COURT OF APPEALS
DECISION
DATED AND RELEASED

April 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0230-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RAYMOND BIER,

Plaintiff-Appellant-
Cross Respondent,

v.

MIKE WICKS,

Defendant-Respondent-
Cross Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(a), STATS.[1] Raymond Bier appeals from a summary judgment dismissing his negligence action in small claims court against Mike Wicks. The trial court concluded that there was an accord and satisfaction. Bier argues that

[1] This appeal has been expedited pursuant to RULE 809.17, STATS.

the trial court erred in granting summary judgment against him because there is a dispute over whether the payment he received from Wicks's insurer satisfied all of his claims against Wicks. We conclude that there is a factual dispute over whether Bier's claims were divided and separate and, therefore, summary judgment was improperly granted.

Wicks cross-appeals from the trial court's order denying his claim that Biers's action was frivolous. We conclude that Bier's action is not frivolous. Accordingly, we affirm in part and reverse in part and remand for a trial. We also deny Wicks's and Bier's motions for fees and costs under § 809.25(3), STATS.

BACKGROUND

In 1993, Raymond Bier hired Mike Wicks to install a roof on his home. According to Bier, the roof was installed improperly and leaked, causing damage to Bier's personal property. Bier demanded that Wicks pay for the repairs to his roof and for the damage to his personal property.

Wicks tendered defense of the matter to his insurer, West Bend Mutual Insurance Company. West Bend sent Bier a check dated May 31, 1994, for $926.70, with a notation on the back that the payment was "[i]n full and final settlement of any and all claims." Bier returned the check to Wicks bearing the following handwritten notation: "damage cannot be fixed until leaking roof is fixed, Thank you, R.E. Bier."

By letter dated July 20, 1994, West Bend wrote to Bier stating that it would not pay for the repair or replacement of his roof because of an exclusion in Bier's policy. West Bend, however, asked for a list of damages to Bier's personal property caused by the leaking roof.

By letter dated August 4, 1994, Bier wrote to West Bend explaining that he returned the May 1994 check because he received an estimate that the work necessary to repair the property damage would cost $1,555. He stated that he "would accept $1,555.00 as settlement of the claim."

Wicks's insurer sent Bier a check dated August 8, 1994, for $1,555. On the front of the check was the notation "IN FULL AND FINAL SETTLEMENT" and on the back, the check noted, "In full and final settlement of any and all claims." Bier cashed this check on September 6, 1994, but above his endorsement he wrote, "Water Damage 323 N. Pine St., Janesville, Wi, from leaking roof."

On September 8, 1994, West Bend wrote to Wicks informing him that it had paid Bier $1,555 for the damage he sustained from the faulty work Wicks performed on Bier's roof. It added that Bier had filed a claim against Wicks for $385, the cost to repair the roof. It explained that this claim was excluded by the policy and that it would not defend him regarding these damages.

In July 1995, Bier brought a small claims action against Wicks for the damage to his roof. Wicks answered that the entire matter had been settled, raising an accord and satisfaction defense. Wicks also argued that Bier's claim was frivolous and asked for costs and attorney fees under § 814.025, STATS. The trial court dismissed the matter on summary judgment motion, concluding that the debt had been settled. It did not find the action frivolous. Bier and Wicks appeal.

STANDARD OF REVIEW

An appeal from a grant of summary judgment raises an issue of law which we review *de novo* by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint to determine whether it states a claim upon which relief may be granted, and then the answer to determine whether it presents a material issue of fact. ***Id***. If they do, we then examine the moving party's affidavits and other supporting documents to determine whether the party has established a *prima facie* case for summary judgment. ***Id***. If it has, we then look to the opposing party's affidavits and other supporting documents to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. ***Id***. at 372-73, 514 N.W.2d at 49-50.

