COURT OF APPEAL FOR ONTARIO

CITATION: Konstan v. Berkovits, 2024 ONCA 510
DATE: 20240627
DOCKET: COA-23-CV-0347, COA-23-CV-0365 & COA-23-CV-0371

Miller, Copeland and Gomery JJ.A.

DOCKET: COA-23-CV-0347

BETWEEN

Maria Konstan*, Jim Konstan, Elaine Konstan and Etta Konstan

Plaintiffs (Respondent*)

and

Samuel Jacob Berkovits*, Saeed Hosseini, Ted Fritz, William Blair and Toronto Police Services Board

Defendants (Appellant*/
Respondent by way of cross-appeal*)

AND BETWEEN

Samuel Jacob Berkovits

Plaintiff by Counterclaim (Appellant/
Respondent by way of cross-appeal)

and

Maria Konstan* and Harold Gerstel**

Defendants by Counterclaim (Respondent*/
Respondent**/Appellant by way of cross-appeal**)

AND BETWEEN

Harold Gerstel

Plaintiff by Counterclaim (Respondent/
Appellant by way of cross-appeal)

and

Samuel Jacob Berkovits* and Saeed Hosseini

Defendants by Counterclaim (Appellant*/
Respondent by way of cross-appeal*)

Docket: COA-23-CV-0365

AND BETWEEN

1539058 Ontario Inc. o/a Omni2 Jewelcrafters and Omni Jewels & Java and
2221652 Ontario Inc. o/a Omni Cash for Gold

Plaintiffs (Respondents)

and

2102503 Ontario Inc. o/a Harold the Jewellery Buyer and Harold Gerstel

Defendants (Appellants)

AND BETWEEN

2102503 Ontario Inc. o/a Harold the Jewellery Buyer and Harold Gerstel

Plaintiffs by Counterclaim (Appellants)

and

1539058 Ontario Inc. o/a Omni2 Jewelcrafters and Omni Jewels & Java*,
2221652 Ontario Inc. o/a Omni Cash for Gold*, Saeed Hosseini, Samuel Jacob
Berkovits* and Hillel Berkovits

Defendants by Counterclaim (Respondents*)

Docket: COA-23-CV-0371

AND BETWEEN

Samuel Jacob Berkovits, 1539058 Ontario Inc., c.o.b. as Omni2 Jewelcrafters and Omni Jewels & Java and 2221652 Ontario Inc., c.o.b. as Omni Cash for Gold

Plaintiffs (Respondents/
Appellants by way of cross-appeal)

and

Harold Gerstel*, Multimedia Nova Corporation, Lori Abittan, Eric McMillan and Shawn Star

Defendants (Appellant*/
Respondent by way of cross-appeal*)

AND BETWEEN

Harold Gerstel

Plaintiff by Counterclaim (Appellant/
Respondent by way of cross-appeal)

and

Samuel Jacob Berkovits, 1539058 Ontario Inc., c.o.b. as Omni2 Jewelcrafters and Omni Jewels & Java, and 2221652 Ontario Inc., c.o.b. as Omni Cash for Gold

Defendants by Counterclaim (Respondents/
Appellants by way of cross-appeal)

Samara Secter, Rebecca Amoah and Daniel Naymark, for Samuel Jacob Berkovits, 1539058 Ontario Inc. o/a Omni2 Jewelcrafters and Omni Jewels & Java, 2221652 Ontario Inc. o/a Omni Cash for Gold, on all matters under appeal.

Melvyn Solmon and Cameron Wetmore, for Harold Gerstel and 2102503 Ontario Inc. o/a Harold the Jewellery Buyer, on all matters under appeal.

Matthew Valitutti, for the respondent, Maria Konstan in COA-23-CV-0347.

Heard: March 20-21, 2024

On appeal from the judgment of Justice James F. Diamond of the Superior Court of Justice, dated February 21, 2023.

Gomery J.A.:

Overview

[1] These interrelated appeals arise in the context of a turf war between competing cash-for-gold businesses run by Harold Gerstel and Samuel Jacob Berkovits through their respective companies.[1]

[2] Harold and Jack each ran jewellery businesses in Toronto for decades. Harold's business, known as Harold the Jewellery Buyer or HJB, operated through his numbered company, 2102503 Ontario Inc. ("Harold's company"). Jack's stores were known collectively as Omni Jewelcrafters. They were operated through his numbered companies, 1539058 Ontario Inc. and 2221652 Ontario Inc.

[1] I will refer to the individual parties in these actions (except Hosseini) by their first names or nicknames, in keeping with how they are referred to in the judgment below. Also in keeping with the reasons below, I will refer to Mr. Berkovitz as "Jack".

("153 Ontario" and "222 Ontario" respectively, and "Jack's companies" or "Omni" collectively). Until 2009, Omni's business focused on retail jewellery.

[3] In 2007, Harold opened a new storefront for HJB more or less kitty corner to an Omni location. Two years later, Jack expanded the scope of his jewellery business to offer customers cash for gold, putting him in direct competition with Harold. Harold found this offensive because of the proximity of the Omni and HJB stores and because he had invested a great deal of money in advertising his cash for gold business.

[4] In the years that followed, each man spared no effort to gain a competitive advantage. This continued for years.

[5] Harold hired people, some of whom were unhoused or struggling with addiction or mental health issues, to divert customers from the Omni stores to HJB. Jack erected advertising intended to confuse Harold's potential customers. He took the signage down only after Harold got an injunction requiring him to do so. There were other examples of reprehensible conduct on both sides. Efforts to broker peace through a local rabbi were unsuccessful.

[6] In July 2010, Harold's long-time employee, Maria Konstan, became directly involved in the feud. She was charged with various criminal offences, including uttering death threats. The charges were based on statements given to police by Jack and Saeed Hosseini, a former mixed martial arts fighter who occasionally

worked for Harold. Jack and Hosseini told police that Maria had offered money to Hosseini to kill or physically harm Jack. The criminal prosecution of these charges was dropped in June 2011, but not before Maria was arrested for breach of her recognizance.

[7] The criminal charges against Maria excited media attention. There were articles about Harold and Jack's cash for gold feud in the national media and a local paper, the Town Crier. In November 2011, the Town Crier published an article, both online and in print, based on an interview with Harold. The article stated that Harold had shown its author text messages revealing that Jack had attempted to bribe and threaten former HJB employees so that they would falsely testify against Harold. As it turned out, the inculpatory messages were fabricated by another individual who sometimes worked for Harold. Jack served a libel notice on Harold following the article's publication.

