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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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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.

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RESPONDENT'S OPENING BRIEF

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## I. INTRODUCTION

Washington state attorneys are held to a high standard of conduct. They are expected to act with competence and diligence, and are required to act with the utmost candor to both the tribunal and to opposing parties. They are officers of the court, and are expected to act accordingly.

Mark E. Smith (and his then-law firm, Smith, McKenzie, Rothwell & Barlow, P.S.) utterly failed to meet that standard. First, Mr. Smith wrongly alleged that his client had a perfected security interest senior to that of Respondent TES Liquidating (“TES”). Then, when forced to prove that the security interest both existed and had been perfected prior to the time TES’ judgment against Eagle Electric was entered, he submitted a document to the Superior Court that had *not* been in existence for months, as he represented, but had instead been created the night before the hearing and signed the morning of the hearing. This dishonest, unethical conduct put into motion a chain of events that ultimately caused a loss to Respondents of over \$54,000. Appellants now deny culpability for their actions, despite having previously acknowledged that Mr. Smith’s conduct was “wrongful” and worthy of censure.

Appellants’ arguments are illogical as well as misleading. They repeatedly misstate the law, attempt to assert the garnishee-Bank’s rights

for it, and ignore – or worse, excuse – Mr. Smith’s tortious conduct. The trial court saw through Appellants’ disingenuous arguments, and granted TES’ motion for summary judgment on each of its claims (tortious interference with a business expectancy, malicious prosecution, and abuse of process) on August 22, 2008. On this appeal Appellants again attempt to confuse the issues and steer the focus of the case away from the fraud Mr. Smith attempted to work in the trial court. This Court should not allow the deceptive and fraudulent nature of Mr. Smith’s conduct to be obscured by the misleading tactics used by Appellants in this appeal. Instead, this Court should look through their unfocused arguments and come to the same conclusion the trial court did: namely, that Mr. Smith and his firm must be held liable for his unquestionably unethical, damage-causing conduct.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES RELATING TO ASSIGNMENTS OF ERROR**

Appellants put forth two separate assignments of error: first, that the trial court erred in granting summary judgment to TES; and second, that the trial court erred in *not* granting summary judgment to Appellants. Appellants then identify five issues relating to these assignments of error. These are addressed in turn below:

**A. Appellants' First Issue Relating to Assignments of Error.**

Appellants first state that summary judgment in favor of TES was inappropriate because they contested "several of TES' factual allegations," and thus imply that there is an objective issue of fact to be resolved. In actuality, they are simply asserting that their own subjective disagreement with TES' statement of the facts (and with the reality of the case) is a sufficient basis upon which to avoid summary judgment. As will be demonstrated below, the material facts of this case are *not* in serious dispute, and the trial court therefore properly entered summary judgment in favor of TES with respect to each of its claims.

**B. Appellants' Second, Third, and Fourth Issues Relating to Assignments of Error.**

In their next three "issues relating to assignments of error," Appellants assert that TES failed to submit uncontested evidence to support each of the elements of its claims for malicious prosecution, abuse of process, and tortious interference with a business expectancy. Again, Appellants' real complaint is that they do not agree with the conclusions TES *and the trial court* believe the facts support. That clearly is not a sufficient basis upon which to avoid summary judgment. The trial court found that TES did, in fact, submit sufficient evidence to support each element of its three claims, and appropriately entered summary judgment in TES' favor on each of those claims.

**C. Appellants' Fifth Issue Relating to Assignments of Error.**

Finally, Appellants claim that it was error to "refuse to grant summary judgment on behalf of Smith." While there was no dispute as to material facts in this case, it was TES – not Smith – who was entitled to summary judgment. As is discussed below, the law clearly supports TES' position. The trial court was correct in refusing to grant Smith's motion for summary judgment.

**III. RESTATEMENT OF THE CASE**

Appellants' Opening Brief adequately explains only a portion of the facts of this case. Amazingly, their statement of the case never even hints at the brazen nature of Mr. Smith's fraudulent conduct, but instead implies that this is just a routine dispute over the law. Accordingly, a more complete statement of the case is necessary here.

The operative facts date back to October 28, 2005, when TES obtained a money judgment against Eagle Electric, Inc. in the amount of \$76,883.64. CP 99-101. Shortly after obtaining that judgment, TES filed and served a Writ of Garnishment on Frontier Bank, where Eagle Electric had a deposit account. CP 102-105. Frontier Bank answered the Writ of Garnishment with a statement that it was indebted to Eagle Electric in the amount of \$62,051.35, which represented the balance of Eagle Electric's

account at that institution. CP 106-108. The Bank indicated that it had no claim to the funds in the account.

