UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

TAMANCHIA MOORE, Plaintiff, vs. INTUITIVE SURGICAL, INC., Defendant.	Case No. 1:15-cv-56-LAG

PLAINTIFF'S MOTION TO ISSUE AN INDICATIVE RULING WHETHER TO VACATE THE JUDGMENT

Pursuant to Federal Rules of Civil Procedure 60(b)(6) and 62.1, Plaintiff, Tamanchia Moore, respectfully moves for an indicative ruling whether, if the Eleventh Circuit relinquished jurisdiction, this Court would vacate the judgment due to its failure to recuse under 28 U.S.C. § 455(b)(4).

Background

In this medical device case, Ms. Moore was injured during a robotically assisted hysterectomy performed with monopolar curved scissors. Doc. 1 at 3. Intuitive Surgical manufactures and markets those scissors. Doc. 1 at 1-2. For that reason, Ms. Moore sued Intuitive Surgical for defective design, failure to warn, violation of the Georgia Fair Business Practice Act, and punitive damages. Doc. 1 at 12-18.

Before trial, Intuitive Surgical filed a *Daubert*[1] motion that sought to exclude the testimony of Ms. Moore's causation expert, Dr. Michael Hall, and Dr. Paul Steiner. Docs. 55; 57. This Court convened a *Daubert* hearing on January 17 and 18, 2019. Docs. 126; 127. At the conclusion of

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

that hearing, this Court orally granted those motions in part, then reduced its rulings to a written order. Doc. 131 at 6, 8.

Because it excluded Ms. Moore's expert causation testimony, this Court granted summary judgment against Ms. Moore's defective design and failure to warn claims. Doc. 131 at 9-10. Separately, this Court also granted summary judgment against Ms. Moore's fair business practices claim because, it concluded, Intuitive Surgical had reasonably restricted sale of the scissors to a professional audience. Doc. 131 at 11. Lastly, this Court granted summary judgment against Ms. Moore's punitive damages claim because it had already rejected all her underlying claims. Doc. 131 at 11. Thereafter, the clerk entered judgment (Doc. 132), and Ms. Moore appealed (Doc. 133).

While the appeal was pending, *see Moore v. Intuitive Surgical, Inc.*, No. 19-10869 (11th Cir.), this Court had a hearing on the parties' sanctions motions, which had not been fully addressed before the Court granted summary judgment. On April 1, 2019, this Court entered an order denying Ms. Moore's motion to reconsider a sanctions order entered against her. *See* Doc. 146 (ruling "production of additional discovery does not constitute a change in circumstances that warrants relief under Rule 60(b)").

Then, on June 18, 2019, this Court convened a "last-minute" telephonic hearing to advise the litigants of "some newly discovered information" it had learned "today." Doc. 157 at 2-3. Specifically, while doing her routine financial disclosures for calendar year 2018, the district judge realized that her husband—whom she had married on November 25, 2018—held investments in Intuitive Surgical, a publicly traded corporation. Doc. 157 at 2. The district judge conceded that, had she "known this prior to the *Daubert* hearing," she "would have been required to recuse." Doc. 157 at 2-3; *see also* 28 U.S.C. § 455(b)(4) (judge "shall" disqualify herself when her "spouse" has "a financial interest" in either "the subject matter in controversy" or "a party to the proceeding").

The district judge apologized for her oversight and informed the litigants that she had to "advise the parties of the conflict and give you an opportunity … to reopen [the case]." Doc. 157 at 3, 6.

Jurisdiction

Ordinarily, the filing of an appeal from a final judgment would divest a district court of jurisdiction. *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir.2003). Nevertheless, circuit law has long held that a "district court retains jurisdiction to consider and deny [Rule 60(b)] motions," but "if it indicates that it will grant the motion, the appellant should then make a motion in the Court of Appeals for a remand of the case in order that the district court may grant such motion." *Ferrell* v. *Trailmobile, Inc.*, 223 F.2d 697, 699 (5th Cir. 1955).

