

STATE OF MICHIGAN
COURT OF APPEALS

BERNADETTE GIACONA,

Plaintiff-Appellee,

v

DANIEL J. GIACONA,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 220678

Macomb Circuit Court

LC No. 97-002553-DO

Before: Cavanagh, P.J., and Gage, and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ from the judgment of divorce awarding plaintiff various marital assets, cash, spousal support, and attorney fees. We affirm in part and reverse in part.

I. Attorney Fees

Defendant first argues that the trial court abused its discretion in awarding plaintiff actual costs and attorney fees when plaintiff received substantial marital assets and was capable of obtaining employment. We disagree. This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000).

"A party in a domestic relations matter who is unable to bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay. However, under MCR 3.206(C)(2), the party requesting the fees must allege facts sufficient to show that the party is unable to bear the expense of the action." *Kosch, supra*. Attorney fees may also be awarded when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

¹ *Giacona v Giacona*, unpublished order of the Court of Appeals, issued August 31, 2001.

In this case, there was sufficient evidence presented that plaintiff was unable to bear the expense of the action. Plaintiff was married to defendant for ten years, working in the home as a housewife and mother. Accordingly, she had not held a job or been earning an income during that time. Plaintiff also testified that she has had trouble obtaining employment due to her outdated secretarial skills. Other than domestic cleaning jobs, plaintiff has been unemployed and at the time of the trial, lived with her nephew and was borrowing money from her brother.

Moreover, the trial court's court award of attorney fees in this case was a proper exercise of its discretion based on defendant's unreasonable and irrational conduct throughout the proceedings. The record is replete with instances of defendant's unreasonable conduct. Plaintiff filed motions to show cause as to why defendant should not be held in contempt for failure to comply with court orders. Further, defendant filed frivolous motions, which plaintiff was forced to respond to, regarding issues that the trial court had previously addressed. In fact, the trial court precluded defendant from filing any further motions without its approval. Defendant was uncooperative at depositions and evidentiary hearings. It is apparent from the record, and as the trial court correctly observed, that defendant was the only party unwilling to cooperate and resolve the issues, prolonging the proceedings more than two years and causing plaintiff to incur greater expense. Defendant's attitude and position regarding the divorce did not appear to be one concerned with equity and fairness, but one of spite, resistance, and vengeance. Thus, the trial court did not err in awarding plaintiff attorney fees.

II. Spousal Support

Defendant next challenges the trial court's award of interim and post-judgment spousal support, arguing that such awards were inequitable under the facts of this case. We disagree. "An award of alimony is within the trial court's discretion." *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). This Court reviews the trial court's factual findings relating to an award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 654-655. "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 655. The trial court's ruling regarding alimony should be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks v Sparks*, 440 Mich 141, 152; 485 NW2d 893 (1992).

The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party and should be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654. In determining an award of alimony, the court should consider "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any." *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

Defendant claims that the trial court erred in awarding plaintiff alimony without examining and making specific findings of fact regarding the foregoing factors or considering plaintiff's fraudulent and adulterous conduct. However, the trial court's failure to specifically state its findings regarding each consideration does not require reversal where this Court's review of the record indicates that a different result would not have been reached, especially

where it appears that the trial court was aware of the appropriate factors. *Lee v Lee*, 191 Mich App 73, 80; 477 NW2d 429 (1991).

Defendant disputes both the interim and post-judgment awards of spousal support. Although both awards of spousal support were fair and equitable in light of the circumstances, we will address each award in turn.

Upon plaintiff's motion, the trial court awarded plaintiff interim spousal support of \$150 per week. At the hearing on plaintiff's motion, although the trial court did not make specific findings on the record regarding each factor, it is clear from the record that the trial court was aware of the relevant factors and considered them in making its decision. The trial court considered evidence regarding the length of the marriage, the parties' ability to pay, including defendant's obligation to make car, insurance, and mortgage payments, their ages, needs, ability to work, health, and fault. Although plaintiff was unemployed, earning no income, and looking for work, the trial court took into account earnings she could make at a minimum wage job. Accordingly, the incomes appeared balanced, while meeting the needs of the parties. Thus, an award of interim spousal support in the amount of \$150 was just and reasonable in light of the circumstances of this case.

