IN THE COURT OF APPEALS OF IOWA

No. 2-371 / 92-251

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CLERK SUPREME COURT

J.M. GRIMSTAD, INC.,

Appellee,

vs.

SCANGRAPHICS, INC.,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Peter Van Metre and Lawrence H. Fautsch, Judges.

The tenant, ScanGraphics, Inc., appeals a district court decision finding that it had abandoned its lease agreement and ordering it to pay unpaid rent. **REMANDED.**

R. James Sheerer of Correll & Sheerer, Cedar Falls, for appellant.

William G. Nicholsen of White & Johnson, P.C., Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

J.M. Grimstad, Inc. leased commercial property in Cedar Falls, Iowa, to ScanGraphics, Inc. The term of the lease was from October 1, 1985, to October 1, 1990. ScanGraphics decided to move its operation to Des Moines, and vacated the property on October 1, 1987. ScanGraphics informed Grimstad that it intended to pay the balance of the lease. Both parties agreed to look for a new tenant to sublet the property for the remainder of the lease.

Towards the end of 1988, ScanGraphics offered to buy out the lease for $14,000. Grimstad refused, but indicated in a letter dated January 11, 1989, that it would make an aggressive attempt to market the property. The letter indicated that Grimstad would keep ScanGraphics informed of "any significant progress."

In the latter part of July or the first part of August 1989, the Don E. Williams Company looked at the property. Grimstad did not inform ScanGraphics the company was interested in leasing the property. The Williams Company decided to rent other property in Waterloo. ScanGraphics later learned that the Williams Company had looked at the property.

ScanGraphics concluded that Grimstad had breached the lease agreement by failing to inform it the Williams Company was interested in leasing the property and by failing to diligently attempt to rent the property.

Consequently, ScanGraphics sent Grimstad a notice of termination of the lease. ScanGraphics' last payment under the lease was made on September 1, 1989.

Grimstad filed this action seeking damages for unpaid rent and unpaid real estate tax contributions. ScanGraphics counterclaimed for rent paid which it would not have paid for the months of August and September 1989 had Grimstad entered into a lease agreement with the Williams Company.

A trial was held before Judge Peter Van Metre on May 8, 1991. The trial lasted only one day. Willard Olson, the manager of the Grimstad office in Cedar Falls testified. Donald Redfern and James Achey, partners in ScanGraphics also testified. Depositions of Ted Mienders and Carl Kiefer, officers in the Williams Company, were admitted into evidence.

Upon submission of briefs, Judge Van Metre discovered that he had a conflict of interest. Apparently, Judge Van Metre had hired an attorney in the law firm representing Grimstad. On August 15, 1991, Judge Van Metre sent the parties a letter informing them of the conflict and that he intended to transfer the case to another judge. He also stated he was having a transcript of the case prepared for the substitute judge. This letter was not a part of the court file and no order or other entry noting a change in judges was placed in the court file.

On October 22, 1991, Judge Lawrence H. Fautsch entered his findings of fact, conclusions of law and judgment. The district court found that Grimstad had used reasonable diligence in attempting to lease the property. The court rejected ScanGraphics' contention that Grimstad had been inflexible in its dealings with the Williams Company. Based upon these findings, the court concluded that ScanGraphics had abandoned its lease agreement. The district court rejected ScanGraphics' counterclaim and ordered it to pay unpaid rent plus interest.

ScanGraphics filed a motion for new trial pursuant to Iowa Rule of Civil Procedure 244(a) and (f). It alleged that it was an irregularity in the proceedings for the trial judge to recuse himself after he had already heard the case. ScanGraphics claimed it was entitled to a decision on the facts by a judge who saw and heard the witnesses. In addition, ScanGraphics argued that the district court erred in finding for Grimstad on the facts of the case.

On January 2, 1992, the district court entered an order overruling ScanGraphics' motion for new trial. The district court concluded that a review of the transcript and evidence sufficiently enabled the court to render a decision in this case. In addition, the district court found that ScanGraphics had waived any right it may have had to object to the substitution of judges by waiting

until after the decision to object. ScanGraphics has filed this appeal.

ScanGraphics contends that it should have been granted a new trial due to an irregularity in the proceedings of the court which prevented it from having a fair trial. It claims that under rule 367(b), a substitute judge may be appointed only in the event of the death or disability of a judge. In the alternative, ScanGraphics claims that even if Judge Van Metre's conflict may be considered a "disability", the substitute judge should have ordered a new trial.

In granting or denying new trials, the trial court has wide but not unlimited discretion. Waddell v. Peet's Feeds, Inc., 255 N.W.2d 29, 32 (Iowa 1978). We will not find an abuse of discretion unless it is shown that the trial court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. Kiner v. Reliance Insurance Co., 463 N.W.2d 9, 13 (Iowa 1990).

