STATE OF MICHIGAN

COURT OF APPEALS

CHERON, INC.,

Plaintiff-Appellant,

v

DON JONES, INC., d/b/a HARBOUR REAL ESTATE, and DUANE JONES,

Defendants-Third-Party Plaintiffs/Counter-Defendants-Appellees,

and

HARRY F. MAYERHOFER, NOREEN MAYERHOFER, MARTIN H. MAYERHOFER, and MIDWEST INNKEEPERS,

Third-Party Defendants/Counter-Plaintiffs.

FOR PUBLICATION
December 26, 2000
10:05 a.m.

No. 216707
Cheboygan Circuit Court
LC No. 95-005324-CK

Updated Copy
March 2, 2001

Before: Meter, P.J., and Griffin and Talbot, JJ.

METER, P.J.

Plaintiff appeals as of right from an order reducing its damages award against defendants by an amount that plaintiff received pursuant to a settlement agreement in a prior action. Plaintiff also appeals an order granting mediation sanctions to defendants under MCR 2.403(O). We affirm in part and reverse in part.

This case arises out of plaintiff's purchase of a motel from Midwest Innkeepers (Midwest). Defendants facilitated plaintiff's purchase of the motel from Midwest. After the

purchase, plaintiff discovered that the motel was unable to generate sufficient income and sued Midwest, alleging misrepresentation and fraud. Subsequently, plaintiff and Midwest settled the suit; Midwest agreed to pay plaintiff $175,000 and to rescind the contract to purchase the motel, and plaintiff signed a covenant not to sue.

Several months later, plaintiff sued defendants, alleging intentional misrepresentation, innocent misrepresentation, and fraud. Plaintiff claims on appeal that its total damages were $532,779 but that it only sought $357,779 in the suit against defendants because it subtracted the $175,000 received under the settlement agreement with Midwest.

Following a bench trial, the trial court found for plaintiff on its innocent misrepresentation claim against defendants and awarded $57,000 in damages. Subsequently, the trial court subtracted the $175,000 settlement amount from this damages award under MCL 600.2925d; MSA 27A.2925(4), thereby reducing the damages award to zero. It is from this action that plaintiff appeals.

Before March 28, 1996, MCL 600.2925d; MSA 27A.2925(4) stated as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.
>
> (b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.
>
> (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

On March 28, 1996, an amendment of the statute took effect; this amendment eliminated the language in subsection b. 1995 PA 161, the act amending the statute, stated that the amendment of § 2925d applied "to cases filed on or after the effective date of this amendatory act." 1995 PA 161, § 3. 1995 PA 161 further stated that "[t]his amendatory act shall take effect September 1, 1995." 1995 PA 161, § 4. However, 1995 PA 161 was not approved and filed until September 29, 1995, and was not ordered to take immediate effect. Accordingly, it took effect on the general effective date for 1995 legislation: March 28, 1996. See Const 1963, art 4, § 27.

Plaintiff contends that the September 1, 1995, effective date stated in 1995 PA 161 should govern the statutory amendment and that the amendment should therefore apply to the instant case because plaintiff filed suit against defendants on October 5, 1995. We disagree. This issue involves statutory interpretation, which is subject to review de novo. *Shields v Shell Oil Co*, 237 Mich App 682, 688; 604 NW2d 719 (1999).

In *Selk v Detroit Plastic Products (On Resubmission)*, 419 Mich 32, 35, n 2; 348 NW2d 652 (1984), the Supreme Court indicated that when a public act states that the act shall apply to all actions pending or commenced on or after the effective date of the act and then provides a specific effective date for the act, the Legislature has evidenced an intent for the act to apply retroactively to the specified effective date, even if the actual approval and filing of the act occurs after the specified effective date. *Selk*, therefore, would seem to support plaintiff's position in the instant case. However, this language from a footnote in *Selk* was mere obiter dicta[1] and therefore does not constitute binding authority under the doctrine of stare decisis. See *People v Squires*, 240 Mich App 454, 458; 613 NW2d 361 (2000). With this in mind, we cannot construe the Legislature's statement in 1995 PA 161, § 3 that the amendment applied "to cases filed on or

