STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ARTHUR LEFFRING,

Appellant,

v

Case No. 01-21801-AV
HON. PHILIP E. RODGERS, JR.

GILBERT H. RUPP,

Appellee.

Keith P. Theisen (P59411)
Attorney for Appellant

Troy A. Scott (P48536)
Attorney for Appellee

OPINION ON APPEAL

This is an appeal from the District Court. Plaintiff/Appellee, Gilbert H. Rupp ("Rupp") contracted with Defendant/Appellant Art Leffring ("Leffring") for landscaping services. The initial contract as reflected in two written proposals called for the construction of two retaining walls and the installation of some decorative stone. The original bid was $4,072. After the work began, there were verbal modifications and additions to the contract. The additional work included, among other things, the construction of a third retaining wall. Rupp paid Leffring $1,512 on June 30, 2000 and $1,000 on July 13, 2000.

Leffring completed all of the agreed upon work on or about July 24, 2000 and sought final payment from Rupp in the amount of $6,500. Rupp requested that Leffring guarantee his work. Leffring wrote out a guarantee and Rupp paid him $4,500 for a total of $7,012.

Over the next few days, there was a severe rain storm, gaps appeared in the third retaining wall and significant erosion occurred in Rupp's lawn in the area of the retaining walls and landscaping. Rupp claimed that the third retaining wall failed. Leffring agreed to rebuild the wall and re-rake and re-seed the lawn.

After Leffring began to tear down the third retaining wall, Rupp verbally accosted Leffring and informed him that he would not pay him any more money. Leffring left and never returned to the job site.

Rupp filed this action to recover the cost of having the wall rebuilt and the landscaping redone. Leffring filed a counterclaim for the amount he believed he was owed.

This matter was tried to District Court Judge Michael J. Haley on May 7, 2001. At the conclusion of the trial, the Judge took the matter under advisement. On May 15, 2001, after notifying counsel, the Judge personally conducted a site view. On May 18, 2001, Judge Haley issued his decision. The Judge stated the main issue in the case as follows: "whether [Leffring] breached an oral agreement to rebuild the wall or the written guaranty with respect to the wall and the lawn." The Court found:

> . . . [t]here was an oral agreement to build the wall to begin with, then a written guarantee offered with respect to the workmanship of the wall. The Plaintiff was not satisfied with the wall, and the Defendant agreed to rebuild it. The Plaintiff offered some verbal abuse on July 24, which caused Mr. Leffring to leave the job site. The Court does not fault Mr. Leffring for doing this, however, he had made a written guarantee and was obliged to honor it and to return to rebuild the wall and finish the lawn within a reasonable time.
>
> The Court is satisfied that Mr. Rupp attempted to recontact Mr. Leffring and that he would not return to the job site until he was paid an additional $2,100. The Court finds that Mr. Leffring was not legally entitled to put a condition on his obligation to rebuild the wall.
>
> The Plaintiff is entitled to damages in the amount of $2,250.31, the amount paid to Modern Landscaping to furnish the labor and materials to complete the rebuild job of the wall and also the work on the lawn.
>
> Plaintiff is also entitled to the cost of the materials for the final wall in the amount of $481.30. The Court is not awarding any additional damages, in spite of the extra cost associated with completing this job. It was apparent that, at least as of July 24, 2000, Defendant was ready, willing and able to complete the wall and redo the lawn had it not been for the verbal abuse which precipitated the departure of the Defendant from the job site. No attorney fees are being awarded pursuant to the Michigan Consumer Protection Act, MCL 445.901.

ISSUES

The issues on appeal are as follows:

1. Whether Trial Court erred by making a site view
   a) because the Judge did so out of the presence of the parties, counsel and a court reporter;
   b) because it created an appearance of impropriety since Mr. Rupp was a former client; or
   c) because it was long after the physical appearance of the property had changed;
2. Whether the Trial Court erred when it determined that Mr. Leffring did not have the right to demand payment before he fulfilled his obligations under the guarantee; and
3. Whether the Trial Court erred by failing to address Mr. Leffring's Counter-Complaint for damages.

