STATE OF MICHIGAN

COURT OF APPEALS

UTICA STEEL, INC.,

Plaintiff/Counter Defendant,

v

JOHN AMORMINO,

Defendant/Cross Defendant-Appellee,

and

MARILYN AMORMINO,

Defendant/Cross Defendant/Cross Plaintiff-Appellee,

and

DOROTHY LIETKE, FRANCIS LIETKE, GREG LIETKE, KAREN LIETKE, KEITH LIETKE, and MARK J. LIETKE,

Defendants,

and

JOHN L. LIETKE,

Defendant/Counter Plaintiff/Cross Defendant/Cross Plaintiff-Appellant.

UNPUBLISHED
April 10, 2014

No. 309112
Macomb Circuit Court
LC No. 2009-004508-CZ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiff, Utica Steel, Inc. ("USI"), brought this action against defendants John Lietke, Marilyn Amormino, and several other defendants, alleging claims in connection with Lietke's and Amormino's embezzlement of funds from USI between 1991 to 2010.[1] USI's claims against the various defendants were resolved by case evaluation or voluntary settlement. At issue in this appeal are Lietke's cross-claims against Amormino and her husband John Amormino for the equitable remedies of an accounting and imposition of a constructive trust. The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the Amorminos' motion and denied Lietke's motion with respect to these claims. Lietke now appeals as of right. We affirm.

I. JUDICIAL DISQUALIFICATION

Lietke first argues that the trial court erred in denying his motion to disqualify presiding Judge Richard Caretti on the ground that Caretti was biased against him. Both Judge Caretti and the chief judge denied Lietke's motion for disqualification, finding no evidence that Judge Caretti was biased against Lietke. Lietke's motion for disqualification was based on comments that Judge Caretti made in reference to Lietke at a settlement conference. According to an affidavit submitted by Lietke's counsel, Judge Caretti made the following remarks in reference to Lietke:

> Your client is the bad guy here. He stole money from the company and utilized Marilyn Amormino to do it. Now he wants to sue her alleging that she stole money from him. That strikes me as unreasonable.

In denying Lietke's motion for disqualification on the basis of these remarks, Judge Caretti acknowledged making remarks "along those lines," but denied that he was biased or prejudiced against Lietke. He explained that the remarks were made in the context of settlement discussions and were intended to facilitate resolution. The chief judge similarly found that it was "common place for the judge in the type of situation that you're talking about to lean on both parties" and, accordingly, agreed that the remarks did not warrant Judge Caretti's disqualification on the basis of bias or prejudice.

"In reviewing a motion to disqualify a judge, this Court reviews the trial court's findings of fact for an abuse of discretion and the court's application of those facts to the relevant law de novo." *Olson v Olson*, 256 Mich App 619, 638; 671 NW2d 64 (2003).

MCR 2.003(C)(1)(a) provides that a judge is disqualified if the "judge is biased or prejudiced for or against a party or attorney." The party challenging a judge on the basis of bias or prejudice "must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Bias or prejudice is defined as "'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded

[1] In this opinion, the singular term "Lietke" refers to defendant John Lietke, the only Lietke defendant who is a party to this appeal, and the singular term "Amormino" refers to defendant Marilyn Amormino only.

person could not entirely set aside when judging certain persons or causes.'" *Id*. at 495 n 29, quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980). "Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). Remarks that are critical of or hostile toward a party are generally not sufficient to establish bias. *Id*.; *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995), mod 451 Mich 457 (1996). The bias must be both "personal and extrajudicial," such that "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain*, 451 Mich at 495.

In *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009), this Court reiterated the standard for overcoming the presumption of judicial impartiality, stating:

> Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 554; 730 NW2d 481 (2007). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a "'deep-seated favoritism or antagonism that would make fair judgment impossible'" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001) (citations omitted).