As soon as it received Frontier Bank's answer, TES prepared to petition the court for entry of judgment against the garnishee-defendant bank. What should have been a simple, straightforward process, however, became anything but when defendant Mark Smith filed a motion to intervene in the case. At that time, Mr. Smith's firm represented certain trust funds of the International Brotherhood of Electrical Workers ("IBEW"), another of Eagle Electric's creditors.

In his motion (and, later, in open court) Mr. Smith asserted that IBEW had a security interest in the Frontier Bank account that was perfected on June 9, 2005, and thus argued that IBEW's claim to the account was senior to that of TES. CP 112-115. At a hearing held on December 16, 2005, Mr. Smith tendered to the trial court a document that he maintained proved the existence and the priority of the security interest his client asserted.<sup>1</sup> It was later discovered that this document *did not even exist* until the day before the hearing. Thus, IBEW's rights (if any) were necessarily junior to TES' rights as a judgment creditor. It is

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<sup>1</sup> Mr. Smith stated that his client had a security interest "evidenced by a security agreement signed by Eagle Electric – in fact, by Michael Cabaug who is the vice president – and a financing statement dated June 9<sup>th</sup>, 2005." CP 112, lines 15-18. In the context of this case this was clearly intended to imply to the court that the security agreement was signed on June 9, not just the financing statement.

inconceivable that Mr. Smith did not know his claim of priority was false. It is also clear that the garnishment judgment would have been entered that day if Mr. Smith had not deceived the court into thinking his client had a valid claim.

Although his motion to intervene was ultimately denied, Mr. Smith's attempt at intervention was not entirely fruitless, as it was enough to delay the proceedings. Neither the trial court nor opposing counsel realized at the hearing that the document was a recent fabrication, and the matter was deferred so the parties could determine the nature and extent of IBEW's claim. While that was going on, and for reasons that are not entirely clear but seem to involve meddling by Mr. Smith, Frontier Bank suddenly "realized" that it, too, had an interest in the account. CP 119-120. Because Mr. Smith had managed to delay the trial court's ruling on the garnishment proceeding, the Bank's amended answer to the garnishment was considered before the garnishment judgment could be entered. Instead of receiving the entire \$62,051.35 that was in the account (to which the Bank had previously disclaimed any interest), TES Liquidating received only \$8,000 from the account – some \$54,000 less than it would have received absent Mr. Smith's fraudulent conduct. CP 121-122.

TES subsequently filed a complaint against Mr. Smith and his law firm, alleging tortious interference with a business expectancy, malicious prosecution, and abuse of process. CP 1-11. Both parties moved for summary judgment on each of these claims. CP 70-81; CP 83-95. The trial court ultimately agreed with TES' position, concluding that Mr. Smith's actions "caused the judgment not to be entered that day." Accordingly, the court entered summary judgment in favor of Respondent TES Liquidating. Verbatim Report of Proceedings 22:23-25; 23:1 (August 22, 2008).

This appeal followed. As was the case at the trial court level, however, Appellants are able to offer little more than unsupported statements that they do not agree the facts are the facts. This is in stark contrast to Appellants' remarks at the August 22, 2008 summary judgment hearing, in which they agreed that TES "is, in large part, right" in its description of the facts, and concluded that "this is a question of kind of basic policy, and that is, what cause of action can arise out of wrongful conduct in the course of litigation?" Verbatim Report of Proceedings at 5:7-10 (August 22, 2008). In fact, Appellants' own decision to move for summary judgment demonstrates that there are no genuine issues of material facts in this case.

Appellants are, in short, speaking out of both sides of their mouths. They ask this Court to believe that there *is* a genuine issue of material fact such that TES is *not* entitled to summary judgment. They simultaneously argue, however, that there is *no* genuine issue of material fact as they ask the Court to enter summary judgment on their behalf. This Court, like the court below, should see through this disingenuous argument and (also like the court below) should find that TES is entitled to summary judgment on each of its claims.

#### IV. ARGUMENT

##### A. Standard of Review.

It is well-settled that summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A motion for summary judgment should be granted if “reasonable persons could reach but one conclusion.” *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003). In this case, the trial court found not only that the facts were undisputed, but also that the only reasonable conclusion they support is that Mr. Smith’s conduct “caused the judgment [against Frontier Bank] not to be entered that day.” Verbatim Report of Proceedings 22:23-25; 23:1 (August 22, 2008).

