IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

TAMANCHIA MOORE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO.: 1:15-CV-00056 (WLS)
	:	
INTUITIVE SURGICAL, INC.,	:	
	:	
Defendant.	:	

ORDER

Before the Court is Plaintiff's "Motion to Issue an Indicative Ruling Whether to Vacate the Judgment." (Doc. 158.) For the reasons herein, Plaintiff's Motion is **DENIED**.

I. Procedural History

Plaintiff brought this products liability action against Defendant on March 16, 2015 for defective design, failure to warn, violation of the Georgia Fair Business Practices Act ("FBPA"), and punitive damages. (Doc. 1.) Plaintiff filed a motion for partial summary judgment and motions to exclude the testimony of Defendant's expert witnesses. (Docs. 51, 52, 53, 54.) Defendant also filed a motion for summary judgment and motions to exclude the testimony of Plaintiff's expert witnesses. (Docs. 55, 56, 57, 58.) On January 17-18, 2019, Judge Leslie Abrams Gardner held a *Daubert* hearing on the Parties' *Daubert* motions. After Plaintiff's three expert witnesses testified, Judge Gardner issued a preliminary oral ruling granting Defendant's motions to exclude Plaintiff's medical causation experts and granting Defendant's motion for summary judgment. (*See* Doc. 131 at 2-3.) Judge Gardner followed her oral ruling with a written order granting-in-part two of Defendant's *Daubert* motions, granting Defendant's motion for summary judgment, and denying as moot the remaining mentioned motions. On February 26, 2019, Plaintiff appealed. (Doc. 133.) Attorney's fees were entered for Defendant. (*See* Doc. 153.)

Thereafter, on June 18, 2019, Judge Gardner held a telephone conference with the Parties during which she disclosed that she had just learned that day that her husband was a

stockholder in Intuitive Surgical. (Doc. 157 at 2.) She explained that she was recently married on November 25, 2018, and that she had only just learned of her husband's financial interest while preparing her routine financial disclosures. *Id.* She stated that she "had absolutely no idea about the investment prior to the hearing or any of the rulings [she had] made in this case." *Id.* at 3:6-8. She stated that had she known, she would have been required to recuse herself, but that now that the case is on appeal, either party can move to reopen the matter. *Id.* at 2-5.

On July 3, 2019, Plaintiff filed its pending motion asking the Court to issue an indicative ruling that, if the matter was remanded from the Eleventh Circuit, this Court would vacate the judgment under Rule 60(b)(6). (Doc. 158.) Plaintiff argues that Judge Gardner "breached her obligation to make a reasonable effort to inform herself about her husband's financial interests" by not ascertaining his stockholdings until nearly seven months after their marriage. (*Id.* at 4-5.) Plaintiff argues that had Judge Gardner not breached that obligation, she would have been required to recuse herself (possibly before entering judgment in this case), and that without vacatur, judges will not be deterred from violating the recusal statute and the public will lose faith in the judicial system. *Id.* at 6, 10-11. On July 18, 2019, this case was reassigned from Judge Gardner to the undersigned. Defendant responded to the motion (Doc. 159), and its response was deemed timely (Doc. 165). Defendant asserts that vacatur is not warranted because it is not possible that Judge Gardner's rulings were influenced by a conflict she was unaware existed, that there was no prejudice to Plaintiff because the rulings were not biased, and that Defendant should not have to relitigate issues that were already fairly decided and which will be partially addressed on appeal. (Doc. 159 at 2.) Plaintiff timely replied asserting that Judge Gardner's delay in informing herself of her husband's financial interests was a serious violation and that the risk of injustice remains because without vacatur Plaintiff will never have an impartial judge provide a de novo review of her case. (Doc. 166.)

II. Discussion

A. Was There a Violation of the Recusal Statute?

A United States judge must disqualify herself if "[s]he knows that [s]he, individually or as a fiduciary, or [her] spouse or minor child residing in [her] household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that

could be substantially affected by the outcome of the proceeding." 28 U.S.C.S. § 455(b)(4). A "financial interest" is defined as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party." 28 U.S.C.S. § 455(d)(4). To that end, a "judge should inform [her]self about [her] personal and fiduciary financial interests, and make a reasonable effort to inform [her]self about the personal financial interests of h[er] spouse and minor children residing in h[er] household." 28 U.S.C.S. § 455(c). Furthermore, a United States judge must disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned. 28 U.S.C.S. § 455(a).