Subsequently, Federal Rule of Civil Procedure 62.1 codified *Ferrell*'s practice. *Munoz* v. *United States*, 451 Fed. App'x 818, 819 n.1 (11th Cir.2011). Specifically, Rule 62.1 "lays out a district court's options when faced with a motion for relief it cannot grant because of a pending appeal." *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1297 (11th Cir. 2014). "The district court may defer or deny the motion, but it also may indicate that it would grant the motion on remand or that the motion raises a substantial issue." *Id.* "If a district court issues an indicative ruling, remand remains at the discretion of the court of appeals." *Id.*; *see also* Fed. R. App. P. 12.1 ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

Argument

I. The Court should issue an indicative ruling that, if it had jurisdiction, it would vacate the judgment

Pursuant to its authority under Rule 62.1, the Court should issue an indicative ruling that, if it had jurisdiction, it would vacate the judgment under Rule 60(b)(6).[2]

A. The district judge breached her obligation to make a reasonable effort to inform herself about her husband's financial interests

The district judge, as an annual filer who received her judicial commission on November 20, 2014, was ordinarily required (unless she sought an extension) to file her annual financial disclosures for calendar year 2018 "on or before May 15" of this year. § 210.40(b), *Guide to Judiciary Policy*. But it is the recusal statute, not a mere judicial policy, that imposed upon the district judge the duty to "make a *reasonable effort* to inform h[er]self about the personal financial interests of h[er] spouse." 28 U.S.C. § 455(c) (emphasis added).

The recusal statute defines a "financial interest" as "ownership of a legal or equitable interest, however small." *Id.* § 455(d)(4). In other words, a judge is "required to recuse him- or herself whenever the judge, his or her spouse, or a minor child living at home owns a single share of stock in a litigant." *In re Hussey*, 391 B.R. 911, 919 (Bankr. S.D. Fla. 2008). Although that requirement "may seem extreme," it "is designed to assure that no federal judge is ever put in a position where his or her financial interests, however minimal, could be cited as having influenced the results of litigation." *Id.*

Judges necessarily "bear the principal burden of compliance" with § 455 because "lawyers do not routinely research judges' financial disclosure forms," which represent "the only

[2] The Court's ruling on a motion to vacate a judgment pursuant to Rule 60(b)(6), if appealed, would be reviewed by the appellate court for an abuse of discretion. *E.g., Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006).

information available on a particular judge's financial holdings." *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 130-31 (2d Cir. 2003). Indeed, "even if they did [search financial disclosures], those forms are generally a minimum of four months out-of-date, *i.e.*, the forms are filed by May 1 and report holdings and transactions for the previous calendar year." *Id.* at 131. At any rate, the upshot is that, ordinarily, "[a] federal judge is very likely to be aware of such an interest, partly because § 455(c) requires that each judge inform himself about his personal and fiduciary financial interests, and to make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household, and partly because the Ethics in Government Act requires that judges file an annual Financial Disclosure Report detailing their stockholdings and other investments with the clerk of the court on which they sit." *E.A. Renfroe & Co., Inc. v. Rigsby*, 2008 WL 11375428, at *4 (N.D. Ala. Jan. 4, 2008).

Here, the district judge failed to make a "reasonable effort" to inform herself about her spouse's financial interests. There is no dispute that the district judge's wedding took place on November 25, 2018. Doc. 157 at 2. But the district judge apparently took no action to ascertain her fiancé's or husband's financial interests in December 2018, January 2019, February 2019, March 2019, April 2019, or May 2019. Instead, it was not until June 18, 2019—approximately one month after the district judge's annual financial disclosures were initially due—that the district judge discovered the conflict. Doc. 157 at 2. To her credit, upon discovering the conflict, the district judge promptly disclosed it to the litigants. Doc. 157 at 2-3. But by delaying almost seven months to ascertain her spouse's financial interests, the district judge certainly did not make a "reasonable effort" within the meaning of § 455(c).

B. Had the district judge not breached that obligation, she would have been required to recuse

There is no serious question that the district judge would have been required to recuse had she made a reasonable effort to ascertain her husband's financial interests upon their marriage.

