeal of those two claims and identifies no error by the trial court in their dismissal.

Once this Court wades through the hyperbole and inaccuracies rampant in McClain's opening brief, it is obvious that the trial court did not err in dismissing his claims for conversion, violation of due process and breach of fiduciary duty. Amidst all the confusion underlying McClain's appellate argument, one thing is abundantly clear. He is shamelessly attempting to profit from a fraudulent scheme.

II. STATEMENT OF FACTS

1st Security is a community-based bank operating in King, Snohomish and Kitsap counties. In June 2009, 1st Security opened a consumer checking account, number 5150378000 (hereinafter "the Account") for a customer who identified himself as Harrison Rains Hanover. Six months later Charles McClain, was added to the Account. Simultaneously, the Account became the destination for deposits of fraudulently diverted funds exceeding $4.6 million. Those transactions in the Account are at the center of this dispute.

A. Background of McClain

The appellant in this case is not a typical litigant. McClain is an experienced pro se plaintiff with a long history of filing lawsuits. Invariably, his lawsuits are dismissed, often with sanctions being assessed against him for asserting frivolous claims or appeals. The trial court was provided with dismissal orders of a number of those cases. CP 367-409.

McClain has been ordered to limit his court filings more than once. In 2005, the U.S. District Court entered an order barring McClain from filing further duplicate lawsuits on the same grounds against the same parties. CP 411-413. The trial court in this matter entered a Preliminary Injunction against McClain to prohibit him from filing duplicate claims against 1st Security, along with other inappropriate claims. See Order Granting Defendant's Motion for Preliminary Injunction Against Charles McClain, dated June 29, 2011.[1]

McClain has been ordered by the State Bar to cease the unlicensed practice of law, on threat of prosecution. CP 415-420. He has also been implicated in the forgery of a Snohomish County judge's signature. This forgery came to light when McClain sued Alan Hall, the former attorney

[1] The Order is sub number 43, designated by 1st Security for this appellate record on September 14, 2015 but not yet marked as Clerk's Papers as of the date Respondent's Brief is being submitted. This document was put before the trial court on summary judgment by specific reference in the Motion for Summary Judgment at CP 555. Pursuant to RAP 9.12, this Court should include this document in the record on appeal and is respectfully requested to do so.

of McClain's son Jonathan. Hall prevailed on summary judgment. Hall testified in that case that his representation of Jonathan McClain ended when Hall learned that Charles McClain had forged the signature on a court order of Judge Kathryn Trumbull. CP 422-427, 437-438. There was no question that a forgery had occurred, according to Judge Trumbull and Judge Anita Farris. CP 429-435. The forgery had enabled McClain to gain access to funds held in trust for his son, despite Judge Farris having previously denied McClain permission to do so. When asked in this case about the forgery issue, he stated that a statute of limitations amounts to an "acquittal." CP 495.

McClain is also no stranger to litigation with financial institutions arising from his efforts to obtain money that doesn't belong to him. He was sued by Boeing Employees Credit Union for check-kiting. He sued Washington Mutual Bank seeking access to funds from that check-kiting scheme (claims dismissed and fees awarded on appeal). CP 406-409.

1st Security knew none of the foregoing history about McClain in 2009 when it accepted him as a customer on a checking account.

B. Background of the 1st Security Account

1st Security opened the Account for a person using the name "Harrison Hanover" in early 2009. At the time, 1st Security didn't know that Hanover had used that name only after being released from a

Washington state penitentiary, having served more than 10 years on a conviction for attempted murder. CP 500-503. In addition to his given name (Jerry Bibb Balisok), Hanover had used the alias "Ricky Wetta" since 1978 when he had literally disappeared rather than face Alabama bank fraud charges. His true identity as Balisok was discovered while he awaited trial in Washington for the attempted murder charge on which he was eventually convicted. CP 500-503.

After Jerry Balisok was released was prison and changed his name to Harrison Hanover, McClain befriended him. CP 447-448. McClain has sometimes referred to Hanover as a business partner. CP 517-518. Hanover admittedly operated as a scam artist, including teaching those skills to others. In sworn declarations submitted by McClain in an unrelated lawsuit, Hanover testified that he had conspired to commit a fraud on the Snohomish County Superior Court and prepared false declarations for signature by witnesses. CP 505-506.

Although 1st Security knew nothing of Hanover's extensive history of misdeeds, McClain knew all of it. That unsavory history did not dissuade McClain from permitting Hanover to live in his home along with McClain's family. When Hanover opened the Account, the address he provided was McClain's home address. CP 459-467, 511-514, 518.

On December 11, 2009, Hanover added McClain as a Signer to the Account, just as the fraudulently diverted funds started to flow in. CP 520. Hanover immediately fled to Miami, his ultimate destination being Costa Rica. CP 216-217, 440-444.[2]

C. The Deposits of Fraudulently Misdirected Funds.

On December 10 and 11, 2009, unusually large deposits totaling $530,111.56 were made to the Account through the Automated Clearinghouse System ("ACH") system. CP 216, 536, 537, 542. In the ACH system, funds are sent directly from the bank account of a sender to the bank account of a receiver. Each transaction identifies the sender of the funds, which appears on the bank statement for the Account. The deposits on the first two days originated from Cox Communications, a nationwide cable company. CP 216.

Hanover designated McClain as a Signer on the Account on the second day of that deposit activity, December 11. McClain immediately made withdrawals totaling $52,000.00 in cash. CP 533-534. Before adding McClain to the Account, Hanover signed a wire transfer order

[2] Although it was not part of the court record below, McClain's brief accurately states that Hanover is now deceased. McClain omits the detail that Hanover died in a Nicaraguan jail in April 2013, while serving a 24 year sentence for sexual abuse of children. http://www.laprensa.com.ni/tag/penal/page/3

sending $475,000.00 to a McClain family member in the Philippines. CP 217, 471-472.

Huge fraudulent deposits to the Account continued on Monday, December 14, 2009. Two ACH deposits were made to the Account in the amounts of $720,272.57 and $3,024,836.36 from Cox Communications and Comcast, respectively. CP 536-537. On December 15, a final ACH system deposit of $382,321.05 was made by Cox Communications. CP 536-537. Fortunately for Cox and Comcast, 1st Security froze the Account on December 14 and quickly learned that the funds had been fraudulently diverted into the Account. CP 539, 542, 546.

