Court of Appeals No. 73190-4-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

Supreme Court No. 93104-6

CHARLES V. MCCLAIN, III, *Pro se*

Appellant/Petitioner

vs.

1st SECURITY BANK
OF WASHINGTON

Respondent

APPELANT'S INFORMAL REPLY TO RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONAL REVIEW

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I. INTRODUCTION

COMES NOW, Charles V. McClain, III, *Pro se*, with his Reply to Respondent's Answer to Petition for Review. Petitioner respectfully requests oral arguments. For the Court's convenience Appellant will follow the outline of Respondent and address only those statements that are created from whole cloth, in contradiction of sworn discovery received from Respondent, misstatements, lies and omissions. Appellant adopts, incorporates by reference, and restates the facts contained within all pleadings in this action.

Appellant's pursuit is for justice and in keeping with that them exposing Respondent's illegal actions, violations of Appellant's contract with Respondent and the fraud upon the Courts.

Appellant was an accountholder with Respondents for at least two years even adding his son to his account for about a year prior to Harrison Hanover's (Hereinafter Hanover) account being opened in 2009.

Appellant was added to Hanover's account at about 9:00am on Friday December 11, 2009. Appellant is not an opportunist. Appellant is a former U.S. Marine, Honorably discharged after almost ten years of service for a medical issue and now totally disabled and unable to work. A father of two adult children one of which has Congestive Heart Failure (CHF) and Muscular Dystrophy (FSHMD) as does his father the

Appellant. Hanover had agreed to give Appellant half his income in turn for Appellant's having saved his life on three occasions. Also, Hanover was aware of Appellant's disabilities and wanted to assure that once the disabilities progressed that Appellant and his family were taken care of.

Appellant and Hanover were cleared by the U.S. Secret Service, FBI and a federal grand jury. Fraud has never been proven in Washington or anywhere else. Whether a fraud was committed or not is totally irrelevant to this action, unless there is proof that Appellant was either a participant, had knowledge of or the mastermind. This is the standard set by law.

Respondent's claims again differs from their sworn discovery and their pleadings to the Courts. Respondent claimed no determination of ownership or Appellant's entitlement to the funds in his account was made by Respondent. All the lower Courts have ignored the inconsistencies in Respondent's pleadings, failed to allow Appellant to go to trial on a breach of contract claim which was identified by both the Respondent and the Snohomish County Court in open court. Appellant attempted to amend his complaint to include Breach of Contract and CPA violations but the Commissioner denied Appellant's request. The lower Court's failed to follow the direction of U.S. Supreme Court's rulings. Just because Appellant has no funds to hire a lawyer does not absolve the Courts to

ignore inconsistencies and misleading interpretation of the law made by Respondent or deny Appellant his day in Court in front of a jury.

Due to the fact Appellant has no funds to hire a lawyer and must do his best to prosecute his action on his own it doesn't allow the normal strategy of most big corporations or businesses to bankrupt the accuser. Appellant told Respondent that he would not quit until justice was done, thus, Respondent wanting legal fees even though Respondent has been held whole harmless for their actions regarding Appellant, as they were given Letters of Indemnification from the parties involved and have not suffered any cost or legal fees, but the Appeals Court (COA) awarded fees anyway. Respondent stated in sworn discovery that it would not return the funds to the other parties (Depositors) without first being given the Indemnification. Thus, a *defacto* admission of liability.

Appellant has endured both the Respondent's insults as well as those of the COA. Appellant has been forced into bankruptcy before due to unfair treatment by the justice system.

This Court should grant Appellant's request for review and oral arguments, or in the alternative remand for trial on Appellant's Breach of Contract claim.

II. STATEMENT OF FACTS

Hanover's, as well as Appellant's, past was deemed irrelevant by

the trial Court and appears in the transcript, but Respondent continues to disregard judicial estopple. Appellant will not spend a lot of this Court's valuable time going over the past.

