

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PAUL STANFORD and ROBYN STANFORD,

Plaintiffs/Counter-Defendants-  
Appellees,

v

MICHAEL GAULTIERI, d/b/a MICHAEL  
GAULTIERI BUILDER,

Defendant/Counter-Plaintiff-  
Appellant.

UNPUBLISHED

June 7, 2005

No. 260017

Wayne Circuit Court

LC No. 03-331411-CZ

---

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting judgment for plaintiffs on their motion for summary disposition and dismissing defendant's counterclaims. We affirm.

Plaintiffs engaged defendant to act as contractor for substantial construction work on their home. No total compensation for the job was agreed upon; instead, defendant periodically submitted invoices as the project progressed, several of which plaintiffs paid without dispute.

Disputes and tensions arose in time. To conclude the parties' business, defendant presented a bill for a total of \$41,769.24. Plaintiffs disputed some of the charges and requested adjustments. The parties agreed to resolve the matter for a total of \$38,954.46. Plaintiffs tendered, and defendant accepted, a check for that amount.

Defendant then persuaded a subcontracting carpentry service to reduce its fees by \$2,100. Plaintiffs learned of this and announced intentions to stop payment on their check for \$38,054.46, to pay the subcontractor \$2,100 directly, and to issue defendant a new check for the difference, \$35,954.46. Defendant deposited the check for the latter amount, but he maintains that he never agreed that it constituted a final accord between the parties. Meanwhile, plaintiffs' efforts to stop payment on the first check failed, with the result that both cleared, leaving defendant with a windfall.

Defendant tendered to plaintiffs a check for \$28,000, which plaintiffs accepted while demanding an additional \$10,054.46, the difference between the refund received and the check

upon which plaintiffs had attempted to stop payment. Plaintiffs filed suit to recover the latter amount. Defendant counterclaimed, asserting that no accord was reached and that plaintiffs still owed him \$2,232.31 on his original invoices. To his counterclaim of breach of contract, defendant added counterclaims of unjust enrichment, intentional infliction of emotional distress, defamation per se, tortious interference with a business relationship, malicious prosecution, and abuse of process.

Plaintiffs moved for summary disposition under MCR 2.116(C)(8) and (10). After hearing arguments, the trial court ruled as follows:

The Defendant . . . received the thirty-eight thousand dollar check from [plaintiffs] but did not return the whole amount that he should have. He should have returned the whole actual check itself. Instead, he sent them a check for the twenty-eight thousand. There's no question of fact. The Court will grant . . . Plaintiff's motion. The defenses are hereby dismissed, and [the court] will grant a Judgment . . . .

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

The trial court's comments from the bench clearly indicate that the court concluded that defendant agreed to accept plaintiffs' second check, for \$35,954.46, as satisfaction and accord for all the parties' dealings. The evidence of this consists of plaintiffs' tendering and defendant's acceptance and negotiation of that check, as well as the factual context of that transaction.

In order to effect an accord and satisfaction, "the tender must be accompanied by an explicit and clear condition indicating that, if the payment is accepted, it is accepted in discharge of the whole claim." *In re MCI Telecommunications Complaint*, 255 Mich App 361, 367; 661 NW2d 611 (2003). In this case, the record includes no documentary evidence that the check for \$35,954.46 was intended to discharge all claims, but that lack of documentation does not necessarily confirm defendant's position.

A person who accepts a payment without initially agreeing that it constitutes an accord, but then retains the funds despite learning that they were tendered with that condition, thereby accepts the accord. See *Faith Reformed Church v Thompson*, 248 Mich App 487, 493-494; 639 NW2d 831 (2001). Defendant admits that he had agreed to the earlier, larger figure, as settlement of all claims. However, plaintiffs then announced an intention to stop payment on the earlier check in order to pay some of that amount directly to the subcontractor, with the remainder being paid to defendant. It would strain credulity to interpret these developments as leaving any doubt in defendant's mind that plaintiffs conditioned their tender of \$35,954.46 on it being a revised accord, replacing the earlier tender of \$38,054.46. Although defendant may not have agreed to this by word, he did agree by gesture:

[I]f the tender is in full satisfaction of an unliquidated claim, the amount of which is in good faith disputed by the debtor, and the creditor is fully informed of the condition accompanying acceptance, an accord and satisfaction is accomplished if the money so tendered is retained; for there can be no severance of the condition

from acceptance and it avails the creditor nothing to protest and notify the debtor that the amount tendered is credited on the claims and not accepted in full satisfaction [Id. at 494, quoting *Shaw v United Motors Products Co*, 239 Mich 194, 196; 214 NW 100 (1927).]