I.

WHETHER THE TRIAL COURT ERRED BY MAKING A SITE VIEW

a) because the Judge did so out of the presence of the parties, counsel and a court reporter

Leffring argues that District Court Judge Michael Haley erred by making a site view to the home of Rupp out of the presence of the parties, counsel, or a court reporter.

As counsel for Rupp points out, MCR 2.513 expressly authorizes a court, *on its own initiative*, to view property or a place where a material event occurred. In *People v Eglar*, 19 Mich App 563, 565-566; 173 NW2d 5 (1969), however, the Court addressed the issue of a trial judge conducting a view of a scene without knowledge of the parties in a bench trial. The Court expressed concern about the trial court's observations and the context of those observations. *Id.* For example, the Court stated that the trial judge may have viewed an incorrect location and that the parties' lack of presence at the judge's viewing may have hindered the parties' decisions whether to offer additional proofs at trial. *Id.* In reversing defendant's conviction and remanding for a new trial, the Court stated that the trial judge erred in viewing the premises without giving the defendant and

counsel for both parties an opportunity to be present with him. *Id.* See also, *Vanden Bosch v Consumers Power Co*, 56 Mich App 543, 556-557; 224 NW2d 900 (1974), rev'd on other grds 394 Mich 428; 230 NW2d 271 (1975).

Most recently, in *Travis v Preston*, Docket No. 221756 (2001), the Court of Appeals addressed this issue. In *Travis*, the plaintiffs alleged odors and fumes emanating from the defendants' hog farming operation. While rendering the court's opinion, the trial judge revealed to the parties for the first time that he had visited the area of the hog farm and plaintiffs' residences on five separate occasions to personally investigate the odor. The Court awarded damages to the plaintiffs. The Court of Appeals reversed and remanded, saying:

> Although the trial court had authority to conduct a view pursuant to MCR 2.513(B), we conclude that a reversal and remand for a new trial is necessary to avoid a substantial injustice to defendants. MCR 2.613(A). We base this conclusion on the trial court's own statement that it relied on the observations made during the five visits in rendering its decision, and because it was error to conduct the view without the parties' knowledge. The trial court's personal observations irreparably tainted the trial and judgment. The trial court was not merely clarifying its understanding of undisputed facts, cf. *Toussaint v Conta*, 292 Mich 366, 369-370; 290 NW 830 (1940), but was instead making an independent investigation and observation regarding the strength of the odors coming from defendants' farm. We further note that the trial court viewed the scene during a time when damages could not be awarded based on a stipulation by the parties.

The cases in which the court's personal site view required reversal are distinguishable from the case at bar. In the instant case, the Judge gave notice of his intention to personally inspect the subject property to the parties' counsel. At that time, counsel made no objection. This is analogous to *People v Bryant*, 43 Mich App 659; 204 NW2d 746 (1973) in which the defendant was convicted of second-degree murder, and he appealed. On appeal, the defendant alleged error because the trial judge viewed the scene of the altercation out of the presence of both counsel and the defendant, citing *Eglar, supra.* The Court of Appeals held that this was not error because the judge discussed his intention to view the scene before doing so with counsel and there was no objection made. The Court held that, under these circumstances, there was no preserved error. *Id* at 662.

Thus, the Court did not err in making the site view without the parties or counsel or a court reporter present.

b) because it created the appearance of an impropriety

Leffring argues that the trial court erred in making a site view at Rupp's home because Rupp was a former client.

The high standards of impartiality required and expected of judicial officers in this state will not countenance favoritism. Impartiality, although a difficult goal to achieve with perfection, must be relentlessly pursued in order to insure the rendering of fair, just determinations and to enhance public confidence in the judiciary. A judge who does not maintain impartiality does violence to the fundamental principle of disinterested justice which is the bulwark of our judicial system. However, it is a conflict of interest not the appearance of impropriety that governs judicial disqualification.