Appellant continues to prosecute this action in order to get it before a jury. The Court's continually disregard the direction of the U. S. Supreme Court's regarding *Pro se* litigants. Appellant is entitled to the following: Due Process provides that the "rights of *sui juris* litigants are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; **if a court can reasonably read pleadings to state valid claims on which a litigant could prevail, it should do so despite the failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements**." *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972); *Hoag v. MacDougall*, 454 U.S. 364, 70 L. Ed. 2d 551, 102 S. Ct. 700 (1982). (Emphasis Added)

The Superior Court should have and did recognize this is an action on contract, but refused to afford Appellant his day in Court on that issue. It should be noted that the Federal Court's decision referenced by Respondent did in fact, identify material facts that are in dispute between the Appellant and Respondent. (App. A-3, pgs. 12, lns. 12-25, pg. 13, lns. 1-19, pg. 14, lns. 1-7) This precludes the summary judgement decision by

Snohomish County Court. Appellant made legitimate objections at A-3, pg. 4, lns. 12-20, pg. 8, lns. 19-21, pg. 9, lns. 14-20, pg. 15, lns. 14-19 The Respondent and their Counsel through their misconduct, unethical, dishonest, deceitful and illegal actions have misrepresented, the facts, the issues, the law and have contradicted their own sworn statements that were provided in discovery to Appellant and pleaded the same to the Courts. In the interest of justice the Respondent cannot be allowed to perjure itself to avoid a trial by jury to decide the facts. The trial Court and the COA failed to follow the direction of the U.S. Supreme Court. This allows for Review by this Court.

Additionally, Respondent has failed to address the issue of Appellant's bank statement in its answer. Pursuant to CR 8(d) Effect of Failure to Deny. Thus, Respondent has agreed that an addition deposit of over $4.6 million dollars was placed into Appellant's account in December of 2009. This is the reason the bank statement shows a total of $9,323,583.08 in deposits for December of 2009. It is well established in common law that voluntary deposits to a bank account is in fact a gift. Respondent is liable pursuant to the highest law of the land the U.S. Supreme Court for that amount less withdrawals by account holders. *See Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992) **("[a] person with an account at a bank enjoys a claim against the bank for**

funds in an amount equal to the account balance."). The facts and the law can be no clearer than this. The legal doctrine of *Stare decisis* requires all lower Courts to follow the rulings of the U.S. Supreme Court.

Appellant has filed lawsuits to protect his rights or the rights of his family. To the best of Appellant's memory he has that right. Appellant has never practiced law nor has he forged a judge's signature.

A. The Deposit of Fraudulently Misdirected Funds.

Respondent in this section is using smoke and mirrors. The fact the funds were misdirected is of no bearing in this action according to the law and Appellant's contract. The issues here are Respondent's actions in removing all funds from Appellant's account and the seizure of $475,000.00 from the bank account of a foreign national in a foreign country. The fact it was an intermediary bank is of no consequence according to the U.S. Supreme Court in *Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014) it just means both parties committed money laundering, wire and bank fraud.

Appellant did withdraw some funds on December 11, 2009, however, the Court should take Judicial Notice that Respondent is not requesting those funds be returned. The real question is why. Because once withdrawn title passes to the person that withdrew the money. Hence when the funds were wired out of the Country Hanover, obtained all rights

and title to the funds. Respondent agreed to this in their pleading "Defendant's Response to Plaintiff's Motion for Summary Judgement by stating "*As co-owner of the Account, Hanover was authorized to make withdrawals. Huffington Dec., Exhibit O. Upon removal of the funds, all right title and interest thereto were vested in Hanover not McClain.*" This statement verifies both ownership of the account, the right to the funds contained within the account and that upon withdrawal all rights, title and interest are the accountholders. That being the case How did Respondent seize the $475,000.00 from a foreign nationals account in a bank outside this Country. Respondent again demanded a Letter of Indemnification prior to the return of the $475,000.00 to Cox Communications.