[8] Harold and Jack expanded their feud to the courts. Each sued the other and their corporations. The causes of actions included abuse of process, conspiracy to injure, nuisance, interference with economic relations, and defamation. Maria also started an action. After the criminal charges against her were dropped, she sued Jack and Hosseini for malicious prosecution, abuse of process, conspiracy to injure, and intentional infliction of emotion distress. Counterclaims were filed in various actions. Other parties were involved but the claims against them were settled or abandoned prior to trial.

[9] Three actions were eventually tried together: the “Murder for Hire Action” (COA-23-CV-0347); the “Interference Action” (COA-23-CV-0365); and the “Town Crier Action” (COA-23-CV-0371). Over a 28-day trial, Jack, Harold and Maria testified along with many other ordinary witnesses and two experts. The trial judge acknowledged that it was difficult to determine exactly what had happened, not only because of the volume of evidence but because Harold, Jack, and Maria were generally neither credible nor reliable witnesses. Although Hosseini did not participate in the trial, the trial judge concluded that his statements to police and other out of court statements were wholly unreliable.

[10] In the Murder for Hire Action, the trial judge granted Maria’s claim for abuse of process against Jack and Hosseini. He also found that Hosseini was liable to her for both malicious prosecution and intentional infliction of mental distress. He held Hosseini and Jack jointly and severally liable for Maria’s general, special, aggravated and punitive damages totaling $221,775.

[11] In the Interference Action, the trial judge held Harold and his company liable to Jack and his companies for nuisance and intentional interference with economic relations. Harold and his company were ordered to pay $200,000 in compensatory damages.

[12] Finally, in the Town Crier Action, the trial judge granted Jack’s defamation claim against Harold, awarding him general damages of $50,000.

[13] The trial judge dismissed the balance of the claims and counterclaims.

[14] In these five consolidated appeals and cross-appeals, Maria, Harold, and Jack, as well as Harold and Jack's respective companies, ask this court to intervene either to overturn the trial judge's decision on claims rejected at trial or to increase or decrease the damages awarded. For the reasons below, I would grant Jack's appeal of the finding that he is liable to Maria for abuse of process and set the judgment against him aside in the Murder for Hire action. I would dismiss all other appeals and cross-appeals.

Standard of review

[15] This court cannot interfere with a trial judge's decision absent an error of law or a palpable and overriding error of fact or mixed law and fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10, 27-28. A misapprehension of the elements required to establish a cause of action is an error of law: *Housen*, at para. 27. An error of fact or mixed law and fact is palpable "if it is plainly seen and if all the evidence need not be reconsidered in order to identify it"; it is overriding "if it has affected the result": *Hydro-Quebec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33, citing *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33 (emphasis omitted).

Jack's Appeal in the Murder for Hire Action (COA-23-CV-0347)

a. Facts relevant to the Murder for Hire Action

[16] No purpose would be served in reviewing all the evidence and facts in this case, which are set out at length in the reasons at first instance. I will instead set out the facts, as determined by the trial judge, relevant to each appeal and cross-appeal as I consider them.

[17] On July 16, 2010, Jack honked his car horn at Maria while she was walking down the street, and they yelled insults at each other. Right after this incident, Maria had a conversation with Harold and Hosseini at Harold's store. Hosseini was an imposing and intimidating figure with several criminal convictions. As Harold admitted at trial, he paid Hosseini to do "surveillance work" at one of Jack's stores a few times. For example, Hossein kept track of how many customers were going in and out the Omni store. On at least one occasion, Hosseini posed as a customer seeking to sell jewelry (supplied by Harold) to get information about Jack's prices and business practices.

[18] A few hours later after his discussion with Maria and Harold on July 16, 2010, Hosseini contacted Jack and suggested they meet. They met later that day and spoke again by phone at least twice over the next few days. Hosseini told Jack that Maria had hired him to harm Jack very badly, starting with breaking his legs and "possibly worse", for which she offered to pay Hosseini $50,000. This was a

fabrication. The trial judge found that, during her conversation with Hosseini and Harold on July 16, 2010, Maria “said something about Jack deserving his legs to be broken”. He concluded, however, that she did not make any actual threat or offer to hire Hosseini to murder or hurt Jack. Hosseini invented a “murder for hire” plot because he thought he could use it to get money from Jack or Harold or possibly both.

[19] Jack went to the local police station to report what Hosseini had told him right after their first meeting. He was not asked for a statement immediately, but two police officers went to visit Jack at his home later that same evening. The trial judge found that Jack's evidence relating to his attendance at the police station was confusing at best, in part because his testimony about being told to wait and having no one attend to his request was contradicted by a police officer's testimony about the station's usual procedure when an individual states that their life is in danger.

[20] Based on the police officers’ notes, Jack told them during this first interview that he had been harassed and threatened by Harold but did not mention a murder for hire plot or a threat of serious physical harm.

[21] On July 20 and 21, 2010 respectively, Hosseini and Jack each gave separate, sworn KGB statements to the police. In his statement, Jack alleged that Maria screamed “you’re about to go down … you’re finished” during their street

altercation a few days earlier, and that Hosseini had disclosed a plot to him which entailed breaking Jack's legs at a minimum, and "tak[ing] him out" at a maximum. He also told the police that he had been receiving threatening text messages from Harold for the entire month of June 2010. The police officer leading the investigation into Jack and Hosseini's allegations, Ted Fritz, believed that Jack genuinely feared for his life and safety.

[22] In the late evening of July 21, 2010, the police arrested Maria. She was charged with threatening property damage, threatening death and bodily harm, and two counts of counseling to commit an indictable offence. Given her advanced age, she was permitted to spend the rest of the night at home and come to the police station the following morning. She was released later that day on $10,000 bail and recognizance terms.

[23] In the months following Maria's arrest, Jack attempted unsuccessfully to persuade the police that Harold should also be arrested. He gave media interviews alleging that Harold was behind the murder for hire plot. The trial judge found that Jack maliciously sought to exploit the criminal prosecution in order to ruin Harold and improve his own competitive position in the jewelry/cash for gold business.

[24] In June 2011, the Crown decided to drop the July 2010 charges against Maria. When Jack learned of this decision, he attempted to persuade the Crown to delay publicly announcing that the charges would be dropped, so that Jack

would have time to wrest a financial settlement from Harold. The Crown refused this request. On June 29, 2011, however, Maria was arrested for breach of the terms of her recognizance earlier that month. Her breach consisted of walking in front of one of Jack's stores, in violation of a term requiring her to stay a certain distance away from them. The video evidence of the breach was furnished to police by Jack after he learned that the original charges against Maria would be dropped. Maria attempted to commit suicide the day after her second arrest. This second set of charges against her was also eventually dropped.