after the effective date of this amendatory act" to allow for retroactivity to September 1, 1995, given that the amendment did not actually take effect until March 28, 1996. Indeed, statutes are to be applied prospectively[2] unless the Legislature's intent for retroactive application is clear. See *People v Nuss*, 405 Mich 437, 450; 276 NW2d 448 (1979), and *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 614; 255 NW2d 702 (1977). There simply existed no clear intent for a retroactive application in the instant case. If the Legislature had intended a retroactive application to September 1, 1995, it would have provided that the amendment applied "to cases filed on or after September 1, 1995," instead of stating that the amendment applied "to cases filed on or after the effective date of this amendatory act." While the Legislature did state in § 4 that "[t]his amendatory act shall take effect September 1, 1995," we conclude that this was merely an indication that if the act were approved and filed before that date, it would not become law until September 1, 1995. See *Selk, supra* at 35, n 2 (indicating that "effective dates provide notice to those who must conform their conduct to the law as specified in the enactment"); see also *Nuss, supra* at 450, and *Int'l Business Machines, supra* at 614 (indicating that statutes are presumed to operate prospectively). Thus, the trial court did not err in applying the preamendment version of MCL 600.2925d; MSA 27A.2925(4) to this case.

Next, plaintiff argues that the preamendment version of § 2925d required only that the *claim* for damages, not the actual damages award, against a nonsettling tortfeasor be reduced by the settlement amount reached with a settling tortfeasor. Plaintiff argues that because it reduced its original $532,779 claim for damages against defendants to $357,779 by subtracting the $175,000 received from Midwest, it complied with the express requirements of § 2925d. This issue again involves statutory construction and is subject to review de novo. *Shields, supra* at

688. We conclude that the trial court correctly determined that under § 2925d, the $57,000 judgment against defendants had to be reduced by the $175,000 that plaintiff received from Midwest in the first action. Contrary to plaintiff's argument, § 2925d required that the *actual damages award*—not the amount of the claim as determined by plaintiff—be reduced by the settlement amount reached with the other tortfeasor. See, e.g., *Dep't of Transportation v Thrasher*, 446 Mich 61, 79; 521 NW2d 214 (1994), *Rittenhouse v Erhart*, 424 Mich 166, 185, 193; 380 NW2d 440 (1985), and *Mayhew v Berrien Co Rd Comm*, 414 Mich 399, 407; 326 NW2d 366 (1982). No error occurred.[3]

Finally, plaintiff argues that the trial court erred in granting defendants' motion for attorney fees and costs as mediation sanctions under MCR 2.403(O) because the original $57,000 damages award was more than the mediation evaluation of $20,000. We agree. We review de novo a trial court's decision to grant or deny a motion for mediation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

MCR 2.403(O) states:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.
>
> (2) For purposes of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

> (3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306; MSA 27A.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

This Court recently held that "the plain language of MCR 2.403(O) requires the trial court to award mediation sanctions if the jury verdict itself, adjusted only as set forth in MCR 2.403(O)(3), is not more favorable to the rejecting party than the mediation evaluation." *Marketos v American Employers Ins Co*, 240 Mich App 684, 700; 612 NW2d 848 (2000). In other words, a trial court should not subtract a posttrial setoff amount from the verdict before determining whether mediations sanctions are warranted. *Id*. at 700-701. *Marketos* indicated that MCR 2.403(O) was not intended to "allow for mediation sanctions based on the amount of a judgment that has been adjusted by posttrial motions." *Id*. at 700, n 8.