Under the judgment of divorce, plaintiff was awarded spousal support of \$250 a week for one year. In the trial court's written opinion and order, it outlined the relevant factors to be considered in determining whether to award alimony. Accordingly, defendant's argument that the trial court failed to make a determination under the relevant factors is without merit. The trial court found that plaintiff's circumstances warranted an award of spousal support. The trial court found that plaintiff's current unemployment, herniated disc, and out-dated secretarial skills indicated a need for some time to secure employment. Further, plaintiff had minimal income consisting of occasional child support and loans from her brother. Therefore, the trial court awarded plaintiff spousal support for one year. In light of this evidence regarding plaintiff's circumstances, we do not find that the award was inequitable or that the trial court abused its discretion in awarding plaintiff post-judgment spousal support for one year.

III. Issues of Fault

Throughout his brief on appeal, defendant raises several issues regarding fault on the part of plaintiff. Defendant's arguments regarding the trial court's failure to consider plaintiff's conduct are without merit because evidence of fault on the part of plaintiff, including plaintiff's alleged extramarital internet affairs and medical insurance fraud, were never properly raised, testified to, or admitted into evidence at trial. As such, this issue is unpreserved for appeal as it was not raised before or addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Accordingly, we decline to address the issue.²

² Defendant further claims that he was not "permitted" to introduce evidence of plaintiff's fault and was "required to proceed in pro per," rendering him unable to introduce the evidence because of his lack of skill as a layperson. These arguments are meritless. Defendant opted to proceed in pro per after the trial court encouraged him to hire an attorney. The consequences of
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IV. Discovery of Plaintiff's Medical Records

Defendant next argues that the trial court abused its discretion when it denied defendant discovery of plaintiff's medical condition and then considered plaintiff's medical condition in awarding spousal support. First, because defendant failed to properly motion the trial court to compel discovery of plaintiff's medical records, the trial court did not have the opportunity to address this issue. Therefore, this issue is not preserved for appeal and defendant is not entitled to appellate review. *Fast Air, Inc, supra*; *State Treasurer v Downer*, 199 Mich App 447, 449; 502 NW2d 704 (1993).

Nonetheless, the trial court did not abuse its discretion in denying defendant's attempts to subpoena plaintiff's medical records because plaintiff's medical condition was not "in controversy" as required under the court rule. MCR 2.314(A)(1) allows for the discovery of a party's medical information when the "mental or physical condition of a party is in controversy." However, defendant did not dispute any issues regarding plaintiff's health or medical condition. When given the opportunity, defendant did not cross-examine plaintiff regarding her medical condition, health, or herniated discs. After review of the record in this case, and contrary to defendant's argument on appeal, defendant did not seek plaintiff's medical records on the basis of her allegation of health problems. Rather, it could be gleaned from the record that defendant sought access to plaintiff's medical and health insurance records in order to establish fraudulent insurance activity that defendant alleged plaintiff had committed against her ex-husband. Accordingly, the trial court did not abuse its discretion and defendant should not be allowed relief on appeal for an issue that was not raised or pursued in the trial court.

V. The Trial Court's Failure to Address a Violation of a Court Order

Defendant contends that the trial court abused its discretion when it failed to properly address plaintiff's violation of a court order when defendant petitioned the court for enforcement of the order. We disagree. A trial court's decision to issue an order of contempt for failure to comply with a court's order is reviewed for an abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998).