[25] Following the dismissal of the July 2010 charges against her, Maria began the Murder for Hire Action against Jack, Hosseini and the Toronto Police Services Board. Jack countersued Maria and Harold for damages for conspiracy to injure, assault, and intentional infliction of mental suffering. Harold in turn countersued Jack for defamation and misappropriation of personality, and Jack and Hosseini for conspiracy to injure and an unlawful means conspiracy.

b. The grounds for Jack's appeals

[26] Jack appeals the trial judge's determination that he and Hosseini are jointly liable to Maria for abuse of process. He contends that the trial judge misapprehended or misapplied some of the elements required to prove abuse of process and that the trial was unfair, because Hosseini was barred from testifying. Jack also appeals the trial judge's assessment of damages, on the basis that

Maria's recovery in her claim against the Toronto Police Services Board (which was settled before trial) should have reduced the amount that Jack was ordered to pay.

c. Maria did not prove that she was a party to a legal process initiated by Jack

[27] As held in *Harris v. Glaxosmithkline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused, [2011] S.C.C.A. No. 85, at paras. 27-28, a plaintiff alleging abuse of process must prove that:

1. The plaintiff was a party to a legal process initiated by the defendant;
2. The legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective;
3. The defendant took or made a definite act or threat in furtherance of the improper purpose; and
4. The plaintiff has suffered special damages as a result.

[28] The trial judge found that Maria had "clearly satisfied" the first element of abuse of process but did not explain how he reached this conclusion. His finding is, however, consistent with his assessment of Maria's malicious prosecution claim. The first element of that tort is that the criminal proceedings "were initiated by" the defendant: *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at

para. 53. The trial judge held that Jack and Hosseini's role in reporting the murder for hire plot to police satisfied this element, stating:

> As set out in *Miazga*, Maria must prove that Jack and Hosseini were "actively instrumental" in setting the law in motion against Maria. Without the participation of Jack and Hosseini (who were the only witnesses interviewed by the police), Maria would never have been arrested or charged.
>
> The police's entire investigation consisted of (a) Jack attending 13 Division to "have a file opened", and (b) Jack and Hosseini providing their sworn statements to police. The criminal proceedings against Maria were clearly initiated by Jack and Hosseini.

[29] In short, the trial judge found that Jack and Hosseini initiated the criminal prosecution because, but for their sworn statements to police, no investigation would have been undertaken and no charges would have been laid.[2] It follows that he would find, in the context of Maria's abuse of process claim, that she "was a party to a legal process initiated by" Jack and Hosseini and that she therefore satisfied the first element of her abuse of process claim.

[30] In my view, the trial judge misapprehended the criteria for the first element of abuse of process by wrongly applying a "but for" test instead of more stringent criteria.

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[2] After reviewing the other elements of malicious prosecution, the trial judge granted Maria's claim for this cause of action against Hosseini but dismissed it against Jack.

[31] The trial judge's reliance on the language in *Miazga* was misplaced. The defendant in *Miazga* was not, as here, a complainant but a Crown prosecutor. It is in this context that the Supreme Court of Canada referred to the requirement that the defendant be "actively instrumental" in setting a prosecution in motion. Even in that context, however, the Supreme Court held that this element is satisfied only "where the defendant Crown makes the decision to commence or continue the prosecution of charges laid by police, or adopts proceedings started by another prosecutor": *Miazga*, at para. 53.

[32] The determination of whether a private individual initiated a criminal proceeding involves different considerations. In Ontario, the police officer who laid the charge will generally be considered to have initiated a prosecution: *Kefeli v. Centennial College of Applied Arts and Technology*, 2002 CanLII 45008 (C.A.), at para. 24; *D'Addario v. Smith*, 2018 ONCA 163, at para 24. Exceptionally, a complainant will be held to have initiated a criminal prosecution if "the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment": *Kefeli*, at para. 24; *D'Addario*, at paras. 24-25. In *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, at para. 50, this court held that the first part of the test for malicious prosecution could also be met in circumstances falling short of the "virtually impossible" standard:

> [A] person may be regarded as the prosecutor or the individual who initiated the action if "he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded; or if he withholds information in the knowledge of which the police would not prosecute." [Citations omitted.]

[33] Although this passage suggests that a court could find that a private individual initiated a criminal prosecution by simply proving that a criminal complainant misled the police or withheld exculpatory information, this court in *McNeil* and in subsequent decisions has imposed a more rigorous standard.

[34] In *McNeil*, the court held that the first element of malicious prosecution was satisfied not only because the police and the Crown relied wholly on the appellant, which "actively and deliberately misled them", but because the police were unable, despite diligent investigation, to uncover exculpatory evidence controlled by the appellant: *McNeil*, at para. 53.

[35] In *D'Addario,* the trial judge held that proof that the defendants' statements to the police were false by itself was insufficient to establish that they, rather than the police, initiated the prosecution. He held that there would have to be "evidence that the defendants withheld exculpatory evidence; that they pressured the police in laying the charges or somehow compromised the independence of the prosecution": *D'Addario*, at para. 15. The Court of Appeal upheld this decision, based on the trial judge's assessment that the officer who laid the sex

assault charge did so based on her own independent discretion: *D'Addario*, at paras. 25-26.

[36] Finally, in *Pate v. Galway-Cavendish*, 2011 ONCA 329, 342 D.L.R. (4th) 632, at paras. 51-53, this court held that, to find that the defendant employer had initiated a criminal complaint against a former employee, the employee would have to prove not only that the employer knowingly withheld exculpatory information from the police and misled the officers into not conducting their own search into relevant records, but that this conduct undermined the independence of the police investigation and the independence of the decision-making process concerning whether to lay charges and prosecute.

[37] The trial judge accordingly misapprehended when a complainant can be held to have initiated a criminal prosecution for the purpose of a subsequent tort action against them by the accused. The question is not whether criminal charges would have been laid in the absence of the complainant's report to the police. Rather, the question is whether, through knowingly supplying misinformation or withholding evidence, or through other wrongful conduct, the complainant compromised the police investigation and/or the independence of the decision by police to lay charges.

[38] Maria contends that the initiation requirement applicable in a malicious prosecution claim should be relaxed in the context of an abuse of process claim,

because the two torts address different misconduct. Citing *Tsiopoulos v. Commercial Union Assurance Co.*, (1986) 57 O.R. (2d) 117 (Ont. H.C.), at para. 13, and *Bosada v. Pinos et al.*, (1984) 44 O.R. (2d) 789 (Ont. H.C.), at p. 8, she argues that malicious prosecution is concerned with the wrongful procurement of a legal process or the wrongful launching of criminal proceedings, whereas abuse of process concerns the misuse of process, even if properly obtained, for any other purpose but that which it was designed to serve. On this argument, not every individual who makes a police complaint would be liable for abuse of process. They would, however, be liable if their predominant purpose in making the complaint was to harm the accused or some other person.