An appellate court must generally review the grant or denial of a summary judgment motion *de novo*, and therefore must engage in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). The following pages will therefore focus on: (1) identifying the material facts of this case, all of which are undisputed; and (2) demonstrating how those facts entitle TES to summary judgment on each its three claims.

**B. The Facts In The Underlying Case Are Undisputed.**

The material facts of this case can be summarized in two categories. The first relates to IBEW's purported security interest, and the relevant facts pertain to: (1) whether IBEW had a security interest in Eagle Electric's account at Frontier Bank prior to October 28, 2005 (the date TES' judgment was entered); and (2) if it did, whether that interest had priority over TES' judgment. The second category relates to Mr. Smith's interference with TES' garnishment of Eagle Electric's account at Frontier Bank. There, the primary factual question is whether judgment would have been entered in favor of TES "but for" Mr. Smith's actions.

As will be discussed in greater detail below, none of the facts of this case are – or reasonably can be – seriously disputed. Appellants, however, attempt to obscure the issues by making offhand editorial comments ("the Trial Court's conclusion that TES had a property interest

in Eagles [sic] account at Frontier Bank, illustrates the problem with awarding TES summary judgment regardless of legal grounds”) and attempting to assert Frontier Bank’s rights for it (opining that “the [garnishment] form did not make any provision for affirmative defenses or qualifications to the answer...therefore Frontier did not initially assert its prior lien on the account”). *See* Appellant’s Opening Brief at 7. These assertions, however, should not distract the Court from the undisputed facts in this case: specifically, that IBEW had *no* security interest, and Mr. Smith’s assertion to the contrary delayed and obstructed TES’ garnishment action to the point that it ultimately lost its ability to collect on the \$62,000 in Eagle Electric’s deposit account.

**C. Basic Article 9 Principles.**

A brief summary of Article 9 law (the Uniform Commercial Code as adopted in Washington) is necessary because Article 9 issues form the basis of the underlying action in this case, and because Appellants continue to demonstrate tremendous confusion between attachment, perfection, and priority. The distinction is critical to understanding part of Mr. Smith’s misconduct, however, and to applying the facts to the Respondent’s claims, so it will be reviewed briefly here.

**1. Attachment.**

A security interest is defined as an interest in personal property to secure payment or performance of an obligation. RCW 62A.1-201(37). There are three basic components to the “life” of a security interest: attachment, perfection, and priority.

The first step – attachment – occurs when the security interest “becomes enforceable against the debtor with respect to the collateral.” RCW 62A.9A-203(a). In order to become enforceable against the debtor (that is, in order to attach), the following steps must occur: (1) value must be given; (2) the debtor must have rights in the collateral; and (3) *there must be a valid security agreement between the debtor and creditor. Id.* It is this third element that is at the center of the underlying dispute in this case. Appellants have repeatedly contended that a June 2005 promissory note between Eagle Electric and IBEW created a security interest. *See*, for example, CP 136. As is clear from Appellants’ own admissions and from a plain reading of Washington statutes, however, IBEW did not enter into a valid security agreement with Eagle Electric until *at least* December 15, 2005, the date of the hearing at which Mr. Smith claimed the agreement had been signed in June.

Under Washington law, a security agreement must, at a minimum: (1) evidence the parties’ intent to create a security agreement; (2) be

authenticated by the debtor; and (3) adequately describe the relevant collateral. RCW 62A.9A-203(b). A security agreement does not attach (and is not enforceable against the debtor, let alone third parties) until the last of these three steps occurs. *Id.* Here, while Appellants repeatedly argue that “a promissory note has been found adequate to create a security interest” in order to support Mr. Smith’s contention that IBEW’s security interest attached as early as June 2005, they themselves have admitted that the promissory note in the instant case did not rise to the level of a security agreement. CP 136 (“The note from Eagle Electric to IBEW does not create a proper security interest even though the filing of the financing statement suggests the parties intended it.”)

Given this admission (and given that Appellants have provided no evidence that the promissory note in this case contains language adequate to create a security agreement, which promissory notes typically do not contain), it follows that IBEW’s security agreement did not attach until December 15 or 16, 2005 – when Eagle Electric executed the security agreement. IBEW was therefore nothing more than an unsecured creditor before that point, and must be treated as such for purposes of applying the perfection and priority rules (as discussed below).