Defendant's argument that the trial court failed to address his petition for enforcement of the trial court's injunctive order regarding assets is without merit and based on an inaccurate statement of the facts. Contrary to defendant's argument, the trial court addressed defendant's petition for enforcement of the injunctive order. The trial court determined that there were disputed issues of fact with regard to whether plaintiff violated the order by selling the 1987 Dodge Caravan, and therefore, ruled that the issue be resolved at trial. At trial, the trial court resolved the issue regarding the 1987 Dodge Caravan. There was evidence presented that the parties sold the 1987 Dodge Caravan to plaintiff's brother during the marriage for \$1,100. After plaintiff filed for divorce, she asked her brother to borrow the vehicle. The Caravan was not

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defendant's failure to be represented by an attorney are hardly an abuse of discretion by the trial court.

working so plaintiff had it towed, where she was told that it needed a new engine. As a result, plaintiff decided to junk the vehicle for \$50, which plaintiff admitted was not even her vehicle. Defendant did not present any evidence to refute this evidence. Thus, the trial court determined that the 1987 Dodge Caravan was sold during the course of the marriage, and therefore, concluded that the 1987 Dodge Caravan was not an asset of the marriage and irrelevant to the divorce proceedings. Accordingly, the trial court addressed and resolved defendant's issue regarding the alleged fraudulent sale of the 1987 Dodge Caravan. As such, we find no abuse of discretion.

VI. Reduction of the Temporary Spousal Support Order

Defendant also argues that the trial court committed legal error when it refused to reduce the temporary spousal support order retroactively before the filing of a motion to request such a reduction. We agree. This issue involves statutory interpretation, which is a question of law that this Court reviews de novo. *Oakland Co Bd of Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Defendant filed a motion to reduce the interim award of spousal support because he was on disability caused by a medical condition and was receiving a reduced income. The trial court agreed to reduce the temporary spousal support award to \$75 per week until defendant returned to work full-time. The trial court further reduced the award retroactively from the date defendant filed the motion, but refused to reduce the amount retroactively to the date of defendant's disability. Defendant argues on appeal that the trial court erred in refusing to reduce the spousal support award retroactively to the date of defendant's disability, relying on MCL 552.602(2) and (3).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000). "This Court will not read into a statute anything that is not within the manifest intention of the Legislature as gathered from the act itself." *Id.* The first step in determining intent is to review the specific language of the statute itself. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the plain and ordinary meaning of the language is clear and the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permitted. *Id.*

MCL 552.603(2) provides, in pertinent part, that "[r]etroactive modification of a support payment due under a support order is permissible with respect to any period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the prayer or recipient of support." MCL 552.603(2). However, "[t]his section does not apply to an ex parte interim order or a temporary support order" MCL 552.603(3). Thus, the plain and ordinary language of the statute provides that the restriction on retroactive modification of support orders does not apply to interim or temporary support orders. Further, MCR 3.207(C)(3) provides that temporary orders "may be modified at any time during the pendency of the case, following a hearing and upon a showing of good cause." However, it should be noted that just because the trial court could reduce the temporary spousal support order retroactively to the date of defendant's disability does not mean that the trial court was required to do so as the decision whether to reduce or modify a spousal support award is within the trial court's discretion and will only be reversed on appeal where there is an abuse of that discretion. *Pierce*

v Pierce, 332 Mich 548, 551; 52 NW2d 213 (1952). “An alimony award may be modified if there is evidence of a change in circumstances justifying modification.” *Dresser v Dresser*, 130 Mich App 130, 135; 342 NW2d 545 (1983).

The trial court abused its discretion in refusing to reduce the spousal support payment retroactively back to the date of defendant’s disability. Because the trial court reduced the support payment due solely to defendant’s disability and loss of income, it follows that the trial court determined that defendant presented evidence of a change in circumstances justifying modification and was financially unable to pay the full spousal support payment. Thus, defendant’s spousal support payments should have been reduced during the entire period of defendant’s disability.

VII. The Trial Court’s Misstatement of Fact

Defendant next claims that the trial court committed legal error when it based its opinion on a misstatement of fact contained in the record. The trial court’s statement in its written opinion and order that defendant had no objection to paying for plaintiff’s health coverage under COBRA was incorrect and in error. Defendant objected to this recommendation in his written objections to the trial court and then again at the de novo hearing. However, we hold that such error was harmless.