Here, the trial court initially awarded damages in the amount of $57,000 but, in determining whether mediation sanctions were appropriate, it subtracted the $175,000 settlement amount and used the adjusted judgment of zero. Under *Marketos*, the trial court should not have subtracted the settlement amount from the judgment before determining whether mediation sanctions were warranted. *Id.* at 700-701. We acknowledge that *Marketos* involved a jury verdict, whereas the instant case involved a judgment following a bench trial.[4] However, we can discern no reason why the jury verdict in *Marketos* should be treated differently from a trial court's judgment following a bench trial. Moreover, *Marketos* specifically indicated that MCR 2.403(O) was not intended to "allow for mediation sanctions based on the amount of a judgment

that has been adjusted by posttrial motions." *Id*. at 700, n 8. Accordingly, the trial court should have used the $57,000 figure for purposes of determining mediation sanctions in this case. Because the $57,000 damages award was more favorable to plaintiff than the mediation evaluation of $20,000, defendants were not entitled to mediation sanctions.

Defendants contend that mediation sanctions *were* in fact appropriate in this case because the trial court's finding that defendants had committed intentional misrepresentation was erroneous. In other words, defendants contend that the appropriate, initial judgment in this case was zero and not $57,000. Defendants believe that they were not obligated to file a cross appeal to argue this issue because they are merely urging an alternative ground for affirmance of the trial court's decision with regard to mediation sanctions. See *In re Herbach Estate*, 230 Mich App 276, 283-284; 583 NW2d 541 (1998). *Herbach* states as follows:

> Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court. [*Id*. at 284.]

Here, defendants are essentially seeking to obtain "a decision more favorable than that rendered by the lower tribunal," i.e., an initial judgment of zero instead of an initial judgment of $57,000. Accordingly, we conclude that they were obligated to file a cross appeal in order to properly argue this issue. *Id*.

Affirmed in part and reversed in part. We do not retain jurisdiction.

Talbot, J., concurred.

/s/ Patrick M. Meter
/s/ Michael J. Talbot

[1] Indeed, the *Selk* majority indicated that its analysis and conclusion did not involve a question of retroactivity. See *Selk, supra* at 34, in which the Court reaffirmed the rationale of its earlier opinion, *Selk v Detroit Plastics Products*, 419 Mich 1, 8; 345 NW2d 184 (1984).

[2] While there is an exception for remedial statutes, see *Michigan Basic Property Ins Ass'n v Ware*, 230 Mich App 44, 53; 583 NW2d 240 (1998), the statutory amendment at issue here was not remedial. Indeed, the amendment did not further existing rights but instead created new rights for plaintiffs and destroyed existing rights for defendants. See *id*.

[3] Plaintiff additionally suggests that the trial court erred in failing to ascertain the amount of money Midwest paid in exchange for the covenant not to sue. Plaintiff failed to preserve this issue by failing to raise it in the statement of questions presented. *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997). Moreover, we note that plaintiff essentially concedes that the amount at issue was $175,000, since plaintiff contends that it appropriately reduced its claim against defendants by $175,000.

[4] We note that the $57,000 damages award was contained in a document entitled an "opinion and order." The "opinion and order" stated as follows: "Judgment should be entered for [p]laintiff against [d]efendant . . . in the amount of $57,000. It is so ordered." While the document was not entitled a "judgment," it functioned, for all intents and purposes, as a judgment. Indeed, "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." See Black's Law Dictionary (7th ed), p 846. There is no requirement that this determination be contained in a document entitled a "judgment." Such a requirement would elevate form over substance. Here, the trial court did indeed intend the original "opinion and order" to function as the "final determination of the rights and obligations of the parties." The second order entered by the trial court, which allowed for zero damages after the $175,000 setoff, was essentially an *amended* judgment. Nonetheless, under the reasoning of *Marketos, supra* at 700-701, the operative order for purposes of assessing mediation sanctions was the original order awarding $57,000 in damages. This was the original "judgment by the court after a nonjury trial" as contemplated by MCR 2.403(O)(2)(b).