ACCORD AND SATISFACTION

Accord and satisfaction is an agreement between parties to discharge an existing disputed claim. ***Flambeau Products Corp. v. Honeywell Info. Sys. Inc.***, 116 Wis.2d 95, 112, 341 N.W.2d 655, 664 (1984). Like other contracts, it requires an offer, an acceptance and consideration. ***Id.*** The rule of accord and satisfaction provides that if a creditor cashes a check from a debtor which has been offered as full payment for a disputed claim, the creditor is deemed to have accepted the debtor's conditional offer of full payment for the entire claim notwithstanding any reservations by the creditor. ***Id.*** at 101, 341 N.W.2d at 658. Thus, a creditor's act of cashing the check discharges the entire debt, even if the creditor objects to the amount either verbally or in writing. ***Butler v. Kocisko***, 166 Wis.2d 212, 219, 479 N.W.2d 208, 211-12 (Ct. App. 1991).

The rule of accord and satisfaction is intended to promote fairness by protecting the bona fide expectations of a debtor who tenders payment on the condition that it will be accepted as payment in full. ***Flambeau***, 116 Wis.2d at 101, 341 N.W.2d at 658-59. The following two elements must be present for a court to find a valid accord and satisfaction: (1) there must be a good faith dispute about the debt; and (2) the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt. ***Id.*** at 111, 341 N.W.2d at 663.

The issue in this case is whether the creditor, Bier, had reasonable notice that the $1,555 check was intended to be in full satisfaction of the entire claim or only for the damages to his personal property. On summary judgment motion, we look at the affidavits and draw inferences from the facts contained therein, viewed in the light most favorable to the nonmoving party. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 567, 278 N.w.2d 857, 862 (1979). If these facts are subject to conflicting interpretations or reasonable persons might differ as to their significance, summary judgment is improper. ***Id.*** Intent is a fact seldom determinable on summary judgment. ***Lecus v. American Mut. Ins. Co.***, 81 Wis.2d 183, 190, 260 N.W.2d 241, 244 (1977).

We agree with Bier that there is a factual dispute about whether West Bend offered the check as full payment for the entire claim or whether it was only settling the claim for the damage to his personal property and not to

the roof itself. Before West Bend sent the $1,555 check, it wrote to Bier and told him that the damages to the roof were excluded by the terms of the policy but that it would pay for the damage to Bier's personal property. It asked Bier for a list of his damaged personal property. Bier then wrote to West Bend offering to settle the claim for $1,555. Bier received a $1,555 check from West Bend which stated that it represented a "full and final settlement of any and all claims."

We believe that a reasonable person could have concluded that West Bend intended that the $1,555 check was to settle, in full, the claim for the damage to Bier's personal property only and not for the damage to the roof.[2] In other words, the correspondence between the two parties indicates that Bier's claim may have been divided. When there are two separate and distinct claims, the acceptance of payment in full on one claim does not constitute an accord and satisfaction as to the other claim. ***Flambeau***, 116 Wis.2d at 117, 341 N.W.2d at 666. Looking at the facts and drawing inferences in the light most favorable to Bier, we conclude that there is a factual dispute about what West Bend intended to settle when it sent the $1,555 check to Bier. Consequently, summary judgment was improper.

We reverse and remand this matter to the trial court for a trial on whether West Bend's $1,555 check was intended to settle the claims for damage to both the roof and Bier's personal property or whether the claims were divided. Should the court conclude that the $1,555 check was intended to settle both claims, then there was a valid accord and satisfaction when Bier cashed the check. Should the court conclude that West Bend only intended to settle the damage to Bier's personal property and not the roof, then there was no accord and satisfaction.

FRIVOLOUS ACTION

Wicks moved the trial court for fees and costs under § 814.025, STATS., arguing that Bier's action was frivolous because it was commenced and continued in bad faith and Bier or his attorney knew or should have known that

[2] Indeed, the court commissioner concluded that "the insurer made clear from the start that it was not negotiating as to roof damage."

it was without any reasonable basis in law or equity. We conclude that Bier's action was not frivolous because if the court accepts Bier's view of the facts, there is no accord and satisfaction and the negligence claim may proceed on the merits. Thus, it was not unreasonable for Bier or his attorney to bring this action against Wicks and Wicks is not entitled to fees and costs under § 814.025.

FRIVOLOUS APPEAL

Both Wicks and Bier have moved this court for fees and costs pursuant to RULE 809.25(3), STATS., arguing that the other's appeal is frivolous. We deny their motions because both parties have taken positions reasonably based in law and equity. No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.