D. **How the Fraudulent Scheme Worked**.

The deposits into the Account were the fruits of an internet scam launched against Cox and Comcast. The scam is described in the sworn testimony of Comcast's Michael Lippert and Cox's Correen King. CP 589-601. McClain submitted no evidence challenging those declarations.

Cox and Comcast are unrelated companies which each happen to buy goods from a single vendor Arris Solutions, Inc. ("Arris"). Each company pays Arris's invoices through electronic payments over the ACH system. In November 2009, Cox and Comcast each received emails from a person claiming to be "Robert Willox" a "Senior VP" from Arris. "Willox" emailed new bank routing information for use on all future

payments to Arris. CP 589-601. The routing information supplied by "Willox" actually directed payments not to any Arris bank account, but to the Account controlled by Hanover and McClain at 1st Security Bank. CP 597, 601.

Arris had no employee named Robert Willox. The emails to Cox and Comcast did not come from Arris, which had not made any change to its bank routing information and had no intention to have its funds deposited into a 1st Security account. Nor did Arris have any relationship of any type with Hanover or McClain. CP 582, 588.

Cox and Comcast each fell prey to the "Robert Willox" emails. Each company amended its electronic payment instructions so that more than $4.6 million in payments intended for Arris now went to the Account; the personal checking account of admitted scam artist and convicted felon Harrison Hanover, and his partner and friend Charles McClain.

McClain has never submitted any evidence suggesting that he or Hanover had an expectancy or entitlement to funds from Comcast or Cox.

E. 1st Security's Detection of the Fraud and Return of the Money to its True Owners.

Monday, December 14, 2009 was the third straight day of huge fraudulent deposits into the Account. McClain and Hanover had already withdrawn and/or spent $58,785.57 out of the Account and Hanover had

wire transferred $475,000.00 to the Philippines. First thing Monday morning, McClain entered the Everett branch of 1st Security and tried to make an additional withdrawal. CP 473, 581. By this point, the total amount of Cox or Comcast deposits had reached $4,275,220.40.[3] 1st Security's branch employees were trained in security procedures including being attentive to account history when presented with a large transaction. Upon being presented with McClain's request to withdraw funds, Branch Manager Carl March telephoned VP Compliance May-Ling Sowell, because deposits and withdrawals of this size were extremely unusual for the Account. Ms. Sowell immediately made inquiries about the deposits and quickly obtained the information necessary from the ACH system to determine that the deposit that morning from Comcast in the amount of $3,024,836.36 was not legitimate. Based upon that discovery, the funds in the Account were frozen while Ms. Sowell investigated the legitimacy of the other deposits. CP 580-583.

[3] In order to inflate the size of his wrongful claim for stolen money, McClain reads the bank statement as showing more money flowing in and out of the Account. During the period of time the Account was frozen on December 14 and 15, Comcast and Cox each initiated electronic reversals of the deposits through the ACH system. Because the Account was frozen, those reversals were rejected simultaneously. As a consequence, the account statement reflects numerous duplicated debits and credits that actually did not represent any funds being transferred in or out. CP 217. 1st Security explained this in verified discovery responses (which were before the court at CP 545) but McClain persists in contending that several million more dollars were denied him than merely the $4.65 million actually diverted from Comcast and Cox.

Comcast and Arris independently discovered the fraud the same day, December 14, 2009. Simultaneous with its payment of $3,024,836.36, Comcast had issued a routine notice to Arris that the electronic payment was being made. Arris advised Comcast that its account had not been credited with the payment referenced in Comcast's notice. Comcast discovered the fraudulent "Robert Willox" email and almost immediately formalized its request through the ACH system for the return of the deposit. CP 589-597. On December 15, 2009, 1st Security Bank honored Comcast's request and returned $3,024,836.36 from the Account to Comcast. CP 582, 217.

By December 15, 2009, 1st Security Bank had also received confirmation from Cox that its deposits from December 10, 11 and 15, 2009 had been fraudulent diverted to the Account as a result of emails sent from "Robert Willox." CP 580-583. Cox formally requested the return of its deposits.

Other than the money already spent or withdrawn by Hanover and McClain before the fraud was detected, 1st Security returned Cox's misdirected funds on December 15. CP 21-218. Also at Cox's request, 1st Security requested the intermediary bank, which had completed the $475,000.00 Philippines wire transfer, to retrieve the wired funds on the basis of fraud. CP 582. The intermediary bank, not 1st Security,

accomplished the recovery of the the wire transfer. The funds were returned to 1st Security on January 28, 2010, at which time the Account had long-since been closed. 1st Security returned the funds to Cox. CP 543-544.

F. McClain Offered No Evidence Disputing the Fact that Comcast and Cox Deposited the Funds.

At the time of the banking transactions and in the years since, McClain offered varying stories to explain his claim to the funds deposited into the Account. The ever-changing stories commenced with what he told 1st Security's VP Compliance, May-Ling Sowell, then in answers to federal law enforcement, followed by his written submissions to agencies regulating financial institutions and eventually in this lawsuit.

The fact that the bank statements identify the senders of each deposit as either Cox or Comcast has not stopped McClain from telling a farfetched tale about a different source of the funds. McClain told Washington's Department of Financial Institutions in October 2010 that Harrison Hanover was his business partner and that they had received approximately $4.65M for diesel fuel they brokered by private contract. CP 517-518.

When he filed his Summons and Complaint two months later, he alleged that $2.5 million had been received by McClain "as a result of a

private contract." CP 615. As the lawsuit proceeded, McClain revised his story, now claiming that he was not Hanover's business partner, just his friend. CP 447-448. He claimed that Hanover had promised McClain one-half his earnings, for life, in gratitude for McClain having saved Hanover's life. CP 445-448. McClain claims Hanover added him to the Account to enable him to access his portion of Hanover's income. McClain further expanded the story about the diesel fuel contracts. He now claimed the diesel fuel contract was supposed to generate $25 million in deposits to the Account. CP 452.

McClain refused to disclose the location of Hanover or any means of contacting him, despite the fact that Hanover was central to the entire story on which McClain relied. McClain provided no contact information for Hanover in answer to interrogatories or in his deposition, although he admitted he was in weekly contact with Hanover. McClain claimed Hanover might be in Costa Rica, although he wasn't sure. CP 440-444, 468-469, 550.

McClain claims the source of the funds and any fraud underlying the deposits are irrelevant. He claims that once the money was deposited into his checking account, it belonged to him, regardless of whether or not the deposits were procured by fraud or other criminal activity.