[39] *Tsiopoulos* and *Bosada* predate *Harris v. Glaxosmithkline Inc.*, which unequivocally requires that a plaintiff suing for abuse of process prove that they were a party to a legal process "initiated by the defendant". I agree that abuse of process is a more flexible doctrine than malicious prosecution. There is a difference between relaxing the initiation requirement and eliminating it altogether, however. Maria's argument effectively collapses the first two elements of abuse of process such that the sole or at least overriding consideration is a defendant's predominant purpose.

[40] There is a sound policy rationale for a stringent initiation requirement in the context of an abuse of process claim arising from a criminal complaint. It ensures that individuals who genuinely believe they have information about a crime are not

discouraged from reporting it to the police because they fear potential exposure to a tort claim by an accused (or some other person) if the information turns out to be inaccurate or incomplete and the prosecution does not result in a conviction.

[41] Applying the criteria in *Harris v. Glaxosmithkline Inc.*, *McNeil*, *D'Addario*, and *Pate* to the trial judge's findings of fact, Jack did not initiate the criminal prosecution against Maria in July 2010. Her arrest was not based solely or even primarily on the information he provided; his core allegation – that he believed that Maria had offered money to Hosseini to injure him and genuinely feared for his personal safety – was true; he did not have the means to determine whether Hosseini's account to him of the murder for hire plot was true or false; and he did not obstruct the police investigation or interfere with their independent discretion to lay charges.

[42] The focus of the July 2010 investigation and the charges was the murder for hire plot. The primary source of the information that led the police to arrest Maria was provided by Hosseini. All of Jack's knowledge of the plot was second hand. The lead investigator, Detective Fritz, testified that he placed little weight on the text messages from Harold produced by Jack.

[43] The trial judge rejected Maria's argument that Jack's statement to police about the existence of the murder for hire plot was knowingly false, and that Jack and Hosseini conspired, or acted in concert or with a common design when they made their statements to police. He found that:

> Jack exaggerated, took liberties, and tendered half-truths to the police when he gave his sworn statements. Those actions were undertaken maliciously to ultimately try to capture Harold in this murder for hire plot. Yet at that early state of this sordid series of events, Jack held a subjective belief that his life or health was in danger. That belief was not concocted.

[44] The trial judge further found that Jack had no duty to investigate whether Hosseini was telling the truth about the murder for hire plot.

[45] Most critically, the evidence did not establish that Jack's misrepresentations, exaggerations, and omissions compromised the police's independent discretion in deciding to lay charges against Maria.

[46] This is not a situation like *McNeil*, where Jack had the ability to frustrate an effective police investigation by concealing exculpatory information. He had no direct insight into Maria's conversations with Hosseini. He had a tape of at least two of his phone conversations with Hosseini, but their contents did not exculpate Maria. There were other sources of information that the police could have investigated prior to Maria's arrest. For example, they could have sought to interview Maria or Harold, or to obtain the surveillance video from Harold's store that was eventually produced at trial showing that a conversation between Hosseini, Maria and Harold did in fact take place on July 16, 2010. Beyond giving a statement, Jack took no steps to influence or undermine the investigation prior to Maria's arrest.

[47] Jack likewise had no role in the decision to charge Maria. When asked who made the decision to arrest and charge her on July 21, 2010, Fritz stated: “That would have been me”. In response to questions about whether his decision would have been different had he known about evidence that later emerged at trial, Fritz either said it would not have necessarily affected his decision to arrest Maria or, more frequently, that he was not sure if it would have affected his decision. He testified that any single omission or misleading statement “would have been, obviously, taken into consideration but [he didn’t] know if any one or a combination of all these things may have made [him], obviously, impacted [his] decision to lay charges.”

[48] Fritz had been a police officer for decades and had taken hundreds of KGB statements. He was aware that the commercial rivalry between Harold and Jack had led to other police complaints. Notwithstanding this context and the extraordinary nature of the allegations by Hosseini and Jack, Fritz concluded that there were reasonable and probable grounds to arrest Maria in July 2010. Having reviewed the evidence, the trial judge agreed.

[49] Even if the initiation requirement were relaxed to allow for a tort based solely on what Jack did after Maria was arrested, there was no basis to find Jack liable for abuse of process. The trial judge found that Jack tried to convince the police to investigate Harold’s involvement in the murder for hire plot, and tried to delay the public disclosure of the decision to drop the original charges against Maria so that

Jack could obtain a financial settlement from Harold. But none of these efforts succeeded. It follows that Maria could not have suffered any damages as a result of them.

[50] Jack actively took steps to bring about Maria's second arrest in June 2011. When he saw her walking in front of one of his stores in violation of the terms of her recognizance, Jack sent his employees outside to talk to her so that she would remain there for more than a few seconds. He then provided the police with a copy of video surveillance showing that Maria had breached the requirement to keep a certain distance from his store. The judge found that Jack took these steps after learning that the original charges against Maria would be dropped, and that he acted maliciously and for a collateral purpose in bringing the video to the police so as to have Maria charged a second time. These findings, however, do not establish that Jack initiated the second prosecution. There was again a reasonable and valid basis to arrest Maria. There is again no evidence that she was charged in June 2011 because Jack misled the police, provided incomplete information, or impeded their investigation. He simply gave them videotape evidence on which she could be arrested. The surveillance tape showed that she had breached a term of her recognizance, whether she was in front of Jack's store for five seconds or thirty.

[51] I conclude that the evidence does not support a finding that Maria was a party to a legal process initiated by Jack. His appeal should be granted on this basis alone.

d. Maria did not prove that Jack's predominant purpose was furthering an indirect, collateral and improper objective

[52] Jack's appeal likewise succeeds based on the judge's misapprehension of the second element of abuse of process.

[53] In the trial judge's view, the second and third elements of abuse of process are intertwined. He found that Maria had proved both based on the following analysis:

> Jack had a collateral purpose when initiating the criminal process against Maria. Not only was Jack interested in ultimately painting Harold with the same criminal brush, he clearly sought to harm Harold's personal and professional reputation to benefit his own reputation. The fact that Jack gave evidence that he asked Fritz [the lead investigator] and Pirraglia [the Crown prosecutor] to hold off announcing the withdrawal of the criminal charges against Maria so that he could pursue his own financial gain by way of a settlement with Harold is clear evidence of such collateral purposes.
>
> In this Court's view, having Maria charged a second time is itself an additional step in furtherance of Jack's improper, collateral purposes.