## 2. Perfection.

Appellants repeatedly (and impermissibly) fuse the concepts of perfection and priority. Whereas perfection refers to the process through which the security interest becomes enforceable against third parties (as opposed to the debtor alone), priority refers to the “ordering” of creditors (both perfected and unperfected, secured and unsecured) with respect to the subject collateral. *See* 1A Wash. Prac. Methods of Practice §45.12; §§45.32-33 (4<sup>th</sup> ed.).

A security interest in most types of collateral can be perfected by filing a financing statement with the Department of Licensing. RCW 62A.9A-310(a).<sup>2</sup> While the date of filing is relevant to determining priority as between two or more *secured* creditors, Appellants’ understanding of the issue is somewhat confused. For example, Appellants have repeatedly asserted that “there is authority for the proposition that once a proper security agreement attaches, it relates back to the filing of the financing statement.” *See* Opening brief at 14. This, however, is not germane to the present dispute. While the *priority* rules do make use of a “first to file” rule, that rule pertains only to two attached, perfected security interests. RCW 62A.9A-322(a). At the time in

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<sup>2</sup> Of course, the security interest must attach before it can be perfected and it cannot attach until there is a security agreement. In the absence of a security agreement – as was the case here – mere filing does not perfect the interest.

question – that is, at the time TES obtained its default judgment against Eagle Electric – both TES and IBEW were unsecured (and, of course, unperfected) creditors. IBEW did not even complete the “last of” the three requirements for *attachment* until at least December 15, 2005, and its interest necessarily could not have been *perfected* before that date. RCW 62A.9A-308(a).

### 3. Priority.

In addition to confusing perfection and priority issues, Appellants also apply the wrong priority rule. In arguing for the “relation back” rule (see above) Appellants seem to be referring to RCW 62A.9A-322, which governs priorities among conflicting security interests. That rule generally provides that, in a “contest” between two *perfected* security interests, those interests will be ranked “according to priority in time of filing or perfection.” Thus, while the date of perfection does *not* “relate back” to the time of filing, priority can be determined according to that filing date – but *only as between two conflicting perfected security interests. Id.* Here, the relevant priority “contest” is between TES (a judgment creditor) and IBEW (an unsecured party until December 15, 2005). Thus, the rule that Appellants imply this Court should follow is simply inapplicable here.

Rather, RCW 62A.9A-317 generally governs priority as between lien creditors (which includes judgment creditors) and secured parties.

RCW 62A.9A-317(a). Under that section, a creditor's security interest is subordinate to the rights of a lien creditor (here, TES) if that lien creditor *became* a lien creditor before the security interest was perfected. RCW 62A.9A-317(b)(2)(A). Notably, the statute here is referring to when the competing security interest was *perfected*, which necessarily cannot occur until the security interest has attached. RCW 62A.9A-308(a).

Here, IBEW's security interest did not exist – and therefore could not have been attached or perfected – until at least December 15, 2005. CP 112-115; RCW 62A.9A-203(a); RCW 62A.9A-308(a). TES' judgment against Eagle Electric was entered on October 28, 2005. CP 99-101. Thus, under the applicable priority rule, it is clear that TES' judgment has priority over IBEW's putative security interest, as its judgment was entered well before IBEW's security interest was even attached, let alone perfected. RCW 62A.9A-317(b)(2).

**D. The Trial Court Was Correct In Entering Summary Judgment For TES.**

It is Appellants' modus operandi to attempt to obscure the issues in this case. They use this tactic again in Section 2 of their Opening Brief, asserting: (1) that the trial court "award[ed] TES summary judgment regardless of the legal grounds," and (2) that the trial court improperly

failed to resolve issues of fact in TES' favor prior to entering summary judgment in its favor.

The law supporting TES' claims was detailed in TES' Cross-Motion for Summary Judgment, in its Response to Defendants' Motion for Summary Judgment, and in its Reply to Defendants' Response to TES' Cross-Motion for Summary Judgment. Thus, the following sections will provide only a brief analysis of the law, and will instead focus primarily on applying the relevant law to the undisputed facts.

**1. Malicious Prosecution.**

In Washington, a claim for malicious prosecution must meet both statutory and common law components. Under RCW 4.24.250, a plaintiff need only show that: (1) the action was false, unfounded, malicious, and without probable cause, or was filed as part of a conspiracy to misuse judicial process; and (2) the defendant knew of the action's falsity or lack of foundation. RCW 4.24.350(1).