McClain testified in his deposition:

> Q. Why is it -- how is it that you're able to assert that these funds were lawfully deposited into that account? On what basis do you make that claim?
>
> A. The claim I make is my belief at the time, and until it's proven otherwise just, you know, with factual evidence and not I think or I know, you know, sworn declarations, the money came as a result of the contract that Harrison had with whoever it was he was doing business with. I didn't have any knowledge to any different than that at the time. Okay? Once the money showed up, and Harrison transferred ownership of half of it to me, the issue of where the money came from in regards to the legal aspect is done, from the research that I have done. The bank taking the funds out of the account, without notifying me, without getting a Court Order, or without having actual knowledge that the funds were, as what they claimed, stolen or re-diverted or whatever happened, was illegal. And that's the basis of my claim is Supreme Court decisions.

CP 454.

McClain expanded on this testimony:

> Q. Well, what do you think about the moral issues here if the money was indeed stolen, and you're claiming that you're entitled to it anyway?
>
> A. From Cox and Comcast?
>
> Q. I'm asking what you think about morally the idea of making a claim to stolen money?
>
> A. I think the IRS has a form where you can report stolen money income, so if the IRS doesn't have a problem with it I don't a problem with it. And morals don't put food on my family's table.

> Q. So, being immoral is okay if you need the money, is that what --
>
> A. I don't consider it being immoral. Morals have changed over the years. In the 15th century you could beat your wife with a stick, as long as it wasn't bigger than your thumb. That's where we get the adage "rule of thumb." You know, you can't beat your wife with a stick now. Hell, you can't even beat your kids. So, you know, morals change. My moral is these corporations in this country are killing us. And if I have an opportunity to make out, that I didn't do, or I didn't have anything to do with, it just fell in my lap and I'm legally entitled to it, then, yeah, you're right I'm going to take it. And I think anybody that didn't would be a fool.

CP 493-494. In the face of overwhelming admissible evidence that the funds were fraudulently diverted from Cox and Comcast, McClain offered no admissible evidence in support of his fanciful yarn about his partner, the admitted scam artist and attempted murderer, being the broker of diesel fuel oil earning millions of dollars.

G. 1st Security's Account Agreement Provided for the Measures it Took

The Account Agreement has several provisions addressing the eventuality of improper transactions in its accounts. The Account Agreement consists of the signature card (CP 520), Terms and Conditions of Your Account (CP 521), and among is addenda are Account Disclosures (CP 522-531). Among the Account Disclosures are the

following provisions pertinent to 1st Security's actions in freezing the Account and ultimately returning the deposits to Comcast and Cox:

- In the Funds Availability Policy: "Longer Delays May Apply. In some cases we will not make all of the funds that you deposit available to you on the day of your deposit." CP 524.
- Limitations on Services. "The following limitations for withdrawal amount and frequency of transfers may apply when using the services listed above . . ." [including Automated Clearing House Deposits and Withdrawals] . . . "We reserve the right to limit the dollard amount and frequency of any transaction from your accounts(s) for security reasons. Or, if any of the deposited funds or funds transfers are suspected to be in violation of state or federal law they may not be available for immediate withdrawal." CP 525.
- Our Liability for Failure to Make Transfers: "We will not be liable, for instance, if: . . . Any of your deposited funds or funds transfers are suspected to be in violation of state or federal law they may not be available for immediate withdrawal." CP 526.
- ACH and Wire Transfer Agreement: "[Y]ou agree that those funds transfers are governed by federal Regulation J, rules of the National Automated Clearing House Association (NACHA) and

the Northwest Automated Clearing House Association (NWACHA)." CP 531.

The ACH Rules incorporated expressly into the Account Agreement authorized 1st Security to return erroneous entries at the request of the party originating the deposit, including where the payment went to a received not intended to be credited by the originator of the payment. The receiving bank may, but is not required to honor the request. ACH Rule §8.2. CP 250.

H. McClain Sued 1st Security for Conversion, Breach of Fiduciary Duty and Violation of Due Process.

On December 2, 2010, McClain initiated this lawsuit, stating three causes of action against 1st Security: conversion, breach of fiduciary duty and violation of due process rights under the Fifth Amendment of the Constitution. CP 611-626. 1st Security denied liability under all three claims and asserted counterclaims for the filing of a frivolous lawsuit. CP 602-608. McClain's three causes of action were dismissed by summary judgment on January 27, 2012, the order being appealed herein. [4]

[4] See Notice of Appeal, sub number 153, designated by 1st Security for this appellate record on September 15, 2015 but not yet marked as Clerk's Papers as of the date Respondent's Brief is being submitted.

III. RESPONDENT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. What constitutes a genuine issue of material fact for purposes of Civil Rule 56?

2. May funds in a deposit account at a bank be chattel capable of being converted for purposes of the tort of conversion?

3. Does the UCC at RCW 62A.4A-501 permit a bank and its customer to vary its terms by agreement to incorporate funds-transfer system rules such as those of the National Automated Clearing House Association?

4. Did the Account Agreement between 1st Security and Hanover/McClain permit the bank to freeze the funds in the Account and return them when an obvious fraud was detected?

5. For purposes of the tort of conversion, may the property interest necessary to establish "lawful entitlement" be proven solely by the fact that the money has been deposited into one's bank account?

6. Does a bank owe a fiduciary duty to its checking account customer in the absence of any special circumstances?

7. Does a suspicion of governmental involvement, absent any evidentiary proof, suffice to establish a due process violation of Fifth Amendment rights?

8. Where an admitted fraud visited upon a third party by persons unknown is part of the background of a dispute, but no claim for relief for fraud has been asserted by any party to the dispute, does Civil Rule 9(b) apply?

IV. ARGUMENT

A. Standard on Appeal is *De Novo*

The standard of review of an order granting summary judgment is *de novo*, requiring the Court to engage in the same inquiry as did the trial court. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

The trial court correctly granted 1st Security's motion for summary judgment. 1st Security established with admissible evidence that the funds deposited into the Account were misdirected by Cox and Comcast who intended them for a different recipient. 1st Security's admissible evidence also established that under those circumstances, its deposit agreement, incorporating ACH rules, authorized it to reverse the deposits. McClain submitted no admissible evidence creating any issue of material fact regarding any of his three claims; not regarding the source of the funds, 1st Security's actions in reversing the deposits or regarding any element of his

fiduciary duty and due process claims. By engaging in its own *de novo* review of the evidentiary record, this Court should reach the same conclusion as did the trial court and should affirm the summary judgment dismissal of McClain's claims.

