IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TES LIQUIDATING, INC., formerly TACOMA ELECTRIC SUPPLY LLC, a Washington corporation, Respondents, v. MARK E. SMITH, individually: and McKENZIE ROTHWELL BARLOW & KORPI, P.S., a Washington Professional Service Corporation, Appellants.	No. 38358-6-II UNPUBLISHED OPINION

Hunt, J. — Mark Smith and his law firm, McKenzie, Rothwell, Barlow & Korpi, P.S., (collectively Smith), appeal the superior court's grant of summary judgment to TES Liquidating, Inc., formerly Tacoma Electric Supply, LLC (Tacoma Electric), and denial of their motion for summary judgment in a lawsuit relating to a financial dispute with Tacoma Electric and Frontier Bank. The superior court ruled that Smith was liable to Tacoma Electric for approximately $54,000 in damages based on Smith's malicious prosecution, abuse of process, and interference

with business expectancy. Smith argues that he did not proximately cause the damages Tacoma Electric suffered, which instead resulted from Frontier's priority interest in the funds, wholly unrelated to Smith. We reverse.

FACTS

The underlying facts are undisputed. The essential issue on appeal is whether Smith proximately caused damages suffered by Tacoma Electric when, following Smith's baseless lawsuit on behalf of Local 191 International Brotherhood of Electrical Workers Joint Trust Funds (IBEW), money held in debtor Eagle Electric's Frontier account was dispersed to Frontier rather than to Tacoma Electric.

I. Background

Eagle, an electric supply company, held around $62,000 in a company account at Frontier. Three of Eagle's creditors claimed these funds: Tacoma Electric, IBEW, and Frontier. Frontier's security interest in these funds originated in January 2003, when Frontier loaned Eagle $350,000, which the funds partly secured.

Tacoma Electric's interest in these funds originated more than two years later when, in October 2005, it obtained a $77,000 judgment against Eagle. To collect on this judgment, Tacoma Electric filed and served a writ of garnishment on Frontier to access funds in Eagle's account. Frontier returned the form answer to the writ, noting that Eagle kept $62,000 in this account. But before Tacoma Electric could garnish Eagle's account, in December 2005, IBEW moved to intervene through its attorney, Smith. IBEW asserted that they held a perfected security interest in Eagle's account dating back to June 2005.

At a December 16, 2005 superior court hearing on IBEW's intervention motion, Smith produced an undated document entitled "Security Agreement" between IBEW and Eagle. Smith did not explicitly indicate that these two parties had signed this security agreement before entering Tacoma Electric's $77,000 judgment against Eagle. Nevertheless, Smith clearly implied in the superior court that the security agreement had been signed before entry of Tacoma Electric's judgment, thereby apparently giving IBEW's perfected security interest priority over Tacoma Electric's judgment.

In fact, however, the security agreement was not signed "until December 2005," after Tacoma Electric's October 2005 judgment; thus, IBEW's perfected security interest did not automatically have priority over Tacoma Electric's judgment. Br. of Appellant at 3. Nonetheless, in light of Smith's motion to intervene on behalf of IBEW and the security agreement's apparent granting priority to IBEW, the superior court postponed ruling on IBEW's intervention to give the parties time to brief issues that the security agreement presented.

Before the superior court announced its ruling on the intervention, Frontier filed an amended answer to Tacoma Electric's writ of garnishment of Eagle's funds. In its amended answer, Frontier asserted a first priority security interest in the funds in Eagle's account, based on a $300,000 loan that Eagle had previously secured from Frontier. *See* Frontier's promissory note, commercial security agreement, and UCC financing statement. Clerk's Papers (CP) at 44-50.

Thereafter, the superior court denied IBEW's motion to intervene, ruled that "Frontier Bank holds a first position security interest on the [Eagle account]," and entered judgment in Frontier's favor. Under a court-approved stipulation with Frontier, in return for receiving $8,000

from Eagle's Frontier account, Tacoma Electric agreed to release its garnishment lien on Eagle's remaining $54,000, which was to go to Frontier. CP at 121-22.[1]

II. Tacoma Electric's Lawsuit against Smith

In February 2008, Tacoma Electric sued Smith for (1) malicious prosecution, (2) abuse of process, and (3) tortious interference with business expectancy in connection with the above financial dispute. Tacoma Electric sought damages to recover the $54,000, plus pre-judgment interest, that Frontier received when Smith's intervention on IBEW's behalf allegedly "caused" Tacoma Electric to lose its garnishment lien on Eagle's funds. Tacoma Electric also sought damages it "would have recovered in the garnishment proceeding but for the false statements and other improper conduct of [Smith]." CP at 7, 8, 10.

