

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MACDONALD LAW OFFICE, PLLC,

Plaintiff-Appellant,

v

TED JANSEN and PENNY JANSEN,

Defendants-Appellees.

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UNPUBLISHED

June 24, 2010

No. 289167

Hillsdale Circuit Court

LC No. 08-000624-CK

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

BECKERING, J (*concurring*).

I concur in the outcome of my colleagues. I write separately because I would hold that when considering the language of the guarantee agreement on remand, the trial court must also consider the substance of the guarantee in relationship to the retainer agreement and determine whether it was a revocable guarantee.

**I. FACTS AND PROCEDURAL HISTORY**

This is an action to enforce a guarantee agreement between plaintiff Macdonald Law Office, PLLC and defendants Ted and Penny Jansen. According to their briefs,<sup>1</sup> the parties agree that in January 2008, defendants approached John Macdonald of plaintiff law firm<sup>2</sup> and asked him to take over the legal representation of Autumn Ellsworth in a Child Protective Services case involving her parental rights to her children. Ellsworth suffers from a cognitive disability. Ted is a limited license professional counselor and Penny is a licensed master social worker. Ted acted as an “ADA Advocate” for Ellsworth and had become dissatisfied with Ellsworth’s appointed counsel. In order to convince plaintiff to represent Ellsworth, who had limited financial resources, defendants agreed to sign a guarantee agreement in connection with the retainer agreement and fee contract (“retainer agreement”) executed between plaintiff and Ellsworth. The guarantee agreement states as follows:

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<sup>1</sup> No discovery has taken place in this case.

<sup>2</sup> Because Macdonald owns Macdonald Law Office, PLLC, the term “plaintiff” will be used to refer to both Macdonald and the law firm for the remainder of this opinion.

We, Ted Jansen and Penny Jansen, agree to act as Guarantors for the retainer, fees and costs outlined above,<sup>[3]</sup> and agree to be legally responsible for the same to the extent that Client is unable to do so. We realize that this will not entitle us to control of litigation, or be privy to privileged information except as authorized by Client or as is in compliance with HIPPA, the Americans with Disabilities Act, and other, similar, state and federal privacy laws.

Plaintiff contends that he told defendants it would probably cost \$5,000 to represent Ellsworth, but “strongly stated” that there was no way of knowing how much it would truly cost, as it would all depend on what had to be done during the case as well as what plaintiff discovered upon review of the file, which he had not yet seen. Defendants contend that plaintiff estimated the cost at between \$4,000 and \$5,000 for the ensuing year.

Defendants paid plaintiff a \$1,000 retainer on January 30, 2008, and an additional \$4,000 in billings by April 2008. On April 2, 2008, defendants delivered to plaintiff a letter notifying him that they had no more funds available to guarantee payment of legal services and declared that they were withdrawing their commitment to guarantee any further funding of attorney fees beyond the \$5,000 they had already paid.

Plaintiff informed defendants that the letter seeking to withdraw their commitment was neither effective nor binding, that he would have to continue representing Ellsworth, and that he intended to make an issue of attorney fees in the future. Plaintiff did not seek to withdraw from Ellsworth’s case. Instead, he continued representing her for several months. Plaintiff attributes much of the attorney fees incurred after April 2008 to Ted’s involvement in Ellsworth’s case and affairs, wherein Ellsworth allegedly lost the rights to her two older children and eventually obtained a PPO against Ted. Plaintiff collected small monthly payments from Ellsworth for his attorney fees, but filed this action on October 7, 2008, attempting to collect \$25,488.33 against defendants for the remaining amounts incurred in pursuing Ellsworth’s case.

At a November 10, 2008, scheduling conference, Macdonald represented his firm and defendants represented themselves. The parties disputed whether they had orally agreed to a maximum fee amount at the time defendants signed the guarantee agreement. After plaintiff acknowledged that he had received defendants’ April 2, 2008, letter, wherein defendants “put [him] on notice” that they would no longer pay anything, the trial court found as a matter of law that defendants were not responsible for any attorney fees incurred after April 2, 2008, the date of defendants’ letter withdrawing their guarantee agreement. The court dismissed the case and advised plaintiff to sue in district court in order to collect any fees incurred prior to April 2, 2008, that remained unpaid. An order was entered dismissing the case on November 12, 2008.