MCR 2.003(B) sets forth the grounds for the disqualification of a judge as follows:

> (B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
>
> (1) The judge is personally biased or prejudiced for or against a party or attorney.
>
> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (3)The judge has been consulted or employed as an attorney in the matter in controversy.
>
> (4) The judge was a partner of a party, **attorney for a party, or a member of a law firm representing a party within the preceding two years.**
>
> (5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
>
> (6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (a) is a party to the proceeding, or an officer, director or trustee of a party;
>
> (b) is acting as a lawyer in the proceeding;
>
> (c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> (d) is to the judge's knowledge likely to be a material witness in the proceeding. [Emphasis added].

* * *

MCR 2.003(C) sets forth the procedure for raising the issue of disqualification and states, in pertinent part, as follows:

> (C) Procedure.
>
> (1) Time for Filing. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify **must be filed within 14 days after the moving party discovers the ground for disqualification**. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.
>
> (2) All Grounds to Be Included; Affidavit. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion. [Emphasis added].

* * *

The Defendant/Appellant's complaint on appeal is that the Judge's site view created an appearance of impropriety because the Judge represented the Plaintiff/Appellee in a criminal matter ten years ago. Obviously, any well-respected, competent trial attorney who is elected to the bench will have former clients who appear before him. MCR 2.003(A)(4) takes this into consideration by requiring that a judge not preside over a matter involving a party for whom he was the attorney **within the preceding two years.** In the instant case, it is alleged that Judge Haley represented Rupp in a criminal matter **ten years ago**. This does not constitute grounds for disqualification.

In addition, Leffring did not file a motion to disqualify Judge Haley within the time frame contemplated by MCR 2.003(C)(1). Instead, the issue was not raised until the trial was concluded and the Appellant was dissatisfied with the Judge's decision.

c) because it was long after the physical appearance of the property had changed

The final part of this issue is whether the Judge erred in conducting a site view long after the physical appearance of the subject property had changed. The testimony, photographs and documentary evidence in the case clearly established the condition of the subject property after the rain storm and showed that the wall had been rebuilt and the landscaping had been redone long before trial. There is no reason to believe that the Judge did not take these changes into consideration when he viewed the property. The court could not have made an independent investigation and observations regarding the alleged faulty construction and "failure" of the third retaining wall because it was clear from the evidence that the wall had been rebuilt and the

landscaping redone. That does not mean, however, that the change in physical appearance precluded the court from clarifying its understanding of the facts. This Court finds no error.

II.

WHETHER THE TRIAL COURT ERRED WHEN IT DETERMINED THAT MR. LEFFRING DID NOT HAVE THE RIGHT TO DEMAND PAYMENT BEFORE HE FULFILLED HIS OBLIGATIONS UNDER THE GUARANTEE

The Defendant/Appellant Leffring argues that the Court erroneously found that he was seeking an "additional" $2100 before he would rebuild the third wall. Leffring contends that the $2100 he demanded was, not an additional $2,100, but rather the balance due for the work he had already performed.

The original bid for the work to be performed by Leffring was $4,072. That work included the first two retaining walls and the landscaping. Admittedly there were verbal modifications to the agreement, including building the third retaining wall. No definitive price was quoted or agreed upon for all of the additional work, but Rupp testified that he agreed to pay Leffring $589 for the third wall. After Leffring finished all of the work, he presented Rupp with an invoice showing a total cost of $9,060.89, with an outstanding balance due of $6,500. Rupp insisted that Leffring give him a written guaranty. Leffring wrote and signed the following guaranty on one of his business Proposal and Acceptance forms:

> Walls are guaranteed for workmanship by Art Leffring - 18 months
> Lawn guarantee is a good lawn full cover - Homeowner is responsible for upkeep

Rupp paid him $4,500.