B. The Trial Court did not Err in Dismissing McClain's Conversion Claim

A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. *Reliance Insurance Co. v. U.S. Bank, WA., N.A.*, 143 F.3d 502, 506 (9th Cir. 1998), *citing Public Utility District v. Washington Public Power Supply System*, 104 Wn.2d 353, 705 P.2d 1195, 1211 (1985). McClain could not prevail on his claim of conversion for three independent reasons. First, the funds in the Account were not "chattel" for purposes of conversion. Second, 1st Security Bank's actions were lawfully justified under its contract with McClain. Third, McClain could not demonstrate that he was entitled to possession of the funds in the Account. Any one of these three reasons sufficed to disallow McClain's claim of conversion and warrant summary judgment dismissal.

1. A Claim for Conversion Will not Lie as to Funds in a Bank Account

McClain alleges that 1st Security converted his property when it returned to Comcast and Cox the remaining funds from deposits they had

made into the Account. No such claim will lie under Washington law because funds on deposit in a checking account are not chattel, for purposes of conversion. *See Allied Sheet Metal Fabricators, Inc. v. Peoples National Bank of Washington*, 10 Wn. App. 530, 537, 518 P.2d 734, *aff'd*, 83 Wn.2d 1013, *cert. denied*, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).

McClain cannot claim conversion where the subject property was funds on deposit in a checking account. *Reliance*, 143 F.3d at 506. In *Reliance*, a bank had debited a checking account as a contractually-permitted setoff in satisfaction of its customer's loan obligation, which resulted in a third party surety incurring a loss. The surety sued the bank for conversion, alleging that the funds in the account that the bank debited as a setoff belonged to the surety. The Ninth Circuit held, among other things, that a conversion claim could not lie as to funds on deposit. Applying Washington law, the court wrote: "Except for special kinds of accounts in some jurisdictions, bank accounts generally cannot be the subject of conversion, because they are not specific money, but only an acknowledgement by the bank of a debt to its depositor." *Reliance,* 143 F.3d at 506. The court clarified a limited exception which did not apply there (and does not apply here). "Though money or a check could in some circumstances be the subject of conversion, *Public Utility District*, 705

P.2d at 1211, for example if someone wrongfully took a check from another's desk, the tort traditionally involves wrongful taking and carrying away of something tangible." *Id.*

McClain's conversion claim is for funds in the Account on which he was a Signer. Because such funds are not chattel for purposes of the law of conversion, the trial court properly dismissed the claim.

2. McClain Failed to Prove that 1st Security Acted Without Lawful Justification.

A second independent ground exists for affirming the trial court's dismissal of the conversion claim. 1st Security's actions were justified by its written contract with McClain and the incorporated ACH rules.

a. The Contract and the ACH Rules Authorized 1st Security's Actions

1st Security's relationship with McClain is governed by contract. This contract is referred to as the "Account Agreement." The Account Agreement consists of a two-page main document and seven additional addenda. CP 520 – 531.

In the Account Agreement, McClain and 1st Security agreed to be bound by ACH rules. CP 521, 531. ACH Rules are agreed to by members of NACHA, the National Account Clearinghouse Association. The rules govern the participants to the electronic transfers of funds which are the subject of this case. A typical electronic funds transaction occurs when an

Originator sends money from its bank ("ODFI") to a Receiver through the Receiver's bank ("RDFI").

In this case, Originators Cox and Comcast each transferred funds from their respective banks (ODFI's Wachovia and JP Morgan Chase) in payment of amounts due to their intended Receiver, Arris Because they had fallen prey to the fraudulent Willox emails, they sent funds to the wrong RDFI, 1st Security, instead of to Arris's actual bank.

Included within the ACH rules effective in 2009, are provisions designed to remedy an erroneous or fraudulent fund transfer, precisely the situation occurring here. ACH Section 8.2 governs reversing entries. "An ODFI may, orally or in writing, request an RDFI to return or adjust an erroneous entry initiated by the ODFI." CP 250. Erroneous entries include an entry that "orders payment to or from a Receiver different than the Receiver intended to be credited or debited by the Originator." *Id.* The Reversing Entry is timely if it is received by the RDFI within five banking days of the settlement date of the erroneous entry. ACH Rules §§2.9.1. Although the ACH rules have been amended and re-numbered from time to time, the five-business day time window for reversing entries has remained the same.

The attempted reversals and ultimate requests for return of funds in this case occurred on the 1st business day of the erroneous entry of

Comcast funds and the 4th business day of the initial Cox entry. CP 585 and 586. They were timely under applicable ACH Rules.

The ACH Rules provide that where discovery is made that an electronic funds transfer is erroneously made to a Receiver other than the intended Receiver, ODFI's may ask for return of the funds and RDFI's may return it. Therefore, when 1st Security returned the funds to Cox and Comcast at the request of their ODFI's, 1st Security's actions were in conformance with the Account Agreement and the ACH rules.

When McClain signed the Account Agreement, he expressly agreed to the ACH rules, including those discussed above. McClain agreed that if an ODFI made an entry ordering payment to his account when it intended payment to go elsewhere, 1st Security could return it. McClain does not dispute that he signed the Account Agreement or that its terms control the transfer of funds in dispute. Thus, 1st Security's actions were contractually authorized. As a matter of law, McClain failed to prove the second element of conversion that 1st Security acted without lawful justification.

b. McClain's UCC Arguments Were Properly Rejected.

McClain attempts to divert attention from the agreed terms of the Account Agreement and ACH rules by citing to certain UCC provisions to

argue that 1st Security acted without lawful justification. In doing so, McClain fails to acknowledge that the UCC provisions may be varied by terms of the Account Agreement and by ACH rules:

> a) Except as otherwise provided in this Article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party.
>
> (b) "Funds-transfer system rule" means a rule of an association of banks (i) governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders, or (ii) to the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a federal reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank. Except as otherwise provided in this Article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this Article and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule may also govern rights and obligations of parties other than participating banks using the system to the extent stated in RCW 62A.4A-404(c), 62A.4A-405(d), and 62A.4A-507(c).

RCW 62A.4A-501 (emphasis supplied).

In this case, 1st Security and McClain agreed in the Account Agreement to be bound by ACH rules governing electronic funds transfers. 1st Security strictly complied with those rules in returning the fraudulently diverted funds to their rightful owner. Pursuant to RCW 62A.4A-501, the UCC provisions blindly cited by McClain do not apply.

