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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38358-6-II

COURT OF APPEALS 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 & KORPL, P.S., a Washington professional service,

Appellants.

APPELLANTS' REPLY BRIEF

Sam B. Franklin, WSBA No. 1903
William L. Cameron, WSBA No. 5108
Attorney for Appellants

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I. STATEMENT OF THE CASE

The appellants moved for summary judgment in the Superior Court asserting (1) that the plaintiff/respondent could not prove all of the requisite elements for any one of the three causes of action advanced, CP 71-78, and (2) that the claimed breach of duty giving rise to liability, *i.e.*, the alleged misrepresentation of material facts by defendant Smith in the course of judicial proceedings, did not provide a basis for civil liability to the opposing party. CP 133-34 Appellants identified multiple fatal deficiencies in each of plaintiff/respondent's claims. CP 71-78, 130-31, 135-43. The common element missing in each instance was plaintiff/respondent's inability to prove proximate cause.

II. ARGUMENT

A. Proximate Cause – Speculation.

In *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), the Supreme Court opinion defines the proper standard for determining proximate cause in a legal malpractice case. The same rationale applies in every claim seeking recovery of economic loss. The court said:

This case involves a legal malpractice claim against an attorney for failure to file timely a petition for review with this court of a Court of Appeals' decision. The issues presented concern the proper standard for determining proximate cause in a legal malpractice action. The trial court concluded that proximate cause was a question for the jury and instructed the jury to decide whether the attorney's negligence was a substantial factor in causing the client's

loss and whether the client lost a chance to recover. We hold this was error and reverse.

104 Wn.2d at 255.

The *Daugert* court proceeded to hold as follows: (1) that the trial court and not the jury was the appropriate decision maker on the cause-in-fact element of proximate cause when the issue was probability of reversal of a trial court decision by an appellate court; (2) the loss of a chance at recovery is not cognizable when cause-in-fact can be determined as a matter of law; and (3) the substantial factors test was rejected and a strict “but for” analysis of proximate cause with tort claims involving economic loss was applied.

In *Daugert*, the central issue of causation was whether an appellate court would have provided relief from the lower court order in the underlying case. Here, the issue is whether or not plaintiff/respondent could ever prove that “but for” defendant/appellants’ intervention in the underlying action that it would have obtained a judgment on the garnishee defendants’ (Frontier Bank) initial answer to the writ of garnishment and would have thereafter prevailed against the bank and its senior lien status to collect the entire amount of its judgment against the judgment debtor, Eagle.

The record before the trial court and this court is devoid of support for that claim. The bank filed its initial answer in responses to the writ of

garnishment on December 6, 2005. CP 28-30. RCW 6.27.210 gave the defendant judgment debtor, Eagle, 20 days to controvert the answer if it wished. The twentieth day would have been Monday, December 26, 2005. Since this was a holiday, the first day after Christmas, Eagle could have filed a controversion anytime through the close of the business day December 27, 2005. Thus, the first day that respondent could even have moved for entry of judgment on the pleadings pursuant to CR 12(c) would have been December 28, 2005. CR 12© provides in relevant part:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The pleadings would not have closed until the time for controversion had elapsed, December 27, 2005.

There is nothing in the record to support the assertion that respondent ever sought entry of judgment on garnishee defendant's initial answer at any time. Certainly there is no basis whatsoever for respondent's claim that judgment would have entered on December 16, 2005 but for appellants' intervention. There was nothing before the court by way of pleading, proffered judgement or otherwise to support it nor could there have been until such time as the pleadings were closed per CR 12(c), on December 27, 2005. CP 32-40, 145-60.

Furthermore, at the court hearing on December 16, 2005, the defendant/appellant Mark Smith provided to the court and to counsel for respondent TES, a copy of the security agreement which forms the basis for respondents' claim of misrepresentation. That agreement provided in open court clearly reflects on its face that it was signed December 15, 2005, the day before the court hearing. CP 114-18.

Inexplicably, between December 16, 2005, when the late signed security agreement was provided or made available to counsel for respondent TES and the date on which it could have moved for judgment on the pleadings, December 28, 2005, no action was taken, nor was any action taken to enter judgment thereafter. On January 6, 2007, garnishee defendant, Frontier Bank, filed its amended answer to writ of garnishment setting forth affirmatively that the debt owed to judgment debtor Eagle was subject to a first priority security interest in favor of the bank as security for a loan in excess of \$300,000. CP 42-51. Again, not even by this late date had respondent TES taken any steps whatsoever to enter judgment on the initial Answer filed one month before. This inaction is inexplicable given the clear position taken by counsel for TES in open court on December 16, 2005, when counsel for TES stated among other things:

Assuming that he does have a perfected security interest, the question still remains, why - - what legal basis does he

have from preventing us from going forward? We acknowledge that he had - - if his clients have perfected security interest in the proceeds, we'd take the proceeds of the garnishment subject to a trust for their benefit.