Hanover was wrongly convicted in Nicaragua along with so called co-conspirators. Those co-conspirators were acquitted of all charges as would Hanover if he were still alive.

B. How the Fraudulent Scheme Worked.

Appellant cannot respond to this part of Respondent's answer as Appellant has no actual knowledge of how or who conducted whatever this was and neither does Respondent. But again as stated earlier it does not matter to the issues of Appellant or the law supporting Appellant's position. Respondent froze the account and breached Appellant's contract.

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

Appellant did attempt to withdraw several cashier's checks. None of those checks were made out to Appellant, nor did appellant attempt to withdraw cash. In fact, one check was for the Boys and Girls Club for $100,000.00 for Christmas. If you believed Respondent, Appellant is a crook.

Respondent's actions violated the contract Appellant has with Respondent, as discussed in the Petition for Review. Additionally, Respondent did not have "Actual Knowledge" as required by statute. (RCW 30A.22.210) which Respondent pleads does not apply to Respondent. Appellant disagrees. Also, no written notice was supplied to Appellant, as per the statute identified above.

D. Appellant Offered No Evidence Disputing the Fact that Comcast and Cox Deposited the Funds

Appellant has disputed the reason for the deposits, but again with the smoke and mirrors of Respondent. Pursuant to the contract with Respondent and the fact that Respondent stated in discover that *"Defendant is unaware of any document, contract, ACH or NACHA policy that required it to return the ACH deposits to the ODFI's."* and response to admissions denying same. However, Respondent continues to plead to

the Courts that it acted properly due to ACH, NACH and Appellant's contract. Again, Respondent contradicts sworn discovery.

Respondent refuses to follow the law of the land or Washington State. Appellant has spent over three years researching the law pertinent to this action. Where the money came from is irrelevant to this action and the conduct of Respondent. Frankly, Appellant was surprised by the law also. Basically it states that when a third party is given money and accepts that money in good faith, for valuable consideration and with no knowledge of wrongdoing, as Appellant and Hanover did here, those third parties obtain clear title to the funds. One who receives money in good conscious and has practiced no deceit or unfairness in receiving it is under no legal obligation to return it to one from whom it's been obtained by deceit on the part of another. *Transamerica Insurance Company v. Long,* 318 F. Supp. 156, (W.D. Pa. 1970) Petitioner meets the standards of the above mentioned cases.

One who receives money in good conscious and has practiced no deceit or unfairness in receiving it is under no legal obligation to return it to one from whom it's been obtained by deceit on the part of another. *Transamerica Insurance Company v. Long,* 318 F. Supp. 156, (W.D. Pa. 1970) **After stolen money has been negotiated, the victim owner cannot recover a like amount from a third party recipient unless it**

can be proven that the recipient had prior knowledge that the money was stolen. It is absolutely necessary for commerce that the one who receives money is not put under inquiry as to the source. It is generally impractical to discovery the source of money, and for this reason, **one who receives money in good faith for valuable consideration prevails over the victim.** *James Talcott, Incorporated v. Roy D. Warren Commercial Incorporated*, 171 S.E. 2d. 907, (GA Ct. App. 1969) This case is directly on point *Go-Best Assets Limited v. Citizens Bank of Massachusetts*, 463 Mass. 50 (July 30, 2012)(Emphasis Added) the Court stated the following;

> Where a bank has a duty of care, the duty is to take reasonable steps to prevent the misappropriation. When one looks pragmatically at what would have been required here if Citizens Bank owed such a duty, it is easier to understand why we limit the duty to those rare circumstances where a bank has actual knowledge of an intended or apparent misappropriation. **Once Citizens Bank accepted Go-Best's payment orders, it was obligated under Article 4A of the Uniform Commercial Code,** adopted by the Legislature in 1991, G. L. c. 106, § 4A, inserted by St. 1991, c. 286, § 2, to pay the $5 million to the client account by the next business day. G. L. c. 106, § 4A-404 (a) ("bank is obliged
> to pay the amount of the order to the beneficiary of the order . . . on the payment date after the close of the funds transfer business day"). **Even if Go-Best had attempted to prevent payment to the**