## II. STANDARD OF REVIEW

As the majority points out, MCR 2.401(C)(1)(l) permits the trial court at a pretrial conference to consider “other matters that may aid in the disposition of the action,” and under

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<sup>3</sup> The guarantee agreement references the retainer agreement.

MCR 2.116(I)(1), “the trial court is affirmatively required to ‘render judgment without delay’ when ‘the pleadings show that a party is entitled to judgment as a matter of law.’” *Sobiecki v Dep’t of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006) (citation omitted). In this case, the trial court apparently concluded that because the parties agreed that plaintiff had received defendants’ April 2, 2008, letter withdrawing their guarantee, there was no genuine issue of material fact, and as a matter of law, plaintiff was not entitled to collect attorney fees for any legal services rendered after receiving the letter. We review de novo the trial court’s conclusion. *Id.*

### III. ANALYSIS

The majority concludes that defendants’ guarantee agreement is to be interpreted and enforced according to its terms and deems a remand necessary because the trial court failed to consider the language of the written guarantee. The majority instructs that on remand, the trial court must determine whether an ambiguity in the language exists and whether the parties intended the written guarantee to be a complete expression of their agreement. If the language of the guarantee is ambiguous or the parties did not intend the written guarantee to be a complete expression of their agreement, parol evidence may be admitted in order to ascertain the parties’ intent.

While I agree generally with the majority’s rulings, I would hold that the trial court must also evaluate the substance of the guarantee agreement in relationship to the retainer agreement and underlying transaction, i.e., the contracting of an attorney-client relationship. Depending on whether it is considered *continuing* or *restrictive* in nature, a guarantee agreement may be revocable. Continuing and restrictive guarantees are generally described as follows:

A guaranty may be either a “restricted guaranty,” which is limited to a single transaction, or a “continuing guaranty,” which is not limited to a single transaction but contemplates a future course of dealing encompassing a series of transactions. The guaranty is restricted if it is limited to a single transaction or a limited number of transactions and is not effective with regard to transactions other than those guaranteed. A guaranty is continuing if it contemplates a future course of dealing during an indefinite period, or is intended to cover a series of transactions, an overall debt, or all future obligations of the principal to the obligee, and is frequently used in connection with a line of credit. A continuing guaranty covers all transactions, including those arising in the future, that are within the contemplation of the agreement and may include subsequent indebtedness without new consideration being given.

The determination whether a guaranty is continuing or restricted centers on the parties’ intention, as revealed by the language of the guaranty—such as any money owed “now or at any time hereafter” or all obligations of a company under notes “however and whenever incurred” and “now existing or hereafter contracted”—as construed in view of the circumstances. While there is some authority that the guaranty is limited, if the language is equivocal or does not show the parties’ intention, it has elsewhere been held that unless the words fairly imply that liability is limited, the guaranty continues until it is revoked. [38 Am Jur 2d, Guaranty, § 17.]

The Michigan Supreme Court has held that “a guarantor who has given a continuing guaranty may revoke the guaranty but such revocation is ineffective until notice is given.” *Klat v Chrysler Corp*, 285 Mich 241, 255; 280 NW 747 (1938). See also *American Steel & Wire Co v Richardson*, 191 Mich 549; 158 NW 34 (1916). Both cases include only light treatment of the issue. A variety of secondary sources, however, state that a continuing guarantee is terminable by the guarantor upon providing proper notice. See, e.g., Restatement of Suretyship & Guaranty, 3d, § 16; 38 Am Jur 2d, Guaranty, §§ 48-49; 18 Michigan Law & Practice, Guaranty, § 6. See also *Phelps Dodge Corp v Schumacher Electric Corp*, 415 F3d 665, 668 (CA 7, 2005). “The result is that the guarantor will not be liable to the creditor on the latter’s extension of credit to the debtor after receipt of the notice of revocation.” 38 Am Jur 2d, Guaranty, § 48.