For these reasons, the trial court correctly recognized that an accord had been reached in connection with the check for \$35,954.46 and that defendant was entitled neither to keep any payments in excess of that amount, nor to maintain a counterclaim for damages in connection with the underlying contract. Because we find that defendant agreed to the \$35,954.46 payment, no genuine issue of material fact exists regarding the total amount due from plaintiff to defendant.<sup>1</sup>

We will now discuss the validity of defendant's counterclaims of defamation per se, malicious prosecution, abuse of process, and intentional infliction of emotional distress.

Defamation of a private party requires proof that the actor published a defamatory communication regarding that party, with knowledge that the statement was both false and defamatory. See *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 190 n 20; 398 NW2d 245 (1986), citing 3 Restatement Torts, 2d, § 580B. Ordinary negligence is sufficient for proving a case of defamation of a private figure. *Rouch, supra* at 202-203. By pleading defamation per se, defendant alleges that he is entitled to "at least nominal damages in the absence of any proof of actual or special damages." *Burden v Elias Brothers Big Boy Restaurants*, 240 Mich App 723, 728-729; 613 NW2d 378 (2000).

We conclude that, in light of the obvious tensions that had arisen between the parties, defendant cannot show that plaintiffs lacked a reasonable basis for believing that defendant intended to convert some of their funds when he obtained a substantial overpayment from plaintiffs. Because defendant had suddenly acquired an unexpected advantage in this conflict, plaintiffs were entitled to fear the worst and protest accordingly to concerned persons and authorities. Even assuming defendant never intended to retain any amount of the overpayments in dispute or to use his possession of the funds as leverage, plaintiffs had a reasonable basis for fearing a less benevolent response from defendant, and they were not negligent or otherwise culpable in protesting as they did to others. The trial court properly dismissed defendant's defamation counterclaim.

Malicious prosecution is actionable in response to a person

who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action, or in any other manner prescribed by law, to answer to the suit or

---

<sup>1</sup> Defendant contends that plaintiffs improperly submitted a case evaluation summary in support of their motion for summary disposition. Any error in admitting the case evaluation summary was harmless because the pertinent facts were apparent from other sources.

prosecution of any person . . . . [MCL 600.2907; see also *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998).]

Defendant argues that filing a police report, or reporting an alleged crime to the prosecutor's office, constitutes a proceeding for purposes of this tort. We disagree.

Defendant's claim of malicious prosecution must fail, because the only way in which defendant asserts that he was compelled to "answer to the suit or prosecution" was by enduring some questioning by the police. Because no warrant or arrest followed from plaintiffs' advocacy to the police and prosecutor, the investigation in question did not rise to the level of prosecution for purposes of sustaining a claim of malicious prosecution.

"To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). This theory of recovery must fail in this case because plaintiffs' resort to legal process was not improper. Their insistence that defendant had agreed to settle all claims for \$35,954.46, which would require him to refund amounts he received from plaintiffs in excess of that sum, was well grounded in fact and law. Plaintiffs had good reason to fear that defendant might take unfair advantage of their overpayments, and they properly expressed those fears to other concerned persons and entities, which nevertheless failed to induce any formal criminal process against defendant.

Finally, to prevail on his counterclaim of intentional infliction of emotional distress, defendant must show that plaintiffs intentionally or recklessly engaged in extreme and outrageous conduct that proximately caused defendant to suffer severe emotional distress. See *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996).

Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. [*Id.* at 234.]

Defendant protests that plaintiffs threatened to make him "miserable" and cause him to "squeal for mercy," and he reiterates that plaintiffs attempted to interest the police and prosecutor in the matter. Although defendant paints an unflattering picture of plaintiffs, his allegations illustrate parties vigorously advocating their position and plaintiffs unsympathetically characterizing defendant's position and prospects. This conduct may appear unseemly in certain respects, but it is neither horrendous nor intolerable. The trial court properly dismissed this counterclaim.

Affirmed.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Patrick M. Meter