In this case, Judge Caretti's brief comments, although critical of Lietke's position in the settlement conference, do not rise to the level of "an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes." *Cain*, 451 Mich at 495 n 29. Judge Caretti explained that his purpose in referring to Lietke as the "bad guy" who "stole money from the company and utilized Marilyn Amormino to do it," and his comment that Lietke's claims against Amormino were "unreasonable" under the circumstances, were based on the factual record that had been developed and were intended to encourage Lietke to moderate his position in settlement by reminding him that the allegations and evidence in the case were not favorable to him. Judge Caretti denied that the statements indicated that he had already decided the case adversely to Lietke or that he had pre-determined the outcome of the Lietke's and Amormino's cross-claims. According to Amormino's counsel, Judge Caretti made similar remarks about Amormino during the settlement discussions. Considering the context in which the statements were made, a settlement conference in which it is not uncommon for a court to highlight the strengths and weaknesses of the litigants' respective positions in an effort to facilitate settlement, we agree that Lietke failed to overcome the heavy presumption of judicial impartiality. Accordingly, neither the trial court nor the chief judge abused their discretion in denying the motion for disqualification.

II. SUMMARY DISPOSITION

Lietke next argues that the trial court erred when it denied his motion for summary disposition and granted summary disposition in favor of Amormino on Lietke's cross-claims for an equitable accounting and imposition of a constructive trust.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The trial court granted summary disposition in favor of Amormino on Lietke's cross-claims pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) determines whether there is factual support for a claim. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). When reviewing a motion under MCR 2.116(C)(10), the court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Michalski v Reuven Bar Levav*, 463 Mich 723, 729-730; 625 NW2d 754 (2001); see also MCR 2.116(G)(5). If the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law, the motion is properly granted. *Michalski*, 463 Mich at 730.

The trial court concluded that the unclean hands doctrine barred Lietke's claims for equitable relief. In addition to asserting the unclean hands doctrine, Amormino also argued that she was entitled to summary disposition on Lietke's cross-claims because Lietke could not prove the existence of a fiduciary or confidential relationship between them.

Regarding the doctrine of unclean hands, this Court held in *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 52; 783 NW2d 515 (2010):

> It is well settled that one who seeks equitable relief must do so with clean hands. *McCluskey v Winisky*, 373 Mich 315, 321; 129 NW2d 400 (1964); *Berar Enterprises, Inc v Harmon*, 101 Mich App 216, 231; 300 NW2d 519 (1980). A party with unclean hands may not assert the equitable defense of laches. *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 66; 380 NW2d 53 (1985). Our Supreme Court has observed that a party who has "acted in violation of the law" is not "before a court of equity with clean hands," and is therefore "not in position to ask for any remedy in a court of equity." *Farrar v Lonsby Lumber & Coal Co*, 149 Mich 118, 121; 112 NW 726 (1907).

"Any wilful act concerning the cause of action which transgresses equitable standards of conduct is sufficient cause for the invocation of the clean hands doctrine." *Bellware v Wolffis*, 154 Mich App 715, 720; 397 NW2d 861 (1986).

We agree with Lietke that the trial court erred in determining that Amormino was entitled to summary disposition of Lietke's equitable claims for an accounting and a constructive trust on the ground that there was no genuine issue of material fact regarding Lietke's unclean hands. A party who moves for summary disposition under MCR 2.116(C)(10) has the initial burden of identifying the issues for which the moving party believes there is no genuine issue as to any material fact, MCR 2.116(G)(4), and must support his or her belief with affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(3). Amormino did not support her

summary disposition motion with evidence of Lietke's active and wilful involvement in the embezzlement scheme. On appeal, Amormino relies on evidentiary support submitted by other parties in connection with other claims, and contends that a court properly may review the entire record on its own initiative when reviewing a motion for summary disposition. We disagree.