client account by claiming that Goldings was not entitled to payment because of fraud or breach of contract (which Go-Best did not do here), the bank still is obligated to make the payment. See official comment 3 to U.C.C. § 4A-404, 2B (Part II) U.L.A. 98 (Master ed. 2002). *Go-Best Assets Limited v. Citizens Bank of Massachusetts*, 463 Mass. 50 (July 30, 2012) "Where a [Uniform Commercial Code] provision specifically defines parties' rights and remedies, it displaces analogous common-law theories of liability." Gossels v. Fleet Nat'l Bank, 453 Mass. 366, 370 (2009), and cases cited. See official comment to U.C.C. § 4A-102, 2B (Part II) U.L.A. 18 (Master ed. 2002) ("resort to principles of law or equity outside of Article 4A [of the Uniform Commercial Code] is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article").(Emphasis Added)

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.** (Emphasis Added)

Once Respondent accepted the payment order Respondent was obligated to pay Appellant and could not recover the alleged fraudulent funds from Appellant's account even when the originator claimed fraud or breach of contract. At this point in time only the payor has a claim. Here any Court action by the Payor was subverted by the payors getting Respondent FSBW to do their dirty work. Had the Respondent not violated Appellant's contract the payors would have had to sue Appellant and prove a fraud was committed which could not have been done as no one knows who sent the e-mails. This was avoided by the payors by providing Respondent FSBW with Letters of Indemnification. Appellant's claims are based in fact and law regardless of the misstated, misleading, whole cloth fabrications and perjuries contained within the Respondent's pleadings to the Courts.

The new approach of the Third Restatement is located in comment c to section 6. It states: **§ 6 Payment of Money Not Due: Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.** The parties (Payer's the ODFI's) that claim the money was erroneous deposited into Petitioner's (Recipient's) account with the Respondent have a claim against Appellant for those funds that Respondent took clear title by acceptance of the payment orders. That clear title passed to Appellant and Hanover and again to

Appellant upon the acceptance of half the funds from Hanover. Thus, making Hanover and Appellant third party recipients that accepted the funds for valuable consideration, in good faith and with no knowledge of wrongdoing (which is the standard set by the U.S. Supreme Court and common law)

Appellant's claims are based in fact and law regardless of the misstated, misleading, whole cloth fabrications and perjuries contained within the Respondent's pleadings to the Courts. **It is a rule of law that title to currency passes with delivery to the person who receives it in good faith and for valuable consideration.** *Rankin v. Chase National Bank*, 188 U.S. 557, 23 S. Ct. 372, 47 L. Ed. 594[6] (1903); *Knapp v. First Nat. Bank & Trust Co.*, 154 F.2d 395, 398-399 (10th Cir.1946). See also, *Holly v. Domestic & Foreign Missionary Society*, 180 U.S. 284, 21 S. Ct. 395, 45 L. Ed. 531 (1901); *State National Bank of Boston v. United States*, 114 U.S. 401, 5 S. Ct. 888, 29 L. Ed. 149 (1885); *In re Brainard Hotel Co.*, 75 F.2d 481 (2d Cir. 1935); Restatement, Restitution, § 173, comment n. (Emphasis Added)\

E. FSBW Contract Does not Provide for the Actions Taken

Appellant has previously addressed this issue but for the Court's convenience Appellant will restate here. Respondent is continually misleading the Courts and committing perjury. Respondent stated in

discovery that; ***"Respondent is unaware of any document, contract, ACH or NACHA policy that required it to return the ACH deposits to the ODFI's."*** As the Court is well aware discovery requests require a party to answer under oath. Respondent also stated under oath in discovery; ***"Respondent did not make a decision as to the ownership of funds."*** and ***"In addition, Respondent made no determination regarding plaintiff's property interest or lack thereof in the fraudulent deposits."*** This was stated under oath in discovery to avoid the application and portion of *Kalk v Security Pacific Bank*, 126 Wn. 2d. 346 (1995) not overturned in describing RCW 30.22.140 which states; **As long as a financial institution relies on the form of an account, as opposed to the actual ownership of the funds within the account, it is protected from liability.** (Emphasis Added) Here Respondent relied on the actual ownership of the funds in the account and thus is liable to Appellant.