We first address the question of preservation of error. Grimstad claims ScanGraphics failed to preserve error on this issue because it did not object prior to the district court's decision on October 22, 1991. ScanGraphics points out that before Judge Fautsch filed his ruling, there was nothing in the record for it to object to. We agree. We can find no authority which requires a party to object to a letter or other source not part of the

record. We conclude ScanGraphics has sufficiently preserved error for our review.

We then turn to the question of whether the district court abused its discretion in not granting a new trial in this case based on irregularity in the proceedings of the court.

A judge's impartiality is basic to the due and orderly conducting of litigation. Forsmark v. State, 349 N.W.2d 763, 767 (Iowa 1984). Iowa Code of Judicial Conduct 3.D(1)(a) serves as a broad standard by which every judge should determine, sua sponte, whether self-disqualification is necessary. In re Estate of Olson, 479 N.W.2d 610, 613 (Iowa App. 1991). Failure to follow required procedures to determine disqualification issues is an irregularity sufficient to require the setting aside of a verdict or the granting of a new trial. See Forsmark, 349 N.W.2d at 767.

While Judge Van Metre's disqualification may be considered proper under the circumstances of this case, we believe an official order should have been entered into the record noting this conflict and advising the parties a substitute judge would have to decide the case. By this procedure, the parties would have an opportunity to file objections and seek a rehearing before the substitute judge.

Rule 367 applies in the event of the death, retirement, or disability of a judge. We look to this rule for

guidance under the present circumstances. Under rule 367, a substitute judge has several options:

> (b) [I]f by a review of the transcript or a reargument he can, in his opinion, sufficiently inform himself to enable him to render a decision, he shall do so; otherwise he may order a continuance, declare a mistrial, or order a new trial of all or any of the issues, or direct the recalling of any witnesses, or make such disposition of the matter as the situation warrants.

See Hunter v. Union State Bank, 468 N.W.2d 456, 457-458 (Iowa 1991).

The general rule is that, where a case is tried by a judge, and the issues remain undetermined by him, his successor cannot decide or make findings in the case without a trial de novo. 48A C.J.S. Judges §67 (1981). We note the present case involved a trial to the bench and our review would be for the correction of errors at law. Generally, we give great deference to the trial court's conclusions concerning the credibility of witnesses because the trial court has the ability to examine the witnesses firsthand. There is a certain importance in having a fact finder present during the production of evidence, especially when passing on the credibility of individual testimony. In re K.L.C., 372 N.W.2d 223, 226 (Iowa 1985).

In K.L.C., a substitute judge decided a case based upon a review of the transcript after the retirement of the judge who heard the parties' testimony. Id. at 227. The scope of review in that case was de novo, however, and the

court stated it would determine the facts anew based on the record in the case. Id. We therefore find K.L.C. is distinguishable from the present case.

Furthermore, in the present case Grimstad's counsel created the conflict which caused Judge Van Metre's disqualification by accepting Judge Van Metre as a client while this case was pending before him.

Based upon all of these factors, we conclude the district court abused its discretion in not entering an order disqualifying himself and advising the parties a substitute judge would have to decide the case. The substitute judge should order a hearing where the parties may file objections and seek relief under rule 367. We remand for such orders. We do not retain jurisdiction. We make no findings on the merits of the case.

REMANDED.

Schlegel, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would find the district court did not abuse its discretion by ruling on the evidence before it, without ordering a new trial or directing the recall of witnesses.

Both parties were aware of Judge Van Metre's intent to disqualify himself and transfer the case to another judge. Specifically, Judge Fautsch found in his order that both parties were aware of Judge Van Metre's August 15, 1991, letter. Two months passed before Judge Fautsch entered his findings of fact, conclusions of law and judgment. Neither party objected during that time period. A party should not be able to await a decision knowing of potential procedural problems, and then only if the decision proves unfavorable, raise its procedural objections.

The appellant argues the district court judge erred by rendering a decision without hearing the live testimony. While it is certainly preferable that the trial judge who heard and saw the witnesses be the judge who renders the decision, it is clear there are situations under Iowa law which allow a judge other than a trial judge to render a decision by reviewing a transcript of the trial proceedings. See e.g., Iowa R. Civ. P. 367(b), In re K.L.C., 372 N.W.2d 223, 226 (Iowa 1985). Further, in Judge Van Metre's letter, he pointed out there was very little dispute on the facts and the testimony was relatively brief.

The appellant also argues that Judge Fautsch was placed at a disadvantage for he was unable to test the credibility of the witnesses by observing them on the witness stand. This contention is unpersuasive for two of the witnesses testified by deposition, so Judge Van Metre could not have gleaned any information from their demeanor.

Under the facts of this case, I would find the trial court did not abuse its discretion by deciding a review of the transcript, depositions, exhibits, and trial briefs sufficiently informed the court so as to enable it to render a decision.