In *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362; 775 NW2d 618 (2009), this Court considered the defendant's argument that "the trial court had a duty to *independently* consider *all* the evidence contained in the court record before it could grant the motion." *Id*. at 375-376 (emphasis in original). The defendant in *Barnard Mfg Co* relied on MCR 2.116(G)(5), which states that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the trial court when the motion is based on subrule (C)(1) - (7) or (10)." This Court acknowledged that MCR 2.116(G)(5) "[a]t first blush . . . appears to support" the conclusion that the trial court had an independent duty to review the record. However, this Court held, the court rules governing summary disposition do not relieve a party of the obligation to cite and submit evidence in support of its position on summary disposition. The Court explained:

> As already noted, MCR 2.116(G) generally governs the burden of production associated with a motion for summary disposition; and, consistently with our adversarial system, MCR 2.116(G)(4) squarely places the burden of identifying the issues and evidentiary support on the parties, not the trial court. See *Quinto* [*v Cross & Peters Co*], 451 Mich [358, 362-363; 547 NW2d 314 (1996)] (noting that Michigan's court rules employ a burden-shifting approach for motions for summary disposition). Accordingly, the moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and must support his or her belief with affidavits, depositions, admissions, or other documentary evidence, MCR 2.116(G)(3). Likewise, once a party makes a properly supported motion under MCR 2.116, the adverse party "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, *set forth specific facts* showing that there is a genuine issue for trial." MCR 2.116(G)(4) (emphasis added); see also *Maiden* [*v Rozwood*], 461 Mich [109, 121; 597 NW2d 817 (1999)] (stating that the "reviewing court should evaluate a motion for summary disposition under MCR 2.116[C][10] by considering the substantively admissible evidence actually proffered in opposition to the motion"). Because MCR 2.116(G)(4) places the burden to establish a genuine issue for trial on the adverse party, MCR 2.116(G)(5) cannot be construed to place a concomitant burden on the trial court to scour the lower court record in search of a basis for denying the moving party's motion. Instead, MCR 2.116(G)(5) must be understood to impose a limitation on the discretion of the trial court rather than impose an affirmative duty. Accordingly, if a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is "then filed in the action or submitted by the parties," the trial court must consider it. MCR 2.116(G)(5); see also *Capital Mortgage Corp v Michigan Basic Prop Ins Ass'n*, 78 Mich App 570, 573; 261 NW2d 5 (1977) (concluding that, under GCR 1963,

> 117.2[3], which was substantially similar to MCR 2.116 [G][5], the trial court could not refuse to consider documentary evidence properly filed by one of the parties). [*Barnard Mfg Co*, 285 Mich App at 376-378.]

Here, neither party relied on the other portions of the record to support their respective positions regarding Lietke's unclean hands. Lietke relied on the allegations in his cross-claim to support his position that Amormino's conduct with Lietke's personal monies was unrelated to any conduct that Amormino and Lietke might have jointly committed with respect to USI's monies. Amormino relied on allegations to the contrary. Only on appeal did Amormino attempt to identify record evidence in support of her position. Because Amormino failed to properly support her motion for summary disposition on the basis of the unclean hands doctrine, Lietke had no duty or opportunity to submit evidence in response in an attempt to establish a genuine issue of material fact. Accordingly, we agree with Lietke that the trial court erred in granting summary disposition in Amormino's favor on the basis of the unclean hands doctrine.

Amormino also argued below that she was entitled to summary disposition on Lietke's cross-claims because there was no genuine issue of material fact concerning the existence of a fiduciary or confidential relationship between them, which were necessary for Lietke's equitable claims for an accounting and constructive trust. We agree, and affirm the trial court's grant of summary disposition for Amormino on this basis. "This Court ordinarily affirms a trial court's decision if it reached the right result, even for the wrong reasons." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

"A suit for an accounting invokes the powers of a court of equity." *Bondy v Davis*, 40 Mich App 153, 159; 198 NW2d 418 (1972). A court sitting in equity may order the remedy of an accounting against a party in a fiduciary relationship to the claimant. See *Cyranoski v Keenan*, 363 Mich 288, 291-292; 109 NW2d 815 (1961). In *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), our Supreme Court quoted Black's Law Dictionary (7th ed), for the definition of "fiduciary relationship." The Court observed that a fiduciary relationship is

> "[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." [*Id*.]