"The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989), *holding modified by United States v. Toler*, 144 F.3d 1423 (11th Cir. 1998). By its express terms, the recusal requirement of § 455(b)(4) is mandatory, not permissive. *See* 28 U.S.C. § 455(b)(4) (a judge "shall" disqualify herself when she "knows" her "spouse" has "a financial interest" in "a party to the proceeding"); *see also Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988) ("section 455(b) is a per se rule that lists particular circumstances requiring recusal"). Even the district judge herself conceded she "would have been required to recuse." Doc. 157 at 2-3.

C. The remedy is to enter an indicative ruling that this Court would vacate the judgment

The question here is what to do when the judge does not possess actual knowledge of the conflict until after the entry of judgment. And the framework for answering that question is generally set forth in the Supreme Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

In *Liljeberg*, the Supreme Court affirmed an appellate court's determination that a new trial was in order. *Id.* at 862. There, a district judge who served on a university's board of trustees was not aware that the university was in serious settlement negotiations with a litigant regarding a significant real estate dispute over which he was presiding. *See id.* at 852-58. *Liljeberg* held those facts "create[d] precisely the kind of appearance of impropriety that § 455(a) was intended to

prevent." *Id.* at 867. Moreover, *Liljeberg* further concluded the "violation [wa]s neither insubstantial nor excusable." *Id.* Rather, even though the judge "did not know of his fiduciary interest in the litigation, he certainly should have known." *Id.* at 867-68. Indeed, citing § 455(c), *Liljeberg* implied "his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455." *Id.* at 868.

Considering the scope of relief available to remedy the district judge's failure to recuse, *Liljeberg* recognized that, "[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty." *Id.* at 862. Rather, Congress had "wisely delegated" that question to the judiciary. *Id.* In any event, *Liljeberg* rejected the notion it would be categorically inappropriate to vacate the judgment: "providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Id.* As such, *Liljeberg* held it would be "appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment." *Id.*

Focusing on "fairness to the particular litigants," *Liljeberg* concluded an "analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues." *Id.* Moreover, *Liljeberg* noted that neither litigant had "made a showing of special hardship by reason of their reliance on the original judgment." *Id.* at 868-69. Finally, with respect to timeliness, *Liljeberg* observed that "a delay of 10 months after the affirmance by the Court of Appeals

would normally foreclose relief," but noted that "in this case the entire delay [wa]s attributable to" the district judge's "inexcusable failure" to disqualify himself in a timely fashion. *Id.* at 869.

Putting its own judicial gloss on *Liljeberg*, the Eleventh Circuit has set forth a "three-factor test" that "requires a court to consider: '[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process.'" *United States v. Cerceda*, 172 F.3d 806, 812 (11th Cir. 1999) (en banc). Nevertheless, a movant need not establish entitlement under all three factors. *See, e.g.*, *Kelly*, 888 F.2d at 747 ("We have no doubt that, at least under factors one and three, the district judge's abuse of discretion in failing to recuse himself from this bench trial constituted reversible error.").

With respect to the first factor, *Cerceda* posited "two considerations" to guide courts in "determining whether the party seeking vacatur has met its burden of proving that the potential bias on the part of the judge represented a risk of injustice to it." *Cerceda*, 172 F.3d at 813. "First, the reviewing court should consider whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party." *Id.* "Second, the court should consider the seriousness of the violation of section 455(a) that is involved." *Id.* On the other side of the coin, *Cerceda* held that the nonmovant "bears the burden of proving that the remedy of vacatur itself poses a risk of injustice to it." *Id.* at 814.

With respect to the second factor, *Cerceda* held the test was whether the remedy of vacatur was "necessary to deter judges" from violating § 455. *Id.* at 815.

With respect to the third factor, *Cerceda* held the test was an assessment of the "risk that the public will lose faith in the judicial system." *Id.* In other words, whether a violation of § 455

was "egregious" or "clear cut" necessarily "factors into the public confidence calculus." *Id.* at 816. These factors favor vacatur here.