In all, Rupp paid Leffring $7,012, which was considerably more than the original bid, but less than what Leffring was demanding. The dispute over how much, if anything, Rupp still owed Leffring for the work he had done was not resolved before the rain storm hit and Leffring was back rebuilding the third retaining wall to satisfy the guaranty he had given Rupp. Once Rupp became verbally abusive, Mr. Leffring left the job and refused to return unless he was paid the $2,100 that he claimed he was still owed for the work he had originally done.

The Trial Court found that "Mr. Rupp attempted to re-contact Mr. Leffring and that he would not return to the job site until he was paid an additional $2,100." The Court further found that "Mr. Leffring was not legally entitled to put a condition on his obligation to rebuild the wall." (Decision, p 6).

Leffring argues that the Judge erroneously found that Leffring was seeking an **additional** $2,100 before he would complete the re-build of the wall when Leffring was actually seeking the balance he thought he was owed for the work he performed before the rain storm. This Court believes that Leffring has misread the Trial Court's Decision. When the Decision is read in its entirety, it is clear that the Trial Court uses the word "additional" to mean "in addition to what Leffring has already received," not "in addition to what Leffring charged for his work in the first place."

The real issue here is whether Leffring could condition performance on the guarantee on payment of the $2100 he thought he was owed. The Trial Court found that Leffring "was not legally entitled to put a condition [payment of the disputed balance due] on his obligation to rebuild the wall."

This Court finds no error. The guaranty is unconditional and unambiguous on its face. Payment of the disputed remaining balance was not a condition precedent to satisfaction of the guaranty. See, *In the Matter of Bluestone's Estate*, 121 Mich App 659; 329 NW2d 446 (1983); *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407; 285 NW2d 770 (1979); and *Angelo Iafrate Co v Detroit and Northern Saving & Loan Assoc*, 80 Mich App 508; 264 NW2d 45 (1978).

III.

WHETHER THE TRIAL COURT ERRED BY FAILING TO ADDRESS MR. LEFFRINGS'S COUNTER-COMPLAINT FOR DAMAGES

Mr. Rupp sought to recover $5,232.36 for the cost to rebuild the third wall and relandscape his lawn, plus costs and attorney fees. Mr. Leffring sought to recover the full value of his services, $14,442.25, less the agreed upon discount of $4,933.53, less payments made of $7,012, or $2496.72.

The Trial Court awarded Mr. Rupp net damages in the amount of $2,731.61.[1] The Trial Court implicitly addressed Mr. Leffring's Counter-Complaint for damages and clearly made a net damage award.

CONCLUSION

This case is an appeal from the District Court. Three issues are presented: (1) whether the Trial Court erred by conducting a site view; (2) whether the Trial Court erred in finding that Mr. Leffring conditioned his guarantee on the receipt of additional money; and (3) whether the Trial Court erred by failing to address Mr. Leffring's Counter-Complaint for damages.

The Trial Court did not err. The site view was authorized by Court Rule and conducted with the knowledge of and without objection from the parties. The Trial Judge was not subject to disqualification for conducting the site view at the residence of a party he represented ten years ago. The Trial Judge would not have been mislead by physical changes in the property that have occurred since the occurrence in question.

Mr. Leffring's guarantee of his workmanship was not conditioned upon receipt of payment in full on his invoice. The guarantee was unconditional and unambiguous on its face.

The Trial Court implicitly addressed Mr. Leffring's Counter-Complaint for damages by awarding Mr. Rupp net damages.

The Decision of the Trial Court is affirmed. No costs or sanctions are awarded.

This Opinion resolves the last disputed issue and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/13/02

[1]Rupp's claim of $5,232.36 less Leffring's claim of $2,496.72 equals $2,735.64. The net award to Rupp was $2,731.61. Surely, this appeal has not been filed for $4.03.