Even if the ACH rules had not been expressly adopted by the parties in the Account Agreement, 1st Security complied with all applicable UCC obligations. McClain insists that RCW 62A.4A-404 required 1st Security to allow him immediate access to the stolen funds. He contends that it is immaterial who owned the funds or how they were erroneously deposited into his account. He is incorrect. RCW 62A.4A-404 provides in part:

> (a) Subject to RCW 62A.4A-211(e), 62A.4A-405(d), and 62A.4A-405(e), if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages as a result of nonpayment, the beneficiary may recover damages resulting from the refusal to pay to the extent the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment.

(Emphasis added.) Under the express terms of the UCC, 1st Security did not have an obligation to allow McClain immediate access to the funds if it had a "reasonable doubt" concerning his right to the funds. Promptly upon the suspicious deposits coming to the attention of 1st Security through its security procedures, 1st Security determined that McClain and

Hanover were not the intended recipients of the funds. It further discovered that the funds had been erroneously deposited into the Account as a result of fraud. CP 581-82. 1st Security's freezing of the Account and subsequent refusal to pay was justified pursuant to RCW 62A.4A-404(a).

1st Security also complied with the UCC when it returned the stolen funds to Cox and Comcast. RCW 62A.4A-211 allows the sender of a payment order to cancel the order when it "orders payment to a beneficiary not entitled to receive payment from the originator." The letters from Cox and Comcast's banks cancelled the payment orders and 1st Security's return of the funds complied with the UCC. CP 585, 586.

3. The Trial Court Properly Concluded that McClain Did Not Establish Entitlement to the Funds

The trial court had a third independent basis for dismissing the conversion claim. McClain was required to establish his entitlement to the property in question. He failed to do so.

McClain offers two inconsistent arguments as to why the funds in the Account were lawfully his. First, he claims that the funds were deposited as proceeds from a private – secret -- diesel fuel contract belonging to Harrison Hanover. Simultaneously he concedes that the funds came from Cox and Comcast and were diverted by someone's

wrongdoing; but argues that once deposited in the Account, they were irrevocably his. Neither of these inconsistent arguments holds water.

a. McClain's Case Was Devoid of Admissible Evidence about a Diesel Fuel Contract but even his Inadmissible Evidence Would have made no Difference

In order to defeat summary judgment, McClain was required to demonstrate through admissible evidence that genuine issues of material fact existed. He claimed that the funds were the proceeds of Hanover's business dealings but presented no admissible evidence in support of the diesel fuel story or how it related to the Cox and Comcast deposits. McClain had no personal knowledge about the transaction. He testified that he had been told by Hanover of the existence of such a contract but that all details were confidential, including who was buying, who was selling, when and where the transactions occurred and how much money changed hands. McClain claimed that only Hanover knew those details. CP 449-453, 457-458, 475-479. When asked in interrogatories for Hanover's whereabouts, McClain submitted sworn answers providing none. CP 548-551. When asked in deposition, McClain admitted that he spoke weekly to Hanover but that he refrained in those conversations from asking where Hanover was, initiating contact with him only through an email address belonging to persons unknown. CP 440-444, 468-469, 550.

He refused to furnish the email address of his Costa Rica "go-between" with Hanover without permission of the owner of that email address, whose identity he claimed not to know. CP 468-470. In short, McClain denied 1st Security all contact information for Hanover; the man who was the sole source of first-hand information on the purported diesel fuel story.

Facing summary judgment dismissal, McClain suddenly produced a declaration from Hanover in support of the fanciful diesel fuel story, but it was stricken by the trial court and is therefore not properly part of the record on appeal. CP 81-82. McClain's claim that the declaration submitted as CP 94-118 was not the one that was stricken is misleading. CP 94-118 was an untimely attempt by McClain to cure facial deficiencies in the Hanover declaration which was nonetheless rejected by the trial court. McClain did not appeal the Order Granting Defendant's Motion to Strike. See Notice of Appeal.[5]

At best, the Hanover declaration is a red-herring because even if it had not been stricken, nothing in that declaration purports to establish that the specific deposits made to the account on December 10 - 15, 2009 were actually originated by a diesel fuel contract. Indeed, the trial court didn't need to decide the legitimacy of the implausible diesel fuel story.

[5] Sub number 153, designated by 1st Security for this appellate record on September 15, 2015 but not yet marked as Clerk's Papers as of the date Respondent's Brief is being submitted.

McClain offered no evidence tracing even one of the deposits to any originator other than Comcast or Cox, whose names appear on each of the ACH deposits. CP 216-217. Hanover's declaration merely discussed his alleged expectation that at some unspecified time the fruits of his diesel oil dealings would be deposited in his 1st Security account.

The Court had overwhelming admissible evidence that explained conclusively where the funds originated. The trial court had account statements reflecting that all of the deposits came directly from Comcast and Cox. CP 319-320. The court had declarations and exhibits from representatives of Comcast and Cox detailing: (1) how the fraud occurred; (2) how the funds were misdirected to the 1st Security account; and (3) the fact that there was never any intention to pay Hanover or McClain or any other 1st Security account-holder. CP 589-601. Nothing about the Hanover declaration casts doubt on Comcast or Cox being the true originators of the funds at issue or gives rise to a genuine issue of material fact as to any of McClain's entitlement to the funds.

b. McClain's Fallback Argument is Legally Groundless

Tacitly acknowledging the absurdity of the diesel fuel story, McClain makes another equally absurd argument. He claims to be entitled to the Comcast and Cox funds, even if stolen, simply by virtue of them

being deposited into the Account. He essentially concedes that the electronic deposits originated with Comcast and Cox and were never intended for Hanover or McClain. He claims, however, that Comcast's and Cox's misfortune should be his gain, to the tune of millions.

In order to establish the element of conversion, McClain must demonstrate his lawful entitlement to the funds at issue. Lawful entitlement to property cannot be established by demonstrating that stolen property magically appeared, which is virtually what he argues. "Lawful entitlement" requires a property interest of some kind. *Marriage of Langham*, 153 Wn.2d 553, 566, 106 P.3d 121 (2005). McClain never presented any evidence to establish a property interest in the deposits of Comcast and Cox's fraudulently diverted funds. He presented no evidence of lawful entitlement. McClain argues that the mere deposit of stolen funds into his account entitled him to those funds.