F. Appellant did Sue for the Stated Claims

Appellant did attempt to add additional claims and in all honesty those additions should have been allowed. However, under *Haines* Appellant did not actually have to state the breach of contract claim as it was referenced time and again within Appellant's pleadings. The claim of Breach of Contract was recognized at the summary judgment hearing by

not only the Respondent but also the Court. Even so, Appellant was not allowed to proceed with that particular claim.

III. ARGUMENT

A. Appellant's Arguments DO in Fact meet the Criteria of RAP 13.4(b)

The decision of the COA does conflict with a decision of the U.S. Supreme Court. (More than one decision is in conflict). The decision is in conflict with *Haines*, *Hoag* and all other cases referencing the right of *Pro se* litigants.

This issue does involve issues of substantial public interest. Respondent is a business that believes it is above the law. It deals with the public daily. Respondent cannot be allowed to circumvent the law, commit multiple felonies, and disclose private financial information to any law enforcement agencies without first being served a subpoena and the violation of its own contract with depositors.

1. A Conflict Does Exist with the U.S. Supreme Court

Appellant will state that the decision of the COA was based on Respondent's misleading and whole cloth fabrications contained within its pleadings. The COA decision echoes the pleading of Respondent when it states *"Despite McClain's lack of any property interest, we note that 1st Security Bank had the legal justification under its contract with McClain*

to seize and return the funds." The specific portion of the contract is never disclosed.

2. Appellant's Constitutional Issue is Civil Conspiracy with U.S. Secret Service

Respondent's was assisted by the U.S. Secret Service with the seizure of the funds outside the Country which deprived Appellant of the use of the funds. Respondent is forced to be an agent of the Government in order to meet the requirements Banking Secrecy Act and several other statutes Banks must follow set out by the Government thus, FSBW is an agent of said government. Considering the actions taken by Respondent which resulted in the breaking of the law regarding money laundering, bank and wire fraud and the failure of prosecution for same. The bank fraud statute, 18 U.S.C. § 1344, provides: Whoever knowingly executes, or attempts to execute a scheme or artifice— (1) to defraud a financial institution; **or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.** (Emphasis Added)

In *Loughrin v. United States*, the Supreme Court construed the

second clause, and held that it does not require the government to prove that the defendant intended to defraud the bank. 134 S. Ct. 2384, 2387 (2014). Section 1344(2) targets schemes to obtain property held by the bank via misrepresentation to a third party, while § 1344(1) penalizes schemes to defraud the bank itself. See id. at 2389–92. The Supreme Court effectively required courts to treat the two clauses separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses. Id. at 2390, 2390 n.4.

3. There is an Issue of Public Interest.

Appellant has previously addressed this issue herein. Appellant did attempt to include the CPA violation but the Commissioner denied Appellant's motion to amend. Contractual and privacy are issues of Public Interest.

4. FSBW Must Follow RCW 30A *et seq.*

Respondent had the duty to follow Washington State law and the provisions of its contract. This issue was most recently addressed in *Sterling Savings Bank v. Phillip Murphy, et al,* No.: 29760-8-III (Jan. 2012) in which Sterling filed an Interpleader. "We note that a bank may, without liability, refuse to disburse any funds contained in the account to any . . . P.O.D. account beneficiary . . . until such time as . . . [t]he payment is authorized or directed by a court of proper jurisdiction. RCW

30.22.210(1)(b) (emphasis added). **Sterling's duty was to maintain the deposit account for Mr. Murphy according to the terms of the contract of deposit."** Here, Respondent failed in that very duty to Appellant consequently Respondent was and is liable to Appellant for their actions and pursuant to the highest law of the law the U.S. Supreme Court in *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992) Appellant has a claim up to the balance of his account verified by Respondent of over $9 Million Dollars through the submission in discovery of Appellant's bank statement by Respondent.