Michigan courts have not yet thoroughly answered the question whether a guarantor may unilaterally terminate a restrictive guarantee agreement. In *Farver v Citizens Ban*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 227517), this Court stated that “[b]ecause there is no evidence showing that Farver or Citizens attempted to terminate the guaranty agreement, we need not reach the issue whether one party may unilaterally terminate a guaranty under Michigan law,” which suggests that the issue has not yet been thoroughly addressed. Based on a review of secondary sources and out-of-state case law, however, it appears that in general, a guarantor cannot unilaterally terminate such an agreement. 38 Am Jur 2d, Guaranty, § 47; *Chevron Chem Co v Mecham*, 536 F Supp 1036, 1044 (D Utah, 1982), quoting 10 Williston, Contracts (3d ed), § 1253 (“The guarantor is not promising a series of performances. There is but one debt, and the guaranty is simply a promise to pay that one debt, if the principal debtor fails to do so.”); *Colonial State Bank v Wasserman*, 107 Wis 2d 739; 321 NW2d 364 (1982); *Haynie v First Nat’l Bank*, 117 Ga App 766, 768; 162 SE2d 27 (1968). The general principle behind a restrictive guarantee is that consideration in exchange for the guarantor’s promise is received at the outset, although the performances guaranteed are to continue for a long or indefinite period. As such, the guarantor, having received the benefit of the bargain, cannot withdraw, however long into the future the obligation may extend. See 23 Williston, Contracts (4th ed), § 61:45. The parties are bound by the contract terms, unless they agree to modify them, even if entering into the agreement was less than prudent. See 38 Am Jur 2d, Guaranty, §59.

No case law could be found that pertained to the nature of a guarantee agreement associated with an attorney fee contract.

In this case, one could argue that defendants’ guarantee agreement was restrictive and irrevocable because the scope of plaintiff’s representation pertained only to Ellsworth’s abuse and/or neglect petitions in Hillsdale County Probate Court. Thus, the agreement covered a single transaction or a limited number of legal transactions, and defendants received the benefit of the bargain when plaintiff agreed to handle the case. While plaintiff could have sought to withdraw as counsel upon receiving defendants’ April 2, 2008, letter, there is no certainty that Ellsworth or the probate court would have permitted plaintiff to withdraw.

On the other hand, one could argue that defendants’ guarantee agreement was continuing and revocable because the underlying nature of the attorney-client relationship was open-ended. The retainer agreement between plaintiff and Ellsworth contemplates a future course of dealings over an indefinite time period. Paragraph 8 of the retainer agreement provides as follows:

**The Client may discharge the Firm at any time. The Firm may withdraw with the Client's consent or for good cause. Good cause shall include the Client's breach of this Agreement, the Client's refusal to cooperate with the Firm, the Client's refusal to follow the Firm's advice on a material matter, or any other fact or circumstance that would render the Firm's Continuing representation unlawful or unethical.** (Emphasis in original.)

According to the explicit terms of the retainer agreement, Ellsworth was free to discharge plaintiff at any time, and plaintiff was able to withdraw as Ellsworth's counsel at any time with either Ellsworth's consent or for good cause. It seems rather illogical to conclude that while the parties to an attorney-client relationship are free to terminate their contractual relationship, a guarantor remains irrevocably bound for an indefinite period into the future until such time as the attorney-client relationship comes to an end. In such instance, a client and lawyer could potentially pursue a case ad infinitum, in essence holding the guarantor fiscally hostage for what could amount to hundreds of thousands of dollars in attorney fees. Assuming the guarantee agreement is considered continuing and revocable, the next step would be to determine whether, and if so when, plaintiff would have been able to withdraw from representing Ellsworth upon receiving defendants' notice withdrawing their guarantee agreement.

While the parties to a contract are free to agree as they see fit, and the language of a contract controls if it is unambiguous and a complete expression of the parties' intent, I would hold that the trial court must evaluate the language of the guarantee agreement in the context of the underlying transaction it guarantees, and determine whether the guarantee agreement was revocable.

/s/ Jane M. Beckering