1. There is a substantial risk of injustice, given the particular circumstances and seriousness of the violation and the minimal risk of hardship posed by the remedy of vacatur

On one hand, Ms. Moore has met her burden of demonstrating a substantial risk of injustice given the particular circumstances and seriousness of the violation. As explained above, *see supra* Argument I.B, this is not a § 455(a) case in which recusal depends on whether an objective observer would think the judge's impartiality might reasonably be questioned; rather, it is a § 455(b) case in which recusal is mandatory. Similarly, the violation in this case is quite serious. *See supra* Argument I.A. The district judge allowed more than half a year to elapse before she made any effort to ascertain her husband's financial interests. That is far too long to be acceptable. Indeed, during that seven-month timeframe, the district judge made very important rulings regarding *Daubert*, summary judgment, and sanctions. Docs. 131; 146. This exceedingly long lapse of time would contribute to any litigant's reasonable fear of the district judge's absence of impartiality.

On the other hand, Intuitive Surgical cannot meet its burden of demonstrating any significant risk of hardship posed by the remedy of vacatur. The *Daubert* issues have already been fully briefed, and the *Daubert* hearing has already been transcribed. It is possible that a new district judge could make correct *Daubert* rulings based on the existing paper record, which would obviate the need to litigate the present appeal. And, if it became necessary for a new district judge to conduct any additional *Daubert* proceedings, those proceedings would not rise to the level of a "hardship" suffered by Intuitive Surgical.

2. The remedy of vacatur is necessary to deter judges from violating § 455 because it will incentivize them to make a reasonable effort to ascertain their spouses' financial interests in a timely fashion

The remedy of vacatur is necessary to deter judges from violating § 455 because it will incentivize them to make a reasonable effort to ascertain their spouses' financial interests in a timely fashion. Here, the district judge delayed for seven months before she made any effort—never mind a reasonable effort—to ascertain her husband's financial interests. As it happens, the *Guide to Judiciary Policy* does not appear to have any provisions that describe how often judges need to determine their minor children's or spouse's financial interests. For that reason, this is not a case like *Cerceda* where the existence of some policy addressing the recusal problem has already "has already minimized the risk that similar violations will occur in the future." 172 F.3d at 815.

Although the district judge ultimately granted summary judgment against Ms. Moore, that ruling was based on her discretionary decision to exclude expert testimony. Likewise, the district judge's ruling that it would not reconsider the sanctions order against Ms. Moore was also a discretionary decision. As such, "[b]ecause of the many rulings" by the district judge "that pre-dated the summary judgment decision, some of which involved exercises of discretion," a "harmless error standard" regarding recusal "is practically unworkable and, thus, inappropriate here." *Murray v. Scott*, 253 F.3d 1308, 1313 n.4 (11th Cir. 2001).

3. There is a substantial risk that the public would lose faith in the judicial system without vacatur

As explained above, the district judge's violation of § 455(b)(4) was serious, egregious, and clear cut. Indeed, the violation was so serious, egregious, and clear cut that the district judge herself was very apologetic that this had happened and perhaps even indicated an inclination to vacate her own orders if given the opportunity. *See* Doc. 157 at 2-7. If her failure to recuse were not corrected by vacating the judgment, the public would lose faith in the judicial system's ability

to police its own potential sources of bias, and litigants would enter court with little reason to believe that jurists would take seriously their obligation to make a reasonable effort to ascertain their spouses' financial interests before presiding in a case. *See, e.g.*, *United States v. White*, 846 F.2d 678, 696 (11th Cir. 1988) ("it is not merely of some importance but is of *fundamental* importance that justice should not only be done, but should manifestly and undoubtedly *be seen* to be done" (emphases in original and punctuation omitted)).

Conclusion

The Court should issue an indicative ruling that it would vacate the judgment.

Dated: July 3, 2019.

Respectfully submitted,

/s/ Jeffrey L. Haberman

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, a copy of the foregoing was served on the Clerk of Court by CM/ECF, which will notify all counsel and parties of record.

/s/ Jeffrey L. Haberman
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