B. Trial Court Erred in Dismissing Appellant's Conversion Claim

Respondent willfully interfered with Appellant's account in violation of its contract and law. The U.S. Supreme Court trumps state court. *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992) gives Appellant a claim against Respondent and property interest in the deposit account.

Next Respondent's actions were not justified as it was not authorized by contract or ACH and NACH policies or guidelines. This is yet another whole cloth fabrication.

Hanover's declaration meeting the guidelines set forth by the rules

at the trial Court (Dkt 111) was in fact not stricken and has been identified previously in the transcript as not being considered even though Appellant brought it to the Court's attention.

Appellant has never made the argument of entitlement simply by the funds being deposited into the account.

C. Appellant Did in Fact Receive the Funds from Hanover in Good Faith

Respondent has never disputed Appellant's pleadings, Declarations or open Court mentioning "Good Faith" by stating Appellant did not receive the funds in good faith. That argument has never been made by Respondent until now thus, it is barred by rule. Additionally, where is the Declaration from Respondent stating that allegation. It does not exist.

Respondent cannot know whether Appellant received funds in good faith or not and certainly cannot state this issue this late in the action.

D RCW 30A.22 *et seq.* Does Apply to Respondent

Once again Respondent is trying to dispel a law that clearly applies. Apparently, Respondent cannot read their own pleading or the law. It clearly states that *"... 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 of funds contained in , or proposed to be withdrawn...*** *"*

Comcast and Cox are other persons under the law the statute applies. Respondent had no knowledge of the real owners according to discovery. That being said respondent should have held the funds as a disinterested third party until a Court ruled on the true owner of the funds per statute.

However, this would have required Comcast and Cox to plead fraud in a Court of law in Washington State. It would have been impossible for Comcast or Cox to prevail with all nine elements, as no one knows who committed the fraud if there was one.

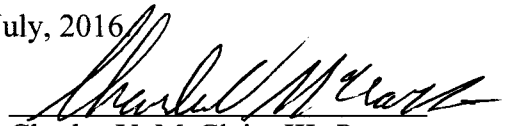
E. Appellant Request the Court to Deny Attorney's Fees

As stated previously Respondent has incurred no fees or cost due to the providing of the Letters of Indemnification by Comcast, Cox, Wells Fargo and J.P. Morgan Chase Bank.

IV. CONCLUSION

Appellant respectfully request the Court to grant the review and hold oral arguments or in the alternative remand for trial on Breach of Contract. If not, Petitioner, Appellant will be left with after six years with no remedy at law for the breach of contract by Respondent.

Respectfully Submitted this 20th day of July, 2016



Charles V. McClain, III, *Pro se*

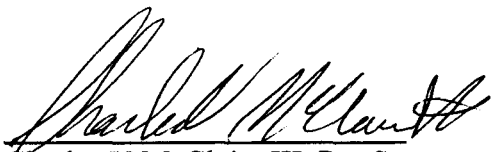
CERTIFICATE OF SERVICE

I certify that on this 20th, day of July 2016, I caused the **APPELANT'S INFORMAL REPLY TO RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONAL REVIEW** to be delivered by Priority Mail to:

TEMPLE OF JUSTICE
P.O. Box 40929
Olympia, WA 98504-0929
Attn: Clerk of the Court

And a copy by U.S. Mail to:

McKay Huffington & Tyler, PLLC.
701 5th Avenue Ste. 4400
Seattle, WA 98104
Attn: Jean Huffington
William McKay



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