In addition to the two statutory elements, there are several common law elements that must be satisfied in a malicious prosecution case: (1) the prosecution was instituted or continued by the defendant; (2) there was want of probable cause for the institution or continuation of the prosecution; (3) the proceedings were instituted or continued through malice; (4) the proceedings terminated on the merits in favor of the

plaintiff, or were abandoned;<sup>3</sup> and (5) the plaintiff suffered injury or damage as a result of the prosecution. *Gem Trading Company v. Cudahy Corp.*, 92 Wn.2d 956, 964-65, 603 P.2d 828 (1979). Moreover, a claim of malicious prosecution in the civil context also requires that the plaintiff show (6) an arrest or seizure of property; and (7) special injury. *Id.* at 965.

Each of these elements is considered in turn below.

**i. Statutory elements:**

***a. The action was false, unfounded, malicious, and without probable cause, or was filed as part of a conspiracy to misuse judicial process.***

**Undisputed Facts Relating to this Element:** Mark Smith filed his Motion to Intervene on December 7, 2005. CP 32. That motion alleged, *inter alia*, that “the Trusts’ [sic] filed and perfected their security interest on June 9, 2005.” CP 33. That motion was false and unfounded.

A hearing was held on the matter on December 16, 2005, at which time Mr. Smith represented that his client had a security interest in the Frontier Bank account that was perfected on June 9, 2005. CP 112. There was no such security interest. Mr. Smith tendered a signed document to the court, implying that it had been executed in June when in fact it had

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<sup>3</sup> While this remains on the list of elements cited by many cases, Washington courts have held that, post-RCW 4.24.350, this is no long an element of the tort. Here, however, the proceedings at issue were, in fact, terminated in favor of the Plaintiff, so this element is easily satisfied regardless. *See, for example, Gem Trading Co. v. Cudahy Corp.*, 22 Wn.App. 278, 284 (1978).

not even been created until the day before. *Id.* Only after Mr. Smith's dishonest conduct was discovered did he submit a supplemental brief in support of his Motion to Intervene, at which time he acknowledged that the Trusts "obtained a perfected security interesting Eagle's accounts receivables [sic]<sup>4</sup> on December 15, 2005." CP 126. Rule 11 terms were assessed against Mr. Smith's client on January 18, 2006. CP 56-57. Clearly, IBEW had *no* security interest when Mr. Smith attempted to intervene in the garnishment action. His entire basis for intervening, however, was to assert IBEW's putative security interest in the subject account. Because there was no security interest, it must follow that there was no basis for the intervention. This element is easily satisfied.

***b. The defendant knew of the action's falsity or lack of foundation.***

**Undisputed Facts Relating to this Element:** As noted above, Mr. Smith admitted the falsity of his earlier pleadings when he supplemented his motion to intervene on January 12, 2006 – over a month after filing the pleadings in which he represented that his clients had a perfected security interest dating back to June 2005. *See* CP 112, 126. Moreover, on December 15, 2005, Mr. Smith created a document and on December 16 he defrauded the court into believing the document had been

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<sup>4</sup> He apparently intended to refer to Eagle Electric's "accounts" or "deposit accounts," rather than "accounts receivable."

in existence for months. He obviously knew that he was lying to the court when he made those representations.

**ii. Common law elements:**

***c. The prosecution was instituted or continued by the defendant.***

**Undisputed Facts Relating to this Element:** Mr. Smith instituted the relevant action through his Motion to Intervene on December 7, 2005. This served to commence the action that is the subject of the instant case.

***d. There was want of probable cause for the institution or continuation of the prosecution.***

**Undisputed Facts Relating to this Element:** Mr. Smith initially claimed that his client had a perfected security interest in the Frontier Bank funds since at least June 9, 2005. CP 112. He later admitted that the security interest did not even attach until December 15, 2005. CP 126. Because this putative security interest – which necessarily must have been attached *before* TES’ October 2005 judgment in order to have priority over that judgment – was the basis for Mr. Smith’s motion to intervene, it inexorably follows that there was no probable cause for the institution of the intervention action.

***e. The proceedings were instituted or continued through malice.***

Under Washington law, the “element of malice is satisfied by proving the prosecution was undertaken from improper or wrongful

motives or in reckless disregard of the rights of the plaintiff.” 16A Wash. Prac., Tort Law And Practice § 21.6 (3d ed.), citing *Orwick v. City of Seattle*, 37 Wn. App. 594, 682 P.2d 954 (1984), *affirmed in part, reversed in part* 103 Wn. 2d 249, 692 P.2d 793 (1984); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn. 2d 485, 125 P.2d 681 (1942). Moreover, malice may be inferred from the lack of probable cause. *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995); *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991).

**Undisputed Facts Relating to this Element:** As discussed above, there is no dispute as to the fact that Mr. Smith lacked probable cause in instituting his intervention action. Consequently, there can be no question that he asserted a non-existent security interest with reckless disregard for TES’ (or any other creditors’) rights. Thus, the element of malice is easily satisfied.

*f. The proceedings terminated on the merits in favor of the plaintiff, or were abandoned.*<sup>5</sup>

**Undisputed Facts Relating to this Element:** Mr. Smith’s Motion to Intervene was denied, and CR 11 sanctions were assessed against his client. CP 56-57.

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<sup>5</sup> While this remains on the list of elements cited by many cases, Washington courts have held that, post-RCW 4.24.350, this is no longer an element of the tort. Here, however, the proceedings at issue were, in fact, terminated in favor of the Plaintiff, so this element is

***g. The plaintiff suffered injury or damage as a result of the prosecution.***

**Undisputed Facts Relating to this Element:** *Before* Defendant's wrongful attempt to intervene, TES had nearly completed the process of garnishing Eagle Electric's account at Frontier Bank, which was worth approximately \$62,000. *After* Defendant's wrongful attempt to intervene, TES lost its ability to successfully garnish the account, and ultimately received only \$8,000 from that account. CP 121-122. Thus, the "before and after" dollar values clearly show damage.

***h. Arrest or seizure of property.***

Appellants strenuously argue that TES did not acquire an interest in the Frontier Bank funds following the Bank's initial answer. They opine that "as a matter of law the motion could have no affect [sic], because TES would not have been entitled to a judgment against Frontier until at least January 6, 2006." Appellants' Opening Brief at 8. This, however, is an inaccurate statement of the law. The Washington Supreme Court has held that "while it is true under our statutes the plaintiff does not obtain by his garnishment any fixed and enforceable lien on the money garnished till he shall have obtained judgment against the defendant...*he does, prior to judgment, obtain a prior right which cannot be defeated*

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easily satisfied regardless. See, for example, *Gem Trading Co. v. Cudahy Corp.*, 22 Wn.App. 278, 284 (1978).

*except by failing to obtain his judgment.” Hawley v. Isaacson, 117 Wn. 197, 202, 200 P. 1109 (1921) (emphasis added). Thus, in Washington a plaintiff does have a right to the would-be garnished funds even prior to entry of the garnishment judgment. Id.*

**Undisputed Facts Relating to this Element:** These are the same as the facts pertinent to element (e), above. *Before* Appellants’ wrongful actions, TES was set to receive \$62,000 from Eagle Electric’s account. Afterwards, TES received only \$8,000. CP 121-122.

*i. Special injury.*

The relevant inquiry here is whether the injury suffered by TES in this case – that is, the loss of significant funds which it otherwise would have received – is a “normal” result of a motion to intervene. *Gem Trading Company v. Cudahy Corp.*, 92 Wn.2d 956, 964-65, 603 P.2d 828 (1979). A valid motion to intervene would not ordinarily result in any immediate financial injury to a party in a given case, and an intervenor’s assertion of its own valid legal right would not legally “damage” a party to that case. Thus, the damages suffered by TES constitute “special injury.”

**Undisputed Facts Relating to this Element:** Here, Mr. Smith was not asserting a valid legal right, or even something he believed in good faith to be a valid legal right. Rather, Mr. Smith knowingly asserted a claim that either: (1) did not exist at all; or (2) did not have priority over

TES' claim. Certainly, this was not a "normal" motion to intervene, and TES accordingly did not suffer only the "normal" collateral consequences that result from a third party's valid assertion of its right to intervene in a given case.

Based on the foregoing, it is clear that each of the elements of TES' malicious prosecution claim is easily satisfied by the undisputed facts of this case. Thus, the trial court properly entered summary judgment in favor of TES on this claim.

## **2. Abuse of Process.**

As is true with respect to the malicious prosecution claim, the facts underlying TES' abuse of process claim are undisputed. Washington courts have clearly defined the elements necessary for a successful abuse of process claim. These elements are as follows: (1) the existence of an ulterior purpose to accomplish an objective 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. *Mark v. Williams*, 45 Wn. App. 182, 724 P.2d 428 (1986), citing *Sea-Pac Co. v. United Food & Comm'l Workers, Local 44*, 103 Wn.2d 800, 806, 699 P.2d 217 (1985). Thus, 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." *Id.* As is the case

with the other causes of action, the elements of abuse of process are easily satisfied.