Plaintiff argues that "the district judge apparently took no action to ascertain her fiancé's or husband's financial interests in December 2018, January 2019, February 2019 . . . . – until June 18, 2019." (Doc. 158 at 5.) But the record does not establish that assertion. There is no evidence that Judge Gardner took "no action," only that Judge Gardner did not learn of her husband's financial interest in Intuitive Surgical until June 2019 upon preparing her financial disclosures. Judge Gardner was married on November 25, 2018, held a hearing on January 17-18, 2019 during which she issued an oral ruling granting Intuitive Surgical's motion for summary judgment, and entered judgment in favor of Intuitive Surgical on January 30, 2019. (Docs. 126, 127, 131, 132.) Although Judge Gardner entered orders as late as May 2019 addressing attorney's fees, this case essentially involves a timeframe of a little more than two months during which Judge Gardner could have informed herself of her husband's financial interests and recused herself before entering judgment in this case. Plaintiff has cited no factual or legal support for this Court to conclude that Judge Gardner failed to make a reasonable effort to ascertain her husband's financial interests. Indeed, no party has cited (and the Court is unaware of) any case analyzing the same set of facts or finding that a judge failed to make a reasonable effort in compliance with section 455(c).

In one case, the district judge's wife had inherited stock in the parent company of a party to a case years before the case was initiated. *Shell Oil Co. v. United States*, 672 F.3d 1283, 1286 (Fed. Cir. 2012). The judge asserted that he was unaware of the conflict until he entered final judgment in the case and realized the parent-subsidiary relationship. *Id.* Instead of recusing himself from the case, the judge severed the conflicted subsidiary party and continued entering orders in the case. The Federal Circuit Court of Appeals concluded that vacatur was

appropriate because "as soon as he discovered the conflict, the trial judge was required to disqualify himself from the entire proceeding and ask the clerk of court to transfer the case to another judge." *Shell Oil Co.*, 672 F.3d at 1290. But no party argued, and no finding was made, that the judge had failed to exercise reasonable effort to ascertain his spouse's financial interests.

In another case, a district judge was a stockholder of a party to a case before him as a result of a merger between that party and an entity in which he held stock, Chase Bank. *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 130 (2d Cir. 2003). The judge asserted that he did not realize that he had an interest in the party, Chemical Bank, even though his orders had identified the party as "'Chemical Bank (now known as The Chase Manhattan Bank).'" *Id.* The Second Circuit found that the judge was required to disqualify himself under section 455(a) because he did in fact own stock in the party, and that under the facts, "a reasonable person would conclude that a judge was violating section 455(b)(4)" even if he asserted that he did not have actual knowledge of his financial interest in a party. *Id.* at 128. The judge had presided over the case for three years before divesting his stock in Chase Bank, but although the court did emphasize that the statute "require[s] some reasonable investigation and action on a judge's own initiative," it did not find that the judge had failed to comply with section 455(c). *Id.* at 130.

Finally, in a more similar case that was initiated in July 1980, the judge got married in 1983, but she did not discover that her husband held a financial interest in a party until 1985 at which point she immediately suspended her activity in the case. *Union Carbide Corp. v. U.S. Cutting Serv.*, 782 F.2d 710, 713-14 (7th Cir. 1986). Here too, her husband's stock was actually in another named company such that she did not realize there was an interest in a party to the case. *Id.* Although the Court stated that she may have discovered the interest "at the latest in May 1984 when she filed her financial disclosure form," the Court found no violation whatsoever of the recusal statute. *Id.* at 713, 716.

In all of these cases, years had elapsed between the existence of the conflict and the judge's discovery of the conflict, and yet, no violation of section 455(c) was found. Here, a maximum of seven months elapsed, and the record does not show that Judge Gardner failed to take reasonable action to ascertain her husband's financial interests. Plaintiff cites *Liljeberg*

v. Health Servs. Acquisition Corp., in which the Supreme Court stated that a district judge's "failure to stay informed of [his] fiduciary interest may well constitute" a violation of section 455(c). 486 U.S. 847, 868 (1988). But that case is starkly distinguishable from the present case. There, the district judge had been on the board of trustees of a university for years that was involved in a large financial transaction with a party, which was reflected in the minutes of the board meetings. *Id.* at 865-68. Indeed, the Supreme Court identified four facts that might reasonably cause an objective observer to question the judge's impartiality, including that he had failed to recuse himself even after he clearly knew of his financial interest in a party. *Id.* at 865-67. Here, there are no facts to suggest that Judge Gardner should have known of her new husband's small financial interest[1] in Intuitive Surgical or that she failed to reasonably make herself aware. As such, and consistent with other courts considering a judge's actions under section 455, the Court can find no violation of section 455(c) here.