Smith moved for summary judgment. Tacoma Electric filed a cross motion for summary judgment. In August 2008, a different superior court department heard argument on these motions, denied Smith's motion, and granted Tacoma Electric's cross-motion for summary judgment.[2]

Smith appeals.

[1] The parties did not designate the signed order as part of the record on appeal. Instead, the parties included only an unsigned copy attached as an exhibit in support of Tacoma Electric's cross motion for summary judgment. *See* CP at 96-97, 121-25. Because neither party appears to object to our considering this unsigned copy of the order, and it is the only version before us on appeal, we refer to this copy.

[2] The superior court reasoned that Smith's conduct in intervening "caused the judgment not to be entered" in Tacoma Electric's favor. Verbatim Report of Motion Proceeding (VRP) (Aug. 22, 2008) at 22-23.

ANALYSIS

Smith argues that the superior court erred by denying its motion for summary judgment and by granting Tacoma Electric's motion for summary judgment because it did not cause Tacoma Electric's losses, which resulted from Frontier's priority interest in the funds in question. We agree.

I. Standard of Review

We review summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Because Tacoma Electric failed to establish that Smith caused damages under any of its three tort claims, summary judgment for Tacoma Electric was not appropriate; conversely, the superior court should have granted Smith's motion for summary judgment.

II. Summary Judgment for Tacoma Electric—Proximate Cause

Smith argues that the superior court erred by granting Tacoma Electric's motion for summary judgment because Tacoma Electric "suffered no cognizable harm" that Smith proximately caused. Br. of Appellant at 10-12. We agree.

In order to recover damages under any of its three legal theories—malicious prosecution,[3]

[3] To maintain an action for malicious prosecution, "plaintiff [must have] suffered injury or damage

abuse of process,[4] and interference with business expectancy[5]—Tacoma Electric has to show that Smith's conduct "direct[ly] and proximate[ly]" caused Tacoma Electric's loss of access to Eagle's Frontier account funds, as it asserted in its complaint. CP at 65-67. Tacoma Electric failed to make such a showing.

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as a result of the prosecution." *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 962-63, 603 P.2d 828 (1979) (citation omitted). "[T]he plaintiff must allege and prove the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution." *See Gem Trading*, 92 Wn.2d at 962-63.

[4] Washington courts adopt the Restatement (Second) of Torts definition of "abuse of process," imposing liability only for "harm caused by the abuse of process." Restatement (Second) of Torts § 682, at 474 (1977). "The essential elements are (1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings. The crucial inquiry is whether the judicial system's process, made available to insure the presence of the defendant or his or her property in court, has been misused to achieve another, inappropriate end. One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *See Mark v. Williams*, 45 Wn. App. 182, 191-92, 724 P.2d 428 (1986) (citation omitted) (citing Restatement. *supra,* § 682, at 474.

[5] *Resultant damages* are a necessary element to sustain a claim of "tortious interference with contractual relations or business expectancy. The five elements are: (1) [t]he existence of a valid contractual relationship or business expectancy; (2) [t]hat defendants had knowledge of that relationship; (3) [a]n intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) [t]hat defendants interfered for an improper purpose or used improper means; and (5) [r]esultant damages." *See Commodore v. University Mechanical Contractors, Inc*., 120 Wn.2d 120, 137, 839 P.2d 314 (1992). As noted above, Tacoma Electric's loss of access to Eagle's funds did not "result" from Smith's intervention, but rather from Frontier's priority interest in the funds.

A. "Before and After" Approach

Tacoma Electric asserts (1) before Smith (on IBEW's behalf) intervened in its garnishment action, it would have recouped the $62,000 in Eagle's Frontier account as partial payment of its $77,000 judgment against Eagle; (2) but after Smith's intervention, Frontier amended its "form" answer to the garnishment petition to assert its superior secured interest in Eagle's funds, thus, displacing Tacoma Electric's claim to these funds; and (3) " the 'before and after' dollar values clearly show damage." Br. of Resp't at 28. Tacoma Electric's overly simplified "before and after" approach to causation and damages ignores basic tenets of causation:

> Proximate causation is divided into two elements: cause in fact and legal causation . . . . *Cause in fact* refers to the actual, "but for," cause of the injury, i.e., "but for" the defendant's actions the plaintiff would not be injured.
> The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon 'mixed considerations of logic, common sense, justice, policy, and precedent.'

Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 478-79, 951 P.2d 749 (1998) (citations omitted).

Here, there is no legally actionable connection between Smith's use of legal process on behalf of its client and the subordination of Tacoma Electric's interest in Eagle's funds to Frontier's secured interest in the funds, which predated Tacoma Electric's interest by some two and a half years. Two and a half years before Tacoma Electric's $77,000 judgment against Eagle and its garnishment action against Eagle's Frontier Bank account, Frontier had taken a first priority interest in Eagle's funds to secure a $350,000 loan. As Smith analogized in the following

illustration:

> [Tacoma Electric] [and IBEW for that matter] found Frontier's wallet on the street. When Frontier realized the loss, or as [Tacoma Electric] theorizes, when Frontier saw [Tacoma Electric] and IBEW fighting over it, Frontier took the money back. Frontier Bank was always the rightful owner.

Br. of Appellant at 12 (alluding to the factual scenario in *Omicron Co. v. U.S. Fidelity & Guar. Co.*, 21 Wn.2d 703, 152 P.2d 716 (1944)).[6] It was Frontier's senior interest in Eagle's funds that displaced Tacoma Electric's claim to the funds, not Smith's attempt to intervene on behalf of its client, IBEW.

B. "But For" Approach

Similarly, Tacoma Electric asserts that *but for* Smith's use of legal process to intervene in its garnishment action, it would have recouped the funds in Eagle's Frontier account under the writ of garnishment. Neither the facts nor the law support this assertion. On the contrary, it is clear from the record that, regardless of Smith's intervention, Tacoma Electric neither acquired nor possibly could have acquired an interest in Eagle's funds senior to Frontier's preexisting secured interest, as the superior court incorrectly believed.[7]

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[6] Tacoma Electric argues that Smith's filing of IBEW's motion to intervene caused Frontier to realize its error in its original answer to Tacoma Electric's writ of garnishment complaint and to amend its answer to assert Frontier's superior interest to Eagle's funds. Instead of citing support from the record, Tacoma Electric relies on a "before and after" approach in its attempt to prove causation: "*Before* [Smith's] wrongful attempt to intervene, [Tacoma Electric] had nearly completed the process of garnishing [Eagle's] account. *After* [Smith's] wrongful attempt to intervene, [Tacoma Electric] lost its ability to successfully garnish the account." Br. of Resp't. at 21. Furthermore, the record shows that Frontier realized the error on its own and promptly filed an amended answer, asserting its prior secured interest in Eagle's outstanding $350,000 loan.

[7] *See,* for example, the superior court's comment: "I think [Tacoma Electric] had a property interest." VRP (Aug. 22, 2008) at 15.

The record before the superior court on summary judgment shows that any damages Tacoma Electric suffered proximately resulted from Frontier's senior interest in Eagle's funds, not from Smith's intervention in Tacoma Electric's garnishment action on IBEW's behalf. Because Tacoma Electric fails to show a question of fact about whether Smith's actions proximately caused it to lose its garnishment claim on Eagle's funds, Tacoma Electric cannot establish the last element of any of its three tort claims—damages resulting from Smith's actions.

Because, therefore, the facts do not support any of Tacoma Electric's causes of action, all three legal theories of recovery fail. Accordingly, we need not address the remaining elements of these three alleged torts. We hold, therefore, that Tacoma Electric was not entitled to summary judgment.

III. Denial of Smith's Motion for Summary Judgment

Tacoma Electric failed to demonstrate proximate causation for any of its three tort claims against Smith. The record shows not only that the trial court erred in granting summary judgment to Tacoma Electric, but also that there is no genuine issue of material fact justifying going forward on Tacoma Electric's action against Smith. We hold, therefore, that Smith is entitled to summary judgment as a matter of law.

We reverse summary judgment in favor of Tacoma Electric and grant summary judgment in favor of Smith.[8]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, J.

Bridgewater, J.

[8] Neither party requested attorney fees on appeal under RAP 18.1(b). Thus, we do not consider them.