[54] The trial judge skipped a critical step in this analysis. Although he found that Jack had indirect, collateral, and improper objectives, he failed to determine whether the furtherance of such objectives was his predominant purpose in initiating the criminal investigation which led to charges against Maria.

[55] An improper and collateral motive does not amount to a predominant purpose. In *Westjet Airlines Ltd. v. Air Canada,* [2005] O.J. No. 2310*,* at para. 19, Nordheimer J. (as he then was) observed that commercial competitors are sometimes motivated to sue one another. This does not automatically imply that the predominant purpose is to further that objective:

> If the action itself is trumped up or completely spurious, the institution of the action for the goal of driving a competitor out of business might well be found to be instituted for an improper purpose since there would be no associated valid basis for the claim. However, if there is some basis for the claim, it seems to me that it then becomes difficult to characterize the action as having been instituted for an improper purpose just because a by-product of its successful prosecution may be the elimination of the defendant as a competitor.

[56] Recognizing that Jack hoped to leverage a criminal prosecution against Maria for improper and collateral purposes (his vendetta against Harold) does not translate to a finding that this was his predominant purpose in filing police complaints against her. The trial judge found that Jack genuinely feared for his life and safety on July 21, 2010, when he gave the formal statement to police that led to Maria's first arrest. This finding is irreconcilable with a finding that Jack's predominant purpose in going to the police was to harm Harold. Likewise, although he was clearly motivated by malice in reporting Maria's breach of her recognizance in June 2011, the resulting charge against her cannot be characterized as

"trumped up or completely spurious". As the trial judge found, there were valid and reasonable grounds for both of Maria's arrests.

[57] Jack's appeal in the Murder for Hire Action should accordingly be granted and Maria's abuse of process claim against him should be dismissed, without the need to consider Jack's other grounds of appeal.

Harold's Cross-Appeal in the Murder for Hire Action (COA-23-CV-0347)

[58] Harold cross-appeals the dismissal of his claims against Jack and Hosseini in the Murder for Hire Action on three grounds: (a) the trial judge erred in finding that Jack reasonably believed in the existence of a murder for hire plot when he made his KGB statement; (b) the trial judge failed to consider evidence relevant to Harold's conspiracy to injure and unlawful means conspiracy claims; and (c) he did not consider Harold's abuse of process claim based on Jack's criminal complaint against Maria and his civil suit against Harold.

[59] I do not find that Harold has identified any reversible errors and so would dismiss this cross-appeal.

a. The trial judge did not make a reversible error in finding that Jack reasonably believed in the murder for hire plot when he made his KGB statement

[60] Harold challenges the trial judge's finding that Jack had a reasonable belief in a murder for hire plot when he gave his KGB statement on July 21, 2010. He

argues that the trial judge should have rejected Jack's testimony on this point because Jack's account of his conversation with Hosseini on July 16, 2010, was irreconcilable with the absence of any reference to any threat to Jack's physical safety in the notes of the police officers who interviewed him later that evening, and with the failure of police to take any immediate action when he visited the station earlier that day. Harold argues that the trial judge's error is material because Jack's dishonesty bears on his credibility as well as the assessment of whether or not he and Hosseini conspired to make false allegations against Maria and Harold.

[61] This argument invites this court to improperly reweigh and substitute its appreciation of the evidence for that of the trial judge. The trial judge explained why he reached the conclusions he did in the face of contradictory and flawed accounts. I am not persuaded that he made any palpable and overriding error.

[62] Although the trial judge ultimately concluded that there was no murder for hire plot, he found that Maria likely "did say something about Jack deserving his legs to be broken" during her conversation with Harold and Hosseini on July 16, and that Hosseini told Jack about a murder for hire plot after that conversation. The trial judge noted that, initially, Harold and Maria each denied any conversation with Hosseini after Maria's altercation with Jack; Harold denied that Hosseini was in the store and Maria claimed that he was there but that she never spoke directly to him. The trial judge found they were either mistaken or lied under oath, because

video surveillance footage produced at trial showed the three of them had an "extensive" discussion at Harold's store on July 16 after the altercation, during which Maria "clearly spoke directly and at length with Hosseini". Confronted with the footage, Harold admitted that a conversation had taken place, during which Maria "may have said some nasty things about Jack", specifically that "she wouldn't be unhappy if something bad were to happen to [him]". In cross-examination, Maria admitted that she made a joke along the lines of "somebody should break that guy's legs", referring to Jack. Hosseini's visit to Jack later that day was confirmed through the testimony of one of his employees, who testified that Jack "looked like he had seen a ghost" on July 16, 2010.

[63] The trial judge's finding about Jack's subjective belief in a murder for hire plot on July 21 was grounded in the evidence. He recognized that Jack, like Maria, Harold, and Hosseini, was generally neither a reliable nor credible witness. This did not require him to reject Jack's evidence in its entirety. Jack's testimony that he sincerely feared for his safety based on Hosseini's disclosure on July 16 was corroborated by his employee's evidence about his demeanour. It was also corroborated by Fritz, an experienced police officer, who believed that Jack sincerely feared for his safety, even though the two officers who visited Jack that day did not refer to the murder for hire plot or a threat of serious physical harm in their notes.

[64] I would accordingly reject this ground of appeal.

b. The trial judge did not make a reversible error in his analysis of Harold's conspiracy to injure and unlawful means conspiracy claims

[65] A plaintiff claiming conspiracy to injure must prove that the defendants acted "in combination, that is, in concert, by agreement or with a common design": *Agribrands Purina Canada Inc. v. Kasemekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 26. In supplementary reasons, the trial judge held that Harold's counterclaim for conspiracy-based torts could not succeed for the same reason that Maria's similar causes of action against Jack and Hosseini could not succeed:

> Jack was clearly motivated to have Harold ultimately charged so that Harold [and his company] would suffer significant harm and damages leading to Jack "winning the turf war".
>
> Hosseini was not motivated by any of those things, and simply sought to advance his own personal financial interest. He switched sides several times, all with the hope of getting paid by first Jack, and then Harold. The motivations of Jack and Hosseini were always "two ships passing in the night", and there was never any common design between Jack and Hosseini to having Maria criminally charged.

[66] Harold argues that, by focussing only on Harold and Jack's differing motivations, the trial judge failed to consider evidence that they conspired to go to the police with a fabricated story in July 2010.

[67] This argument cannot succeed. The trial judge unambiguously found that there was no conspiracy between Jack and Hosseini. The murder for hire plot was Hosseini's invention, fabricated to extort both Jack and Harold. As the trial judge

stated later in his reasons, when Hosseini heard Maria say that Jack deserved to have his legs broken, he “saw an opportunity to make himself money, and proceeded to further his goals by convincing Jack that a murder for hire plot occurred when it did not”. The trial judge further found that Jack believed what Hosseini told him. Although Jack later attempted to leverage Hosseini’s disclosure for his own purposes, he sincerely feared, at least when he made his KGB statement on July 21, 2010, that his life or safety was at risk.

[68] As aptly stated in *Pontillo v. Zinger et al.*, 2010 ONSC 5537, at para. 15, there is “no tort of engaging in acts that further someone else’s conspiracy”. The trial judge found that Harold and Jack each had ulterior motives for reporting the murder for hire plot to police. He did not, however, find that they had an agreement with a common design.

[69] Harold argues that the trial judge should have explained how he reconciled his finding with transcripts of two phone conversations between Jack and Hosseini before they made their KGB statements. This was a lengthy and challenging trial with a great deal of evidence, including competing narratives from unreliable and untrustworthy witnesses. The trial judge was entitled to reach conclusions based on all the evidence without reciting every specific piece of evidence he relied on at each stage of his analysis. He was clearly aware of the transcripts of the phone calls between Jack and Hosseini, as he referred explicitly to them elsewhere in his reasons.

[70] In my view, Harold is again asking this court to improperly reweigh and substitute its appreciation of the evidence for that of the trial judge. The trial judge's finding that there was no conspiracy was open for him to make on the evidence.

[71] Harold has not established that the trial judge made any palpable and overriding error with respect to the existence of a conspiracy. This ground of appeal should also be rejected.

c. The trial judge did not err in dismissing Harold's abuse of process claim

[72] Harold contends that the trial judge failed to address his abuse of process claims against Jack in his counterclaim in the Murder for Hire Action. This ground of appeal also lacks merit.

[73] In supplementary reasons, the trial judge disposed of Harold's abuse of process claims in a summary fashion. He found that Jack and his companies had no collateral objective in commencing the Interference Action against Harold and his company; their primary objective was "to redress the civil wrongs (found to have factually and legally occurred in [the trial judge's] Reasons) visited upon Jack and the Omni corporations".

[74] The trial judge did not explicitly refer to Harold's abuse of process claim in the Murder for Hire Action in his reasons or supplementary reasons. This is not surprising since, in his closing argument, Harold's lawyer did not meaningfully address the claim. He did not argue, as he does before this court, that Jack

committed an abuse of process against Harold by trying to convince the police to investigate and charge him.

[75] In any event, Harold's abuse of process claim in the Murder for Hire Action has no merit. Harold was not a party to a legal process initiated by Jack. As I have found, it was the police, not Jack, who initiated the criminal prosecution against Maria. Harold was never charged with any offence, approached for a statement, or even contacted by the police.

[76] I accordingly conclude that Harold's counterclaim in the Murder for Hire Action should be dismissed.

Harold's appeal in the Interference Action (COA-23-CV-0365)

[77] The trial judge found that, for a period of nearly six years, Harold hired people who were unhoused or struggling with addiction or mental health issues to loiter around the Omni store near HJB wearing advertising sandwich boards. These individuals approached potential Omni customers seeking to divert them to HJB. Omni employees, customers, and potential customers were harassed, disparaged, and intimidated. The Omni store was subject to constant surveillance by video cameras and Harold's employees. Parking and physical access to the store was obstructed.

[78] Based on these findings, the trial judge found that Harold and his company were liable to Jack and his companies for nuisance and interference with economic relations. He awarded Jack and Omni $200,000 in damages.

[79] Harold and his company contend that the trial judge made an extricable error of law in holding them liable for intentional interference with economic relations. He also challenges the damages award as unfounded in the evidence.

[80] I would not grant the appeal on either of these grounds.

a. The trial judge's conclusion on liability for intentional interference with economic relations does not affect the outcome of the action

[81] Harold and his company argue that the trial judge misapprehended an element of the tort of intentional interference with economic relations. A plaintiff must prove interference "by illegal or unlawful means": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 81. The trial judge found that the "unlawful means" element was met based on the same conduct that gave rise to liability in nuisance. Notably, Harold and his company harassed, disparaged, and intimidated Omni employees, customers, and potential customers. For conduct to constitute unlawful means, however, the conduct "must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct": *A.I. Enterprises Ltd. v. Bram*

Enterprises Ltd., 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 176. Harold argues that the conduct identified by the trial judge does not rise to this level.

[82] In my view, the evidence supports a finding that Harold and his company engaged in conduct that would have been actionable by Omni customers subject to harassment and intimidation, assuming they suffered any compensable damages as a result. But even if I am wrong, a reversal of the trial judge's finding on intentional interference with economic relations would not change the outcome of Jack and Omni's action. Harold and his company would still be liable for the same damages in nuisance. There is nothing in the trial judge's reasons suggesting that some of the damages awarded are attributable uniquely to either tort.

b. There is no basis to interfere with the trial judge's damages assessment

[83] Harold and his company contend that the trial judge erred in principle in awarding $200,000 in damages to Jack and Omni. Although the trial judge concluded that the evidence they tendered was largely unreliable, he awarded Jack and Omni an amount that was more than nominal.

[84] As the trial judge correctly noted, a plaintiff claiming damages has the burden of proving them. He found that Jack, a trained accountant, inexplicably failed to maintain proper financial books and records for the two Omni stores affected by the nuisance perpetrated by Harold, and that the assumptions relied on by his expert, Mandel, were substantially based on what they understood from

Jack, who was unreliable. The trial judge nonetheless concluded that Jack's companies "likely suffered some form of economic damage". He alluded to competing authority on the appropriate approach in a case where the plaintiff's evidence regarding damages is uncertain or unreliable. Some courts award only nominal damages in such cases. In *Murano v. Bank of Montreal* (1995), 20 B.L.R. (2d) 61, 31 C.B.R. (3d) 1 (Ont. S.C.), rev'd (1998) 41 O.R. (3d) 222 (C.A.), at para. 163, however, Adams J. held that "an inherent difficulty in piecing together what might have happened had there been no breach or tort committed will not relieve a court of its duty to assess damages".

[85] The trial judge concluded as follows:

> I do not find that 153 and 222 suffered nearly the amount of damages that Mandel had put forth, mostly due to Jack being the source of the assumptions made by Mandel. In the circumstances of this case, and having reviewed the limited financial information provided by Jack/Omni, I am of the opinion that at most, 153 and 222 likely suffered no more than a 10% loss in sales revenue. Based upon the gross profits (which themselves are truly not that reliable) tendered at trial, 153's and 222's damages caused by the nuisance and intentional interference with economic relations as found by this Court would amount to no more than $200,000.00.