**a. Existence of an ulterior purpose to accomplish an objective not within the proper scope of the process.**

At this point, it is useful to note that “the purpose for which the process is used is the only thing of importance in determining whether abuse of a process has occurred.” *See* 16A Wash. Prac., Tort Law And Practice § 21.22 (3d ed.), *citing* Prosser & Keeton on Torts § 121. Moreover, “the element of ulterior motive or purpose may be inferred from what is said or done about the process.” *Id, citing Batten v. Abrams*, 28 Wn. App. 737, 626 P.2d 984 (1981).

**Undisputed Facts Relating to this Element:** It is undisputed that Mr. Smith repeatedly misled, and ultimately lied to, the court about the existence and status of his client’s purported security interest. This conduct alone permits the court to infer an ulterior motive.

**b. An act in the use of legal process not proper in the regular prosecution of the proceedings.**

**Undisputed Facts Relating to this Element:** Again, Mr. Smith repeatedly misled and lied to the court. Such acts are undoubtedly “not proper in the regular course of proceedings.”

It is clear that the facts supporting TES’ abuse of process claim are not in serious dispute, and the existence of such undisputed facts renders

summary judgment in favor of TES appropriate with respect to its abuse of process claim.

**3. Tortious Interference with Business Expectancy.**

The same facts underlie plaintiff TES' third and final claim: tortious interference with business expectancy. Under Washington law, a plaintiff must plead and prove five elements in order to succeed on a claim for tortious interference with a business expectancy: (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship; (3) that the defendant interfered intentionally, thus inducing or causing a breach or termination of the relationship or expectancy; (4) that the defendant interfered for an improper purpose or used improper means; and (5) resultant damage. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). These elements – and the specific undisputed facts supporting them – are discussed below.

**a. The existence of a valid contractual relationship or business expectancy.**

As mentioned above, Washington law provides that a garnishor-plaintiff does, in fact, have an interest in the subject funds even prior to entry of judgment. In *Hawley v. Isaacson*, the Washington State Supreme Court clearly stated that such a plaintiff “does, prior to judgment, obtain a

prior right which cannot be defeated except by failing to obtain his judgment.” *Hawley*, 117 Wn. at 202. In short, a garnishor-plaintiff “certainly acquires a right in the thing garnished” even though that plaintiff “may not have a specific lien by virtue of his garnishment.” *Id.* Thus, TES had a legitimate expectancy in Eagle Electric’s account.

**Undisputed Facts Relating to this Element:** TES obtained a default judgment against Eagle Electric in the amount of \$76,883.64 on October 28, 2005. CP 99-101. It then instituted garnishment proceedings to reach the funds in Eagle Electric’s account. CP 102-104. It received an answer from Frontier Bank on December 6, 2005 stating that \$62,051.35 was available for distribution from the account. CP 107. TES had at least an expectancy in the Frontier Bank account upon receipt of the Bank’s initial answer to its writ of garnishment. *Hawley, supra.*

**b. Appellants had knowledge of that relationship.**

**Undisputed Facts Relating to this Element:** Appellants’ knowledge of TES’ rights in the account prompted it to file its Motion to Intervene in the first place. CP 33 (“Plaintiff’s garnishment action against defendants is interfering with the Trusts’ ability to enforce its security interest...”). Thus, Appellants were aware of the relationship between TES, Frontier Bank, and Eagle Electric.

- c. **Defendant interfered intentionally, thus inducing or causing a breach or termination of the relationship or expectancy.**

**Undisputed Facts Relating to this Element:** Appellants' Motion to Intervene was obviously filed intentionally. Moreover, the hearing on Defendants' Motion to Intervene occurred on December 16, and was then continued until a later date to allow the court adequate time to consider IBEW's claims. *See* Verbatim Report of Proceedings at 12:17-23 (December 16, 2005). Frontier Bank amended its answer on January 6, 2006 to assert its own claim on Eagle Electric's Frontier Bank account, thus resulting in a loss of over \$54,000 to TES. CP 119-120.