Furthermore, by its own terms, section 455(b)(4) requires recusal only where the district judge "knows" that her spouse has a financial interest in a party. *Liljeberg*, 486 U.S. at 859 ("A careful reading of the respective subsections makes clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a)."). Here, no party has asserted, and the record does not otherwise reflect, that Judge Gardner knew that her spouse held a financial interest in Intuitive Surgical, and thus, there can be no violation of section 455(b)(4).

However, a violation of § 455(a) does not require the judge's actual knowledge of the disqualifying interest, only that "a reasonable person would conclude that the judge had knowledge of the disqualifying interest." *Chase Manhattan Bank*, 343 F.3d at 128.[2] The

[1] Just as "[t]he size of the investment is a relevant consideration in evaluating an appearance of impropriety," so too is the size relevant in considering whether Judge Gardner's action or inaction was reasonable. *In re Zow*, No. 12-41944, 2013 Bankr. LEXIS 287, at *6 (Bankr. S.D. Ga. Jan. 24, 2013). In other words, the small size of the interest supports a conclusion that if Judge Gardner had inquired into her husband's interests, "Intuitive Surgical" may very well never have been mentioned.

[2] Although Plaintiff did not allege a violation of section 455(a), the Court finds it necessary to analyze this subsection as it is necessarily implicated in these types of cases. Indeed, the cases on which Plaintiff relies and which provide the framework for these types of cases involve a finding of a violation of section 455(a). *Liljeberg*, 486 U.S. 847, 861; *United States v. Cerceda*, 172 F.3d 806, 812 (11th Cir. 1999) (explaining that in *Liljeberg*, "the Supreme Court applied a three-factor test to determine whether a judicial action taken in violation of section 455(a) should be remedied by vacatur pursuant to Fed.R.Civ.P. 60(b).").

provision is "designed to promote the public's confidence in the impartiality and integrity of the judicial process." *Ginsberg v. Evergreen Sec., Ltd. (In re Evergreen Sec., Ltd.)*, 570 F.3d 1257, 1263 (11th Cir. 2009) (citation omitted). To warrant recusal under section 455(a), there must exist "facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. Specifically, "recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Id.* at 860-61. In *Liljeberg*, the Supreme Court identified four facts warranting recusal under section 455(a), including an actual violation of section 455(b)(4) and the judge's subsequent denial of the motion to vacate in which he did not indicate that he was required to recuse himself. *Id.* at 866-67. Here, there are no facts in this case to allow a reasonable person to conclude that the district judge had actual knowledge.

Nonetheless, section 455(a) does not specify which bases would allow a judge's impartiality to be questioned, only that recusal is required where a judge's impartiality could reasonably be questioned. Here, there are facts that might lead a reasonable person to question Judge Gardner's impartiality. Namely, that Judge Gardner's husband did in fact hold a financial interest in a party to a case over which she presided at the time she granted that party's motion for summary judgment, among other motions, and entered judgment in that party's favor. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg,* 486 U.S. at 865. In these types of cases, "[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Id.* at 869-70 (citation omitted). Thus, for purposes of this indicative ruling, there is a substantial question whether Judge Gardner's impartiality could reasonably be questioned.

B. Is Vacatur Warranted?

Even where a judge has violated the recusal statute, vacatur is not always appropriate or required. "As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a)." *Liljeberg*, 486 U.S. at 862; *see also In re BellSouth Corp.*, 334 F.3d 941, 956 n.7 (11th Cir. 2003) ("[W]e have found that failure to recuse

even when required under Section 455(b) can be harmless error."). Indeed, "[a]lthough § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation;" instead, "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg*, 486 U.S. at 862. In determining whether to vacate a disqualified judge's orders pursuant to Fed.R.Civ.P. 60(b), a court must 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." *Cerceda*, 172 F.3d at 812. One factor alone may be enough to warrant vacatur. *See id.*

As to the risk of injustice to the parties, a court should consider "whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party" and "the seriousness of the violation of section 455(a) that is involved." *Cerceda*, 172 F.3d at 813. Although Plaintiff argues that Judge Gardner's failure to ascertain her husband's financial interests for the "exceedingly long time" of seven months was serious and warranted mandatory recusal under section 455(b) (Doc. 158 at 9), the Court is not so convinced. As explained herein, judges have gone much longer periods of time without realizing that they themselves had a financial interest in a party, and no violation of subsections b or c were found. That seven months elapsed here does not in and of itself indicate a risk of injustice to Plaintiff if vacatur is not granted, nor was Judge Gardner's failure to ascertain her husband's interests sooner a serious violation of 455(a). *See Cerceda*, 172 F.3d at 814 (finding against appellant on this factor considering "the totality of the circumstances, including, *inter alia,* the nature of the violation, the egregiousness thereof, the clarity of the violation, and the reasonableness of the judge's lack of awareness that he was in violation of section 455(a)"). Indeed, Plaintiff argues that this case does not involve a section 455(a) violation at all. (Doc. 158 at 9.)

On the other hand, if the Court must re-conduct the two-day *Daubert* hearing,[3] there is a risk of injustice to Defendant who would be required to expend significant cost and time relitigating these matters in a case where there was no actual impartiality and where it does not

[3] The Court in its discretion might require having these hearings anew so that it can thoroughly assess the credibility and qualifications of the proposed experts *de novo*.

appear that Judge Gardner erroneously decided these issues. *See*, *e.g.*, *In re Sch. Asbestos Litig.*, 977 F.2d 764, 787 (3d Cir. 1992) ("To vacate all those rulings now and to order full reconsideration by the incoming district judge would entail enormous cost to the parties and to the judicial system with little corresponding gain. Accordingly, we will not do so, especially since we believe that none of [the judge's] orders were infected with actual bias."). Furthermore, because the Eleventh Circuit Court of Appeals now has on review Judge Gardner's rulings granting Defendant's summary judgment motion and excluding one of Plaintiff's experts, the risk of injustice to Plaintiff and the public is substantially reduced. *Cerceda*, 172 F.3d at 813 n.10 ("[W]here the Court of Appeals reviews a district judge's challenged actions and affirms them on the merits either before or at the same time it considers whether the judge violated section 455(a), the possibility of a significant risk of injustice is substantially reduced--particularly if the review of the merits was plenary."); *Curves, LLC v. Spalding Cty.*, 685 F.3d 1284, 1288 (11th Cir. 2012) ("[I]njustice -- if any -- to these parties will be cured by our fresh review."). Ultimately, "[r]elief under Rule 60(b)(6) 'is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances[,]' and that 'absent such relief, an extreme and unexpected hardship will result." *Rismed Oncology Sys., Inc. v. Baron*, 638 F. App'x 800, 807 (11th Cir. 2015) (citation omitted). Plaintiff has merely argued about a theoretical violation of section 455(c) based on Judge Gardner's delayed discovery of her new husband's small stock in the Defendant, but she has failed to show that any exceptional circumstances warrant vacatur of Judge Gardner's orders.

For all of these same reasons, the risks that denial of relief will produce injustice in other cases or of undermining the public's confidence in the judicial process are low.[4] There was no actual bias here, any violation of the recusal statute was slight and unclear, Judge Gardner promptly notified the Parties of her husband's small financial interest in Defendant, and the Eleventh Circuit is now reviewing Judge Gardner's grant of summary judgment and exclusion of one of Plaintiff's experts. *See*, *e.g.*, *Curves*, 685 F.3d at 1288 ("[B]ecause of our de novo review . . . the risk of injustice to other parties is non-existent . . . [and] the public's

[4] The Court is not finding that there are no risks, only that such risks are low under the circumstances here. If other facts here had been different, *e.g.*, that her husband held a significant financial interest in Defendant, that Judge Gardner delayed in informing the Parties of her husband's interest, that it appeared that Judge Gardner's orders had been wrongly decided, or that Plaintiff was unable to appeal, vacatur may likely be appropriate.

confidence in the judicial process cannot be said to be undermined. . . . The law does not require us to vacate [the judge's] summary judgment decision."); *Rismed Oncology Sys.*, 638 F. App'x at 808 (Generally, "[t]he circumstances must be 'so compelling that the district court was required to vacate its order.'"); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988) (by urging the judge to stop engaging in the activity that violated section 455(a), "our decision will instill greater confidence in our judiciary"). Indeed, because this situation is so fact-specific and relatively rare, this Court has no reason to think that vacatur would serve the purposes Plaintiff argues it will serve. This Order and that of the Circuit Court should be sufficient to remind judges of their obligation to timely ascertain their spouse's financial interests.[5]

CONCLUSION

For the foregoing reasons, Plaintiff's "Motion to Issue an Indicative Ruling Whether to Vacate the Judgment" (Doc. 158) is **DENIED**.

SO ORDERED, this 16th day of October 2019.

/s/ W. Louis Sands
W. LOUIS SANDS, SR. JUDGE
UNITED STATES DISTRICT COURT

[5] Furthermore, even if this Court vacated Judge Gardner's orders and addressed the challenged motions *de novo*, this Court has reviewed the record and briefs filed and has no reason to think at this time that its orders would be different. *United States v. Musselwhite*, 709 F. App'x 958, 968-69 (11th Cir. 2017) (finding no error where "a conflict-free judge [] took over and considered de novo the motions and all orders entered by" the recused judge and adopted them all as his own).