We find that this misstatement was harmless and does not require reversal or remand because the trial court’s award of health coverage was fair and equitable in light of the circumstances. See *Fletcher v Fletcher*, 447 Mich 871, 882; 889; 526 NW2d 889 (1994). Contrary to defendant’s argument, the trial court found that plaintiff’s request for health coverage was reasonable considering her health history, despite its finding that defendant did not object to continuing this coverage. Plaintiff was a housewife for the duration of the marriage and had health benefits during the marriage through defendant’s policy at Chrysler. Further, plaintiff was in remission from cervical cancer and feared that other insurance carriers would not cover her due to this previous condition with cancer. The trial court agreed that plaintiff’s history with cancer would make it difficult for her to get new insurance coverage. Thus, the trial court concluded that an award of continued health coverage under COBRA was appropriate. This evidence together with plaintiff’s circumstances and earning ability supports the trial court’s award of continued health coverage under COBRA.

VIII. Expert Testimony

Defendant argues that the trial court abused its discretion when it relied on expert testimony that was shown to be based on stale or unreliable information. However, not only did defendant fail to object to plaintiff’s appraisal, but it was admitted by stipulation of the parties. Therefore, defendant’s acquiescence to the admission of the appraisal extinguished any error on appeal. *Schulz v Northville Public Schools*, 247 Mich App 178, 181 n 1; 635 NW2d 508 (2001), citing *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Nonetheless, defendant argues that the appraisal was admitted on plaintiff’s word that defendant had no objections, without giving defendant the opportunity to object. However, the record does not indicate that defendant was “bound and gagged” when the referee admitted the appraisal on the stipulation of the parties. As a result of the parties’ stipulation, it was not necessary to qualify the expert or

call the appraiser to testify regarding the appraisal and the trial court was not required to do so on defendant's behalf.

Furthermore, defendant argues that the appraisal admitted into evidence by plaintiff was based on stale and unreliable information. However, defendant presented no evidence at trial of the correct value of the marital home based on a formal appraisal of his own or that plaintiff's appraisal was based on stale or unreliable information. More importantly, we agree with plaintiff that the appraised value of the home was irrelevant to the trial court's determination to have the home sold and the proceeds divided equally between the parties. The trial court found that because plaintiff stayed home to raise her son with defendant's consent, it would be inequitable to deny her an equal share of the proceeds from the sale of the house, which defendant does not dispute on appeal. Accordingly, defendant's argument is without merit.

IX. Property Division

Defendant raises several issues on appeal regarding the inequitable division of the marital property. The goal in dividing marital assets is to reach an equitable division in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). While the division need not be equal, it should be roughly congruent. *Id.* In reaching an equitable division, the trial court should consider the duration of the marriage, contributions to the marital estate, age of the parties, health of the parties, life status, earning abilities, the parties' circumstances, past relations and conduct of the parties, and general principles of equity. *Id.* at 185. These factors should be considered whenever relevant to the circumstances of the case and the trial court must make specific findings of fact regarding the relevant factors. *Id.* at 185-186

Thus, the trial court's disposition of marital property is intimately related to its findings of fact and this Court reviews the trial court's findings of fact for clear error. *Id.* at 182, 188. "A finding is clearly erroneous if, after review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. If the trial court's findings of fact are upheld, [this Court] then must decide whether the dispositional ruling was fair and equitable in light of those facts. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.* at 182-183.

Defendant first argues that it was inequitable to award plaintiff fifty percent of the assets when defendant raised and established issues of fault. As previously discussed, defendant's argument is unsupported by the record. The records of the evidentiary and de novo hearings are devoid of any evidence of fault by plaintiff. Accordingly, the award of fifty percent of the assets to plaintiff was not inequitable where defendant failed to raise or establish issues of fault.