The Court noted that the concept of fiduciary relationship originated in English law "in situations in which dominion may be exercised by one person over another." *Id*. at 75 n 3. A fiduciary relationship exists when "there is confidence reposed on one side, and the resulting superiority and influence on the other." *Id*., quoting *In re Wood's Estate*, 374 Mich 278, 283; 132 NW2d 35 (1965), overruled in part on other grounds *Widmayer v Leonard*, 422 Mich 280, 288-289 (1985)

(internal quotations omitted). However, the placement of trust, confidence, and reliance must be reasonable, and placement is unreasonable if the interests of the client and nonclient are adverse or even potentially adverse. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999).

Common examples of fiduciary relationships include a trustee to a beneficiary, a guardian to a ward, and a doctor to a patient. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). Generally, the relationship between an employer and an employee is not regarded as fiduciary in nature. *Bradley v Gleason Works*, 175 Mich App 459, 463; 438 NW2d 330 (1989) ("[p]laintiff does not cite any authority for the proposition that an employer-employee relationship is fiduciary in nature").

Lietke argues that Amormino's deposition testimony established a genuine issue of fact whether a fiduciary relationship existed between her and Lietke arising from her management of Lietke's money. Amormino testified that she managed Lietke's money, and that she was obligated to account for the money. She also testified that she limited payments to his account from the Sales Account because she believed that he spent too much money. She also failed to inform him of the balance of his accounts because he would spend the money if he knew it was there. Amormino cited Lietke's deposition testimony that Amormino "just took care of it," meaning his money. He did not ask her about the accounts, and she did not conceal information.

We conclude that Lietke failed to establish a genuine issue of material fact regarding Amormino's status as a fiduciary. Although Lietke placed his trust in Amormino, there is no basis for concluding that his reliance was reasonable. Lietke was president of the company, and Amormino was an employee. Their relationship was not analogous to that between a trustee and beneficiary, a guardian and ward, or a doctor and patient. See *Portage Aluminum*, 206 Mich App at 294; *Bradley*, 175 Mich App at 463. Lietke admitted in his deposition that Amormino did not conceal financial information from him, and that he never asked her about it. Lietke and Amormino's deposition testimony did not establish that Lietke's reliance on Amormino to manage his finances gave Amormino "superiority and influence" or dominion over Lietke. See *In re Karmey Estate*, 468 Mich at 75 n 3.

In *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194; 480 NW2d 910 (1991), the plaintiff argued that the defendant bank assumed the position of a fiduciary toward the plaintiff borrower because the plaintiff was naïve and inexperienced. This Court held that no fiduciary relationship existed between the defendant bank and the plaintiff borrower. *Id*. at 196-197. Thus, proof of a fiduciary relationship requires proof of dominion, superiority, or influence that results from the other party's confidence and reliance. *In re Karmey Estate*, 468 Mich at 75 n 3. Here, Lietke trusted Amormino to manage his funds, but the risk that she would abuse her authority came not from any dominion or influence that she held over him, but rather from Lietke's own lack of oversight. Accordingly, Lietke's failure to establish a fiduciary relationship precluded his entitlement to an accounting.

These circumstances also warranted summary disposition in Amormino's favor with respect to Lietke's claim for imposition of a constructive trust. "A court may impose a constructive trust when necessary to do equity or avoid unjust enrichment." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 202; 729 NW2d 898 (2006). The court may impose a constructive trust although a legal remedy exists, but the imposition must be based on breach of a fiduciary or confidential relationship, undue influence, fraud, misrepresentation, concealment, or mistake. *Reed & Noyce, Inc v Muni Contractors, Inc*, 106 Mich App 113, 120; 308 NW2d 445 (1981). Lietke sought a constructive trust on the ground that Amormino breached her fiduciary duty, but his failure to establish the existence of a fiduciary or confidential relationship between them precluded that relief.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen