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.

GRIFFIN, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the reversal of the mediation sanctions awarded in favor of defendants. The majority concludes that "under MCR 2.403(O) because the original $57,000 damages award was more than the mediation evaluation of $20,000," *ante* at ___, defendants are not entitled to mediation sanctions. The award to which the majority refers is contained in a December 9, 1997, "opinion and order" that recites the trial court's findings of fact and

conclusions of law rendered following this nonjury trial. The majority treats this opinion and order as a judgment; I do not. The disputed opinion and order ends with the following phrases:

> Judgment *should* be entered for plaintiff against defendant, Don Jones, Inc. in the amount of $57,000.
>
> IT IS SO ORDERED. [Emphasis added.]

In my view, the trial court's opinion and order merely set forth its findings of fact, conclusions of law, and award. The parties were advised that a judgment *should* be entered consistent with the court's order and opinion. "Should" is the past tense of "shall." *Random House Webster's College Dictionary* (1997), p 1196. "[T]he main function of should in modern American English is to express duty, necessity . . . ," *id.* at 1197. Further, "[r]ules similar to those for choosing between *shall* and *will* have long been advanced for *should* and *would*," *id.* at 1196-1197, and "[t]he traditional rule of usage says that *future time* is indicated by *shall* in the first person." *Id.* at 1187 (emphasis added).

The trial court's direction to the parties complies with the requirements of MCR 2.517(A)(1):

> In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and *direct entry* of the appropriate judgment. [Emphasis added.]

As stated in 2 Lang, Neilson, Young & Holsinger, Michigan Civil Procedure, Judgments, § 20.2, pp 20-5—20-6:

> A judgment rendered by the court granting the relief requested does not take effect until a written judgment is signed by the court. MCR 2.602(A). (See [State court Administrative Office] SCAO form MC 10 for a sample judgment in a civil case.) For example, when a verdict is given at the end of a trial, judgment is rendered for at least one of the parties. However, that verdict does not become

> the final judgment of the court until a written judgment is submitted to the court and signed by the judge. Generally, the date the judgment is signed is the date of entry. See § 20.8 for a discussion of *nunc pro tunc* entries (those made at a later time to correct the record, with retroactive effect). Time limits for filing postjudgment matters begin to run from the date of entry of the judgment.

MCR 2.602(B) provides four different methods for the entry of a judgment. *Lang, supra* at § 20.3, p 20-6. Although one of the methods is the entry by the court "at the time it grants the relief provided by the judgment or order," MCR 2.602(B)(1), such an event customarily occurs in the presence of counsel in open court following a hearing. The act of signing the judgment in open court affords the parties an opportunity to raise objections to the form of the judgment. Because the opinion and order at issue was entered without an opportunity for objection, its entry would be extraordinary were it deemed to be a judgment.

In 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2602.2, pp 295-296, the commentators emphasize that a judgment is the document that finally disposes of a claim. It is materially different from the trial court's findings of fact and conclusions of law:

> A judgment is the act of a court finally disposing of a claim or judicial proceeding, although the clerk may perform related ministerial acts under the direction of the court. The verdict in a jury trial, and the court's findings of fact and conclusions of law in a non-jury trial, are the bases on which the judgment of the court rests, not the judgment itself. Similarly, a distinction exists between the court's decision or opinion and the judgment entered thereon. An opinion announces the court's decision and its reasons therefor, but the further entry of a judgment is required to carry the decision into legal effect. [*Id.*]

Decisions of this Court and the Supreme Court have held that findings of fact made by a trial court are essentially a verdict and not a judgment. In this regard, we stated in *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995), "[a] finding of fact made by a trial court sitting without a jury is essentially a verdict, which may

include an award of damages." Further, the Supreme Court in *Donohue v Wayne Circuit Judge*, 238 Mich 253, 256; 213 NW 150 (1927), stated:

> A finding of fact made by a circuit court when sitting without a jury is essentially a verdict. A verdict may find damages but as a general rule it does not determine costs. An award of costs is an incident of judgment rather than of findings and conclusions. Costs in nearly all cases follow judgment as a legal incident (33 C. J. p 1175, note 84), and need not be mentioned in the findings.

The order and opinion at issue is silent regarding the usual judgment considerations of costs, interest, and attorney fees. Its incompleteness regarding these matters is further evidence that it is not a final disposition of the claim. In addition, its form differs substantially and materially from standard SCAO judgment form MC 10. In light of these distinctions, I conclude that any efforts to collect upon this order by garnishment or attachment would be problematic at best.

Following the entry of the December 9, 1997, opinion and order, and in response to defendants' "motion for new trial and/or amendment of judgment," the trial court on February 17, 1998, rendered a supplemental *opinion*, the last line of which states "[d]efendant, Don Jones, Inc., *may present a judgment* complying herewith." (Emphasis added.) Because the trial court directed the presentation of a judgment rather than an amendment of a judgment, I believe the trial court intended its earlier opinion and order to be its findings of facts and conclusions of law, not its judgment

The only document entitled "judgment" entered by the lower court was a November 16, 1998, *judgment* that specifies that plaintiff shall not be entitled to recover any monies from the defendants, Don Jones, Inc., and Duane Jones. In my view, the November 16, 1998, judgment is the only judgment in this case. Accordingly, I would hold that defendants are entitled to

mediation sanctions. Because MCR 2.403(O)(2)(b) defines verdict as "a judgment by the court after a nonjury trial" and the mediation evaluation of $20,000 rejected by plaintiff was more than ten percent greater than the judgment in favor of defendants, the circuit court properly awarded defendants mediation sanctions. *Marketos v American Employers Ins Co*, 240 Mich App 684; 612 NW2d 848 (2000), is not applicable or controlling because it involved a jury verdict, MCR 2.403(O)(2)(a), and not a judgment by the court after a nonjury trial, MCR 2.403(O)(2)(b). For these reasons, I respectfully dissent from the reversal of the trial court's award of mediation sanctions in favor of defendants.

Finally, because the December 7, 1997, opinion and order was not a judgment and defendants are entitled to mediation sanctions based on the November 16, 1998, judgment, I find it unnecessary to rule on defendants' alternative ground for affirmance. Although it comes to the wrong result, the majority's opinion recognizes the correct legal principle that a cross appeal is not necessary to urge an alternative ground for affirmance. *Cox v Flint Bd of Hosp Managers*, 462 Mich 859 (2000), *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994), and *In re Herbach Estate*, 230 Mich App 276, 283-284; 583 NW2d 541 (1998). In all other respects, I join the majority's opinion.

/s/ Richard Allen Griffin