That ill-constructed, circular argument has no basis in the law and defies all logic. Most important, it cannot serve as the basis for establishing the necessary element of a conversion claim, that McClain was lawfully entitled to the property.

In any event, the Ninth Circuit has put the issue squarely to rest. In that case, a widow received her deceased husband's social security check, endorsed it improperly and deposited it into her account. In a subsequent

lawsuit with the government, the trial court rejected her argument that she gained a property interest in funds received in error simply by virtue of them being deposited into her account. *Powderly v. Schweiker*, 704 F.2d 1092, 1097 (9th Cir. 1983). Applying Washington law, the Ninth Circuit wrote:

> Property interests do not arise whenever an individual has "an abstract need or desire for," or "unilateral expectation of," a benefit. *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709; *Ressler v. Pierce*, 692 F.2d 1212 at 1214 (CA9 1982). Rather, an individual must have a legitimate claim of entitlement to the benefit created and defined by an independent source, such as state or federal law. *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709; *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (CA9 1982); *Golden State Transit v. City of Los Angeles*, supra, 686 F.2d at 760.
>
> . . .
>
> Appellant's attempt to claim a property interest by reason of her own bank account is groundless. In reality, she is attempting to claim a property interest in the funds erroneously sent to her deceased husband, but cannot escape the fact that she has no entitlement to these funds.

Powderly, 704 F.2d at 1097. A property interest – which McClain must establish to prove conversion – does not arise from the mere fact funds were erroneously deposited into the Account.

Failure by McClain to establish even one element of the conversion claim through admissible evidence would have been sufficient to defeat the claim. Here, the overwhelming admissible evidence negated all three elements. The claim of conversion for the funds in the Account

fails as a matter of law and the trial court properly dismissed it on summary judgment.

As to the portion of the deposits that were wire-transferred to the Philippines, the trial court had still another basis to dismiss McClain's claim. McClain is not a real party in interest and lacks standing to assert a claim as to the $475,000 wire transfer. By his reasoning, however flawed, he claims legal entitlement to money deposited into the Account from any source after he was authorized as a Signer. It is undisputed that Hanover withdrew the $475,000 from the Account and completed the wire transfer prior to adding McClain to the Account. CP 581, 471-472. Consequently, McClain can claim no entitlement to the funds used in the wire transfer. Additionally, the recipient of the wire transfer was a person named Armi Que, not McClain. The record is devoid of any indication McClain has been authorized to act on Armi Que's or Hanover's behalf. McClain had no right, title or interest in the wired funds.

The standing doctrine prohibits a litigant from raising another's legal rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). Cases should be brought and defended by the parties whose rights and interests are at stake. *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). This principle is also reflected in the court rules and in common law limitations on who can

bring suit. *Id.; see also* CR 17(a). McClain lacks standing to allege conversion of the $475,000 wire transfer because as a non-party to the wire transfer, either as a sender or a beneficiary, his rights and interests are not at stake. 1st Security acknowledges no property interest by either Hanover or McClain in the funds diverted from Comcast and Cox. Nevertheless, even under McClain's tortured theory of entitlement, any interest in the funds would be Hanover's who withdrew the funds and wired them before McClain was added to the Account.

Finally, the Court should take note that the frequent references to the wire transfer being "seized" by 1st Security are utterly unsupported by evidence. 1st Security never seized the wire transfer nor took independent action to accomplish its retrieval. The wire transfer went from 1st Security to intermediary Citibank NYC and possibly one or more intermediary bank(s) before being received at Banco De Oro Philippines. CP 543-44. At the request of Cox, 1st Security made a request to the intermediary bank, CitiBank NYC, for reversal of the wire transfer. 1st Security had no involvement in or knowledge of whatever steps were undertaken by CitiBank NYC, any other intermediary banks or Banco De Oro Philippines to accomplish the return of the funds. All that 1st Security knew is that the funds from the returned wire transfer were ultimately received by 1st Security from Citibank NYC approximately six

(6) weeks after the request for their return. CP 544. By that time, 1st Security had closed the Account. 1st Security then returned the funds Cox. CP 544.

In sum, McClain has no standing to allege conversion of the wire transferred funds. In any event, 1st Security never seized any wire transfer, nor deprived McClain of any of the wired funds. There was no error in the trial court's dismissal of the conversion claim, including as to the funds wire transferred by Hanover.

C. 1st Security Owed no Fiduciary Duty to McClain, so that Claim Fails as Well

McClain abandoned his claim for breach of fiduciary duty. The trial court properly dismissed the claim. A fiduciary duty does not arise merely by reason of a checking account relationship between bank and customer. 1st Security's relationship with McClain was purely contractual; an arm's length transaction under which 1st Security offered a defined service to its customer in exchange for a fee. This relationship with a checking customer has uniformly been held not to impose a fiduciary duty on a bank. "As a general rule, the relationship between a bank and a depositor or customer does not ordinarily impose a fiduciary duty of disclosure upon a bank. They deal at arm's length." *Tokarz v. Federal Frontier Savings & Loan Ass'n*, 33 Wn. App. 456, 458-59, 656

P.2d 1089 (1982); *citing Pigg v. Roberston*, 549 S.W.2d 597, 600 (Mo. Ct. App. 1977).

There are certain limited circumstances under which a bank may be held to a duty greater than that imposed in contract. Under Washington law, a bank is held to a quasi-fiduciary standard only where it provides an "extra service," or there exist "special circumstances" resulting in a relationship of trust and confidence with a customer. *See Annechino v. Worthy*, 162 Wn. App. 138, 143-44, 252 P.3d 415 (2011); *Hutson v. Savings and Loan*, 22 Wn. App. 91, 102-103, 588 P.2d 1192 (1978); *Tokarz,* 33 Wn. App. at 462. None of those limited circumstances exist in this case. The trial court's decision to dismiss the fiduciary duty claim should be affirmed.

D. McClain Presents no Facts or Argument in Support of his Due Process Claim, Which the Trial Court Properly Dismissed.

Just as he did in response to the Motion for Summary Judgment, McClain presents no facts or argument pertaining to his due process claim and has abandoned it on appeal.

The Fifth Amendment to the Unites States Constitution provides in part: No person shall . . . be deprived of life, liberty, or property, without due process of law . . . *U.S. CONST. amend. V.* Most rights secured by the Constitution are protected only against infringement by governments,

including the Fifth and Fourteen Amendments. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978); *National Bd. of YMCA v. United States*, 395 U.S. 85, 92, 89 S.Ct. 1511, 23 L.Ed.2d 117 (1969).