[86] I am not persuaded that the trial judge committed a reversible error in reaching this conclusion.

[87] A trial judge's assessment of damages is entitled to significant deference. This court will only interfere if the trial judge committed an error in principle or law

or misapprehended the evidence, or if the quantum awarded was palpably incorrect: *Celestini v. Shoplogix Inc.*, 2023 ONCA 131, at para. 58.

[88] Decisions such as *Martin v. Goldfarb*, (1998) 41 O.R. (3d) 161 (C.A.) and *TMS Lighting v. KJS Transport*, 2014 ONCA 1, 314 O.A.C. 133, have distinguished between cases in which it is difficult to assess a plaintiff's damages and those where only nominal damages are appropriate. As stated in *TMS* Lighting, at para. 83, in which this court ordered a new trial on damages:

> It is well-established that where the absence of evidence renders it impossible to assess damages, a plaintiff may be entitled to only nominal damages. ... But this is not invariably the case. Where a plaintiff proves a substantial loss and the trial judge errs in the assessment of damages arising from that loss, the interests of justice may necessitate a new trial on damages. Although the quantification of damages flowing from the established loss may prove difficult, nonetheless the injured plaintiff is entitled to compensation.

[89] The facts in *TMS* are instructive. A trucking operation was found liable in nuisance and trespass to a neighbouring lighting manufacturing business based on the disruptive airborne dust its operations caused over a five-year period. The trial judge in that case found that the disruption was "neither trivial nor transitory" and led to reduced business productivity. This was "a real wrong, which caused real loss", for which the plaintiff deserved to be compensated: *TMS*, at para. 86.

[90] Here, the trial judge similarly found that Harold perpetrated a nuisance over several years that affected Jack and Omni's business. Jack and Omni were accordingly entitled to compensatory damages.

[91] Jack and Omni had claimed general and special damages in excess of three million dollars. The financial records filed into evidence consisted primarily of financial statements for various fiscal years and monthly sales summaries. The trial judge noted that the financial statements were unaudited and the sales summaries had limited value because they were not segregated by location.The trial judge did not find, however, that none of the financial records filed had any evidentiary value. He instead found that there was sufficient evidence to justify an award of $200,000 for lost profits.

[92] The trial judge rejected the argument that, based on the obvious problems with much of the evidence relating to damages, only nominal damages should be awarded. His rejection is evident because he explained how he calculated compensatory damages and because the amount he awarded is not nominal. The trial judge furthermore rejected a request by Harold's counsel after his decision was released to include the words "nominal damages" in his judgment.

[93] The trial judge's damages assessment was not based on an error of law or principle or a misapprehension of the evidence, nor is it palpably incorrect.

[94] I would accordingly dismiss this appeal.

Harold's Appeal and Jack's Cross-Appeal in the Town Crier Action (COA-23-CV-0371)

a. Facts relevant to the Town Crier Action

[95] Avi Oziel was another individual who worked for Harold from time to time. He suffered from mental health issues and had been criminally convicted for assault and fraud-related charges. Harold claims that he was unaware of Oziel's mental health struggles or criminal record in 2011.

[96] According to Jack, at a meeting in September 2011, Oziel offered to assist him in his fight against Harold in exchange for $5,000. Jack refused. Oziel sent a follow-up text message to Jack, asking him to pay for helpful evidence against Harold. Jack again refused.

[97] Oziel showed Harold a version of his text exchanges with Jack that, unbeknownst to Harold, Oziel had altered to omit Jack's refusal to pay Oziel money in return for his evidence. Harold accompanied Oziel to the police station so that Oziel could report Jack's apparent effort to suborn perjury to an officer whom Harold knew. After taking Oziel's statement, the police officer contacted Jack about the allegations. Jack then provided the police with the actual text exchanges. On November 16, 2011, Oziel confessed that he had doctored the messages, and was

arrested and charged with making a false statement to police. Harold learned of the charge at some point between November 16 and November 24, 2011.[3]

[98] Before Oziel confessed and was charged, Harold took the doctored version of the text messages to a reporter at the Town Crier newspaper and sat for an interview. This interview was the basis for an article entitled “Counter-suit Coming in Cash for Gold Wars”. It was published online on November 29, 2011, attracting 64 page views and 55 unique page views, and in the December 2011 print issue, which had a circulation of 21,000 copies.

[99] The Town Crier article stated that Harold had shown the reporter a text message purportedly from Jack that stated, if Harold’s former employee did not testify against him, Jack would “be inclined to have my lawyer draw a case even if there is no evidence to support it”. The message went on to say that Jack had “taken care of” two of Harold’s former employees monetarily in exchange for testimony against Harold and that that Jack would do the same for Oziel. According to the article, Harold also showed the reported an image from a video allegedly showing Jack making what Harold described as a threatening motion towards

[3] In July 2012, Oziel pled guilty to a charge of public mischief, for which he was given a conditional sentence of four and a half months. Based on Oziel’s statements at sentencing, the criminal court found that he had “acted under [Harold’s] influence”. The trial judge found that this was uncorroborated hearsay and noted that Harold was not charged with any offence.

Maria from outside Harold's store on May 30, 2011. Harold was quoted as saying that charges had not been laid against Jack due to lack of evidence.

[100] Harold learned that Oziel had been arrested for fabricating the text messages before the article was published. He did not, however, take any steps to correct the statements he had made during the interview. Jack served a libel notice on Harold in December 2011, after which he began the Town Crier Action against him. Harold did not apologize or retract the impugned statement prior to or during the trial.

[101] The trial judge found that Harold defamed Jack in the Town Crier article. He rejected Harold's sole defence of justification with respect to his statements about the text messages fabricated by Oziel, but accepted it with respect to his statement about Jack's potentially threatening gesture to Maria. He awarded Jack $50,000 in general damages but declined to award him aggravated or punitive damages.

b. Harold's appeal and Jack's cross-appeal

[102] Harold does not challenge the judge's finding that he defamed Jack in the statements about the text messages published in the Town Crier but contends that the trial judge should have awarded Jack only nominal damages.

[103] Jack cross-appeals, arguing that the trial judge ought to have awarded him aggravated and punitive damages totaling $100,000.

[104] I would not grant either the appeal or cross-appeal.

c. The trial judge did not commit a reversible error in awarding Jack non-nominal damages

[105] In assessing damages resulting from Harold's defamation, the trial judge found that "Jack's reputation [is not] nearly as stellar as Jack claims". He accepted Jack's evidence that he had held various leadership roles and board positions within the Orthodox Jewish community, and had been "somewhat heavily involved" in the jewelry industry and committees within that industry. On the other hand, the evidence at trial had shown Jack to be "manipulative, cavalier, and, on some occasions, less than honest". The trial judge also noted that the defamatory statements were made "at a time when both Harold and Jack were entrenched in their turf war, pulling out all the stops to gain an upper hand over the other, virtually by any means necessary".

[106] The trial judge nevertheless concluded that Jack was entitled to $50,000 in general damages for the harm to his reputation, given the nature of Harold's defamatory statements: "… the defamatory statements paint Jack as being a dishonest criminal bribing potential witnesses to give false testimony. Even someone with a less than stellar reputation is entitled to some redress when defamatory statements cross the line into immoral, dishonest and criminal conduct."

[107] Harold contends that the trial judge committed a reversible error in concluding that Jack had any reputation that could be injured as a result of the defamatory statements, given the trial judge's conclusions about Jack's conduct elsewhere in the reasons. I disagree.

[108] As the trial judge correctly held, general damages in defamation cases "are presumed from the very publication of the false statement and are awarded at large": *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para. 164. The injured plaintiff need not prove any actual loss or injury: *Rutman v. Rabinowitz*, 2018 ONCA 80, 420 D.L.R. (4th) 310, at para. 62, citing *Hill*, at para. 167; Raymond E. Brown, *Brown on Defamation*, loose-leaf, 2d ed. (Toronto: Thomson Reuters, 2017), at 25.1. A plaintiff's inability to point to specific reputational harm is, moreover, "not an admission that such harm did not occur": *Rutman*, at para. 65.

[109] The trial judge's reasons show that he was alive to the factors that mitigated against a generous damages award. Although Jack exaggerated his good reputation during his testimony, he had standing in the local community when the defamatory statements were made and circulated. In the trial judge's view, even in the context of the cash for gold feud, Harold's allegation that Jack had committed a criminal act tarnished Jack's reputation, entitling him to non-nominal damages. This conclusion was open to the trial judge to make on the evidence as a whole.

[110] Harold advances various arguments in support of his contention that Jack should have been awarded only nominal damages. He argues that the trial judge did not place enough weight on Jack's bad acts and the negative effect they had on his reputation. He attempts to establish, through references to Jack's testimony, that Jack admitted that he did not care about his own reputation or believe that Harold's acts succeeded in tarnishing it. He describes the Town Crier Action as a "litigation tactic".

[111] Harold also suggests that Jack is entitled only to nominal damages because he provoked Harold's defamatory statements by making inaccurate and scurrilous allegations about him. Even assuming it is appropriate for Harold to take this position now, the trial judge found that Harold acted out of ill will in making the defamatory statements. This is at odds with the suggestion that he reacted emotionally in response to something Jack said or did.

[112] Harold's references to the record are selective and taken out of context. In any event, it is not this court's role to reweigh the evidence or substitute the trial judge's findings absent a reversible error. Harold has not identified any error in principle or law, established that the trial judge misapprehended the evidence, or shown that the quantum awarded was palpably incorrect.

[113] I would accordingly reject Harold's appeal.

d. The trial judge did not commit a reversible error in declining to award aggravated and punitive damages to Jack

[114] Jack contends that the trial judge misapprehended the test to determine whether he was entitled to aggravated damages and failed to consider his claim for punitive damages at all.

[115] Aggravated and punitive damages may be awarded for defamation if the defendant's conduct has been high-handed and oppressive: *Hill*, at paras. 190, 196. Aggravated damages are compensatory: *Plester v. Wawanesa Mutual Insurance Co.* (2006), 269 D.L.R. (4th) 624, 213 O.A.C. 241 (C.A.), at para. 62, leave to appeal refused, [2006] S.C.C.A. No. 315; *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161, at para. 50. By contrast, punitive damages are designed to signal the court's disassociation with the defendant's conduct: *Whiten v. Pilot Insurance*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 94. For a court to award aggravated damages, a plaintiff must prove that the defendant had "actual malice" in making the defamatory remarks: *Hill*, at para. 190.

[116] The trial judge rejected Jack's claims for aggravated and punitive damages for the following reasons:

> [W]hile Harold was likely acting out of ill will in making the defamatory statements in the Town Crier article, this Court cannot conclude that Harold "knew or ought to have known" that the Oziel text messages were indeed fabricated at the relevant time. If Harold did not know (or could not have known) that the text messages were false,

> the type of malice required to ground an award of aggravated damages is missing. While Harold's potential lack of knowledge of the veracity of the text messages cannot help him with his defence of truth/justification, it also cannot form the basis of an award for aggravated damages.

[117] Jack has not identified any palpable and overriding error warranting appellate intervention in the trial judge's findings and conclusions on these issues.

[118] Citing *Rogacki v. Belz*, (2004) 243 D.L.R. (4th) 585, at para. 44, Jack argues that malice means "acting out of spite or ill will". He therefore argues that the trial judge's finding that Harold acted out of ill will necessarily means that actual malice was proved.

[119] *Rogacki* does not stand for the proposition that every act of ill will attracts an exceptional award of aggravated or punitive damages. The trial judge's reasons show that he understood the principles underlying the award of aggravated or punitive damages. He found that actual malice had not been proved because Harold did not know and could not have known that Oziel fabricated the text messages. Although Harold took pleasure in bringing the fake messages to the attention of the local media, the trial judge effectively found that his act did not rise to the level of high handed and outrageous conduct necessary to attract aggravated damages. This finding was also sufficient to dispose of the claim for punitive damages.

[120] Jack argues that Harold displayed a reckless disregard for the truth and that his conduct after the Town Crier interview and during the litigation should also have attracted aggravated and punitive damages. These arguments were raised at trial and rejected. This court's role is not to interfere with the trial judge's appreciation of the evidence or their findings of mixed fact and law the trial judge absent a reversible error. None has been identified.

[121] I would accordingly dismiss Jack's cross-appeal.

Disposition

[122] As stated at the outset, I would grant Jack's appeal of the finding that he is liable to Maria for abuse of process and set the judgment against him aside in the Murder for Hire action. I would dismiss all other appeals and cross-appeals.

[123] I would direct that, if the parties are unable to agree on the costs of the appeals and cross appeals as well as the disposition of costs awarded at trial on the Murder for Hire Action (COA-23-CV-0347), they should file costs submissions by no later than July 10, 2024. Each set of submissions should not exceed three pages in length and attach a draft bill of costs and any other necessary supporting documentation.

Released: June 27, 2024 "B.W.M."

"S. Gomery J.A."
"I agree. B.W. Miller J.A."
"I agree. J. Copeland J.A."