CP 152.

This statement by counsel for TES is significant in two respects. First, counsel for TES acknowledges that nothing prevented him from proceeding ahead by the normal procedure of seeking entry of judgment on an Answer, since the court denied IBEW's motion for an injunction. CP 156. Second, counsel concedes that any judgment which was entered would be subordinate to any pre-existing perfected security interest, including that of the bank. CP 152

Respondent's assertion that but for appellants' intervention that it would obtain a judgment is not merely speculative, it is in fact conclusively refuted by what actually happened in the underlying case. Arguments or assertions as to what would have happened if circumstances had been different must be backed up by objective actions or other evidence. *See State v. Blanchey*, 75 Wn.2d 926, 935-36, 454 P.2d 841 (1969) where the defense attorney who challenged the adequacy of Miranda warnings was not allowed to state what he would have done if the defendant had requested counsel; "since the defendant did not make such a request, what the defendant would have done is speculative." In two recent legal malpractice cases, appellate courts have rejected assertions as

to what would have happened if circumstances had been different in the underlying case. In both instances the court dismissed claims because they were unsupported by demonstrative factual testimony.

In *Griswold v. Kilpatrick*, 107 Wn. App. 757, 27 P.3d 246 (2001) the court affirmed summary judgment dismissal in favor of the defendant. Plaintiff asserted that because he suffered an unrelated heart attack after the medical accident which formed the basis for a malpractice suit and before his allegedly dilatory attorney got around to negotiating settlement that the case lost value. Notwithstanding proffered expert opinion, the court said that there was insufficient evidence to support the claim.

Likewise in *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 147 P.2d 600 (2006), the court rejected self-serving testimony by the plaintiff that he would have not entered into a contract with an ultimately defaulting contractor had he been provided with adequate legal advice by his attorney. In the case underlying the instant case, there is no evidence whatsoever of any actions taken by the respondent TES to enter judgment against the garnishee defendant on its initial answer.

Respondent does not even attempt to argue or address the legal effect of a judgment on the initial answer had it been entered as between TES and the garnishee defendant. Respondent appears to have acknowledged in the transcript of December 16, 2005 before Judge

Larkin, that any such judgment would have been junior to the clearly superior lien of the bank. CP 152. Respondent has never presented either factual argument or legal authority for any claim that its judgment would have been superior to the bank's perfected security interest.

B. No Private Cause of Action.

The respondent has completely ignored the appellant's assertion that even with the most tendentious interpretation of the actions of the appellant Smith, that there is no private cause of action created thereby. Rather, respondent has contented itself with exaggerated statements as to appellant Smith's culpability. The only erroneous statement of fact by appellant Smith was in the initial motion filed December 6, 2005, in which he stated that the intervenor, IBEW, had a perfected security interest. CP 33. He discovered soon thereafter that that was incorrect. All statements made thereafter were factually correct, and advanced in support of IBEW's argument that the security related back to the original filing in June 2005. CP 149. On December 16, 2005, Smith presented to the Court, and for examination by opposing counsel, the signed Security Agreement, which, on its face, indicated that it had only been signed the day before, December 15, 2005. CP 114-18.. Smith's failure to affirmatively point this out to opposing counsel does not form the basis of civil liability under any authority known.

III. CONCLUSION

The respondent has failed to point to anything in the record that would support its conclusory statement that but for the intervention of the appellant that judgment would have entered in its favor against garnishee defendant, Frontier Bank, on December 16, 2005. Further, respondent has cited no authority to support the conclusion that any judgment entered in its favor in the underlying case would have been senior to Frontier Bank's perfected security interest.

Respondent has failed completely to provide the Court with any authority whatsoever to support its contention that its facts in the record support a private cause of action against opposing counsel in the underlying action. The Court should reverse the Trial Court ruling and enter judgment of dismissal with prejudice of all claims in favor of the appellant/defendant.

RESPECTFULLY SUBMITTED this 9 day of April 2009

LEE SMART, P.S., INC.

By: 

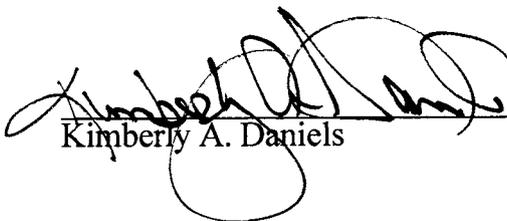
Sam B. Franklin, WSBA No. 1903
William L. Cameron, WSBA No. 5108
Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I caused service of the foregoing pleading via Legal Messenger on each and every attorney of record herein:

Mr. John Guadnola
Gordon Thomas Honeywell
1201 Pacific Avenue, Suite 2200
Tacoma, WA 98401

Dated this 9th day of April, 2009



Kimberly A. Daniels

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