There are very limited circumstances where a Fifth Amendment violation can be found where property is taken by an intermediate third party. In order to prevail on such a claim, McClain must show "direct and substantial" government involvement. *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 at 93; *Casa De Cambio Comdiv v. U.S.*, 291 F.3d 1356, 1361 (Fed. Cir. 2002). In this case, McClain presented no evidence showing government involvement in removing funds from his bank account, let alone "direct and substantial" government involvement triggering Fifth Amendment protections. Indeed, the only references to this claim in McClain's Opening Brief are conclusory statements to the effect that 1st Security's actions were "not possible without conspiracy and government support, This action does violate Appellant's Constitutional Rights, as the Respondent is acting as an agent of government." [sic] AB 4. Just as he failed to do in the trial court, McClain produces no facts or argument on appeal to support his wild speculation regarding governmental involvement.

Additionally, McClain's has failed to prove that he has a constitutionally protected property interest in the Comcast and Cox deposits. The requirements of Fifth Amendment due process impose constraints on governmental actions which deprive individuals of protected liberty and property interests. *Mathews v. Eldridge*, 424 U.S. 319, 424, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A court must be convinced that the plaintiff has a property or liberty interest protected by due process before it can evaluate whether the process afforded that interest was adequate. *Powderly*, 704 F.2d at 1097; *Richardson v. Koshiba*, 696 F.2d 911, 916 (9th Cir. 1982).

As discussed above in relation to McClain's conversion claim, he has no legitimate or lawful right to the funds that were erroneously deposited into the Account and returned to Cox and Comcast. It is undisputed in the evidence that the funds were deposited into the Account as a result of a fraud perpetrated upon Comcast and Cox. McClain's only claim to the funds is based entirely upon the fact that they were erroneously put in his account. His due process claim has no merit and was properly dismissed on summary judgment by the trial court.

E. McClain Fundamentally Misunderstands and Therefore Misstates Legal Doctrine.

1. McClain's Arguments are not Supported by his Cited Authorities

Most of McClain's citations to authority do not stand for the propositions he advances. Although replete with citations, his brief is almost entirely lacking any legal foundation. He takes language out of context. He relies heavily on dicta. He cherry-picks sentences out of cases and statutes which, in a vacuum, appear to support his proposition, but which have no legal significance in this case; or at least not the significance he attempts to derive. While some of this is to be expected in a *pro se* filing, it is nevertheless improper and must be identified for what it is.

A prime example of McClain's fundamental failure to derive a case holding is found in his repeated citation to *Go-Best Assets Ltd., v. Citizens Bank*, 79 Mass. App. Ct. 473, 495, 947 NE2d 581 (2011). That case involves a victim of fraud who sued the bank where the funds had been deposited before the fraudster absconded with them. The theory of recovery was negligence, based upon the fraud victim's claim that the bank should have taken steps that would have prevented its account holder from withdrawing the funds. The language McClain quotes is not from the Massachusetts Court of Appeals case he cites. Rather, the quote

appears in a subsequent case in the Massachusetts Supreme Court, in a footnote. The footnote is pure dicta, in the form of a hypothetical, posing the question of what would have been required of the Bank if it had owed a duty of care to the plaintiff — which the court held it did not. McClain quoted a portion of the footnote for the proposition that the bank's duty was to pay its account-holder, regardless of whether or not a third party had a claim against the account-holder for fraud as to those funds. True to form, McClain omitted the end of the footnote which actually condones 1st Security's actions in this case:

> Therefore if Citizens Bank owed a duty of care, it could not have prevented the funds from being deposited in Goldings's client account and instead would have had to take reasonable steps to prevent Goldings from misappropriating the Go-Best funds in his client account, either by freezing the account or otherwise ensuring that the Go-Best funds were safeguarded. The intrusive nature of such steps and the interference with the account holder's access to funds deposited in his account is justified only where the bank has actual knowledge of an intended or apparent misappropriation.

Go-Best Assets Limited v. Citizens Bank of Massachusetts, 463 Mass. 50, fn 6, 972 NE2d 426 (2012) (emphasis supplied). McClain failed to derive the legal significance of those words or of the case. If *Go-Best Assets* actually applied here, its footnoted dicta would justify 1st Security's actions in freezing the Account because of obvious fraud.

Another example of the unreliability of McClain's citation to authority is found in his reliance on *United States v. Redcorn*, 528 F.3d 727 (10th Cir. 2008). McClain quotes language from the case in support of his assertion that stolen money, once deposited into his account, belongs to him. The case stands for no such proposition. As the case name suggests, *Redcorn* is a criminal case involving an embezzlement scheme. In connection with the wire fraud charges, the government maintained that even after the funds had been stolen, the defendants' subsequent actions in using the funds established additional criminal conduct. In that context, the Court stated that "[o]nce the defendants deposited the funds into their personal bank accounts, they had accomplished their crime and the funds were available for their personal use." *Id.* at 739. The court's meaning was not that a bank deposit somehow gives rise to a property right to stolen funds; rather that once the funds had been stolen and deposited into the defendants' account, the elements of the crime were satisfied and that what the defendants subsequently did with the funds did not alter the analysis. *Id.* at 739. *Redcorn*'s criminal case holding has no place in the analysis of this matter.

McClain advances yet another argument for the first time on appeal, that 1st Security may not take any action regarding the fraudulent

and erroneously deposited funds without "actual knowledge" of the fraud.[6] He cites to RCW 30.22.210 for this proposition. Once again, he fails to understand the purpose of the statute and simply latches on to a phrase that suits his purpose – "actual knowledge" — without any regard for whether the statute even applies. It does not.

The purpose of RCW 30.22 *et seq.*[7] is to qualify and simplify the law concerning ownership interest disputes between depositors and beneficiaries on accounts and succession of funds on deposit with financial institutions. RCW 30.22.020. This is not such a case, but even if it was, RCW 30.22.210 does not prohibit any actions taken by 1st Security in this case. Indeed, the provision is not a prohibition on a bank's actions, it is a protection for a bank's decision not to act.

The statute reads:

> (1) Nothing contained in this chapter shall be deemed to require any financial institution to make any payment from an account to a depositor, or any trust or P.O.D. account beneficiary, or any other person claiming an interest in any funds deposited in the account, if the financial institution has actual knowledge of the existence of a dispute between the depositors, beneficiaries, or other persons concerning their respective rights of ownership to the funds contained in, or proposed to be withdrawn, or

[6] Ironically, another of McClain's random cites to statutes, RCW 62A.4A-404, permits a bank to take action upon "reasonable doubt" concerning his right to the funds.