- d. **The defendant interfered for an improper purpose or used improper means.**

**Undisputed Facts Relating to this Element:** Mr. Smith filed his Motion to Intervene on December 7, 2005. CP 32. That motion alleged, *inter alia*, that "the Trusts' [sic] filed and perfected their security interest on June 9, 2005." CP 33. A hearing was held on the matter on December 16, 2005, at which time Mr. Smith represented that his client had a security interest in the Frontier Bank account that was perfected on June 9, 2005 and tendered a document he suggested proved this claim. CP 112. The claim, of course, was false and the document was fraudulent. Mr. Smith's improper purpose is clear from his pattern of misleading the court and opposing counsel.

e. **Resultant damage.**

**Undisputed Facts Relating to this Element:** There can be no reasonable dispute as to the fact that TES suffered damage because of Mr. Smith's actions. *But for* Appellants' wrongful attempt to intervene, TES would have promptly completed the process of garnishing Eagle Electric's account at Frontier Bank, which was worth approximately \$62,000. *After* Appellants' wrongful attempt to intervene, TES lost its ability to successfully garnish the account, and ultimately received only \$8,000 from it. CP 121-122. Thus, the "before and after" dollar values clearly show damage.

Boiled down to its essence, Appellants' argument is that it is speculation for the Court to conclude that TES would have obtained its garnishment judgment and taken possession of the money in Eagle Electric's account. This argument must fail. It is not speculation for the Court to assume that TES would have done what virtually every plaintiff in those circumstances does, which is obtain a judgment and seize the assets as quickly as possible. Thus, it is virtually self-evident that in the normal course of events the Bank's answer disclaiming any interest in the account would have led almost immediately to entry of a judgment.

The only speculation is found in the Appellants' arguments. They speculate that, even without Mr. Smith's fraudulent conduct, the Bank

might have discovered its error, and might have asserted its interest in the account before it was barred from doing so. However, there is not one shred of evidence from which one could reasonably infer that this was likely to happen, whereas there is ample reason for the court to believe that it virtually certain TES would have obtained its money without delay absent the misconduct. It would be a complete travesty of justice if TES were denied recovery against Mr. Smith and his firm, who caused damage to TES through outright fraud, because of unsupported speculation that the damage *might* have resulted anyway.

It is clear that the facts supporting each element of TES' tortious interference with business expectancy claim are not disputed, and the existence of such undisputed facts renders summary judgment in favor of plaintiff TES appropriate on this claim.

## V. CONCLUSION

This appeal is the most recent step in Appellants' long line of attempts to excuse Mr. Smith's unethical, fraudulent conduct. Throughout their pleadings in the underlying case, Appellants opined on everything from the subprime mortgage crisis to *res judicata*. What they did not do below, and have not done here, is provide a solid legal argument – or even a single case directly supporting their contentions. At one point Appellants even suggested that Mr. Smith – who was not a witness in this

or any other relevant case – was “privileged” to offer false documents and lie in oral argument. This has all been done in an effort to distract the court from the central fact of this case: Mr. Smith attempted to gain an advantage for his client through blatant dishonesty. Fortunately for the court, that dishonesty was discovered before Mr. Smith’s motion could be granted; unfortunately for TES, it was not discovered in time for TES to obtain the judgment to which it was entitled.

This Court can reach but one reasonable conclusion from Appellants’ repeated detours from the real issues: Appellants have never squarely addressed the merits of TES’ claims because they cannot do so without conceding they have no legal defense to Mr. Smith’s fraudulent conduct. Appellants’ arguments (at least those that are on-point) are directly contrary to well-settled secured transactions law, and their argument that TES must show that it *absolutely* would have had its judgment entered prior to January 6, 2006 does nothing short of turn logic on its head.

The issue here is simple: was Mark Smith’s conduct wrongful, and, if so, did it cause damage to TES? There is no genuine issue of material fact here, as the parties fundamentally agree that Mr. Smith’s attempt at intervention was baseless and his conduct fraudulent. The trial court saw through Appellants’ attempts to obscure and confuse the issues, and

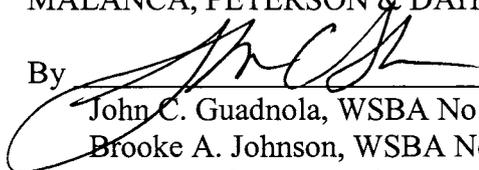
properly entered summary judgment for TES with respect to each of its  
three claims. This Court should now do the same.

DATED this 25<sup>th</sup> day of February, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26 day of February, 2009, she placed with ABC Legal Messengers, Inc. a true and correct copy of the Respondents Opening Brief for hand delivery to counsel of record:

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DEPUTY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Gina A Mitchell

Gina A. Mitchell