[7] RCW 30.22 *et seq.* has been recodified as RCW 30A.22 *et seq.*, effective January 5, 2015. In an effort to remain consistent with the Appellant's opening brief, we will refer to the statute as originally codified.

> previously withdrawn from the account, or in the event the financial institution is otherwise uncertain as to who is entitled to the funds pursuant to the contract of deposit. . .

RCW 30.22.210 is intended to protect a bank from incurring liability in a dispute between persons claiming interest in a bank account. The provision states that a bank is not required to make a payment where it knows of a dispute. The provision does not, however, prohibit a bank from making any payment, nor does it establish a prerequisite level of knowledge for a bank's decision to make a payment of funds. RCW 30.22.210 does not apply to the facts of this case and McClain's reliance upon it is entirely misplaced.

2. A Genuine Issue of Material Fact is More than a Mere Dispute

McClain misapplies CR 56 where it refers to a genuine issue of material fact. McClain identifies numerous instances in which he has disputed propositions advanced by 1st Security and claims that the mere existence of those disputes should have sufficed to defeat summary judgment. He draws no distinction between a legal dispute or an immaterial dispute of fact, on the one hand, and a genuine issue of material fact arising from the admissible evidence submitted by the parties, on the other. Only the latter has significance under CR 56.

McClain has identified no genuine issue of material fact arising from admissible evidence.

3. There is no Claim for Relief for Fraud in this Case

Another example of McClain taking language out of context is found in new argument, raised for the first time on appeal, that 1st Security must plead and prove common law fraud. No party to this case has asserted a claim for relief for fraud. A fraud was perpetrated on Comcast and Cox, neither of whom are parties to this case. That fact is referenced throughout this case. They were undeniably the victims of an internet fraud when their vendor payments were diverted to the Hanover/McClain account by someone pretending to be their vendor, Arris. The fact of that fraud is not a necessary component of 1st Security's defenses or its position on summary judgment.

The use of the word "fraud" to describe the internet scheme does not invoke a legal requirement that 1st Security plead and prove common law fraud. Indeed, 1st Security's is under no obligation to prove that McClain or Hanover participated in the internet fraud (even if their involvement is reasonably inferred). On summary judgment, "fraud" was used to describe the set of facts that led to the erroneous deposits and 1st

Security's actions in response thereto. No requirement exists that 1st Security satisfy CR 9(b) in this instance.

F. McClain's Record Contains Extensive Material Not Proper for Consideration Under RAP 9.12.

McClain has taken appeal only from the trial court's order on summary judgment. See Notice of Appeal.[8] RAP 9.12 defines and limits the record on appeal from a summary judgment:

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12.

McClain designated extensive materials for his appellate record that were not before the trial court. Some of them post-dated the summary judgment by more than a year. Some were stricken by the court. Such material cannot be included before this Court under RAP 9.12. Although the final version of McClain's Opening Brief makes only limited

[8] Sub number 153, designated by 1st Security for this appellate record on September 15, 2015 but not yet marked as Clerk's Papers as of the date Respondent's Brief is being submitted.

references to those improperly designated items, they should not be included in the record on appeal, pursuant to RAP 9.12.

The specific items improperly designated include the following:

CP 1-80 consists of a Motion and Declaration filed by McClain on December 23, 2013, twenty-three months after the summary judgment order being appealed here.

CP 133-141 is a Motion to Strike filed by McClain in connection with a his Motion to Dismiss Counterclaim. Neither of those motions is on appeal and the documents identified at CP 133-141 are not reflected in the summary judgment order as having been considered by the trial court.

CP 153-160 is a Reply on McClain's Motion to Dismiss Counterclaim. For the same reasons stated in the preceding paragraph, these documents are not properly part of the record.

CP 203-204 is a Declaration of Jonathan McClain, McClain's son. It is not reflected on the summary judgment order under appeal as having been considered by the trial court.

CP 294-299 is a Motion to Strike unrelated to the summary judgment proceeding. It is not reflected on the summary judgment order as having been considered by the trial court.

CP 300-305 is McClain's Reply also unrelated to the summary judgment proceeding. For the same reasons, these documents are not part of the record under RAP 9.12.

G. The Court Should Award 1st Security its Attorney's Fees and Costs Incurred on Appeal

1st Security also requests an award of attorney's fees and expenses for McClain's filing of a frivolous lawsuit not grounded in fact or law. CR 11.

V. CONCLUSION

The trial court did not err in granting summary judgment dismissal of McClain's claims for conversion, breach of fiduciary duty and violation of due process. The trial court properly found that McClain failed to prove any of elements of conversion, when failure to prove any one of the elements is fatal to the claim. The claim of breach of fiduciary duty was properly dismissed because 1st Security owed no such duty to McClain. Finally, the violation of due process claim was properly dismissed because McClain filed to produce any evidence of government involvement in the transaction.

This appeal boils down to a shameless attempt by McClain to profit from a fraud perpetrated against two innocent companies. He utterly fails to show any entitlement to the stolen funds and his story

regarding a diesel fuel contract is patently absurd. Despite his extensive experience as a pro se litigant and the considerable length of his opening brief, McClain presents little admissible facts or substantive legal argument in support of his claims. Indeed, he has virtually abandoned on appeal his claims for breach of fiduciary duty and violation of due process. The argument that he does present is circuitous, confusing and difficult to comprehend. Many of his legal arguments are conclusions for which he provides no factual or legal basis. He cites cases and statutes for propositions that are not supported therein. He attempts to expand the record on appeal by citing to records not appropriately before this Court or that were suppressed by the trial court. Once the Court wades through the breadth of McClain's submissions, it can only conclude that this case is a brazen money grab. This Court should affirm the judgment below and award 1st Security the attorney's fees and costs incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 16th day of Sept., 2015.

McKAY HUFFINGTON & TYLER, PLLC

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Attorneys for Respondent 1st Security Bank of Washington

DECLARATION OF SERVICE

On September 16, 2015, I caused to be transmitted via U.S. Mail, postage pre-paid, a copy of the attached BRIEF OF RESPONDENT on the following:

Charles V. McClain
18012 – 31st Ave. NE, Unit A
Arlington, WA 98223

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 16th day of September 2015, at Bellevue, Washington.

BMcKay
William T. McKay, WSBA 17496