Second, defendant maintains that the award of fifty percent of the marital assets to plaintiff was inequitable where plaintiff failed to contribute to the acquisition, maintenance, or improvement of the asset despite the fact that the assets were acquired during the marriage. We disagree. Defendant argues that because plaintiff did not "contribute in any way to the acquisition, maintenance, or improvement" of his 401(k), pension, or savings bonds acquired through payroll deduction, she is not entitled to these assets. As defendant recognizes, this argument is contrary to existing law and, therefore, is without merit. Assets earned by a spouse during the marriage are properly considered part of the marital estate and subject to division between the parties. *McNamara, supra* at 183. Because defendant's 401(k), pension, and

savings bonds were earned during the marriage, they are part of the marital estate and subject to division. Furthermore, defendant's argument urging this Court to modify existing statutory law regarding assets earned during the marriage is without merit. This Court must give due deference to acts of the Legislature and arguments that a statute does not comport with current practices in the roles of marriage should be addressed to the Legislature. See *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000); *Oakland Co Bd of Rd Comm'rs*, *supra*, at 613.

Next, defendant contends that it was inequitable to award plaintiff an equal share in the parties' personal property when plaintiff already removed a substantial amount of personal property from the home prior to commencing the divorce action. However, this issue is also not preserved for appeal as it was not raised before or addressed by the trial court. *Fast Air, Inc*, *supra*. Defendant made no argument and presented no evidence in the lower court that plaintiff "absconded with" \$70,000 in marital assets when she "abandoned the marital home." Thus, there is no support in the record for defendant's claim. Therefore, not only is this issue unpreserved, but it is without merit. It should also be noted that in support of his argument defendant attached to his brief on appeal an inventory of assets allegedly removed by plaintiff that was not part of the lower court record. "A party may not expand the record on appeal, as this Court is limited to the record established by the trial court." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 713; 319 NW2d 638 (1982).

Defendant also argues that it was inequitable to award him the \$5,000 allegedly in the family safe when defendant established that such money was missing after plaintiff moved out of the marital home. We disagree. There was testimony presented, which the trial court relied on when it awarded defendant the \$5,000, that the money was left in the safe when plaintiff moved out. Plaintiff testified that she did not remove the money from the safe and that defendant was the only person who had access to it. Accordingly, there was evidence presented that the money existed and that plaintiff left it in the safe in defendant's possession. While defendant denied that plaintiff left the money in the safe, the trial court found plaintiff to be more credible. This Court gives deference to the trial court's ability to judge the credibility of the witnesses. *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 25; 581 NW2d 11 (1998). We find no error.

Defendant further argues that it was inequitable to award plaintiff the entirety of the \$9,500, which she admittedly withdrew from the parties' joint account immediately prior to filing this divorce action. We disagree. Defendant's argument that plaintiff was awarded \$9,500 is misplaced. Initially, it should be noted that plaintiff was actually awarded \$3,600 under the divorce judgment. Nonetheless, defendant argues that plaintiff was essentially awarded the entire \$9,500 because plaintiff was not held accountable for the money she spent and was permitted to keep the remainder. Plaintiff admitted that she withdrew \$9,500 from the parties' joint bank account just prior to filing for divorce. Contrary to defendant's argument, the record indicates that plaintiff provided the trial court with an accounting of how she spent some of that money. Plaintiff spent \$5,000 on a retainer fee for her attorney in this action and approximately \$900 on marital bills that she claimed defendant failed to pay, leaving \$3,600 in a frozen account at Standard Federal Bank. Because this Court previously determined that the trial court's award of attorney fees was proper, it was not inequitable for the trial court to award plaintiff \$5,000 of the \$9,500. Further, it was not inequitable to award plaintiff the \$900 because that portion of the

money was used to pay marital bills. Thus, the question remains whether it was fair and equitable to award plaintiff the remaining \$3,600. This award was fair and equitable in light of the fact that defendant received the \$5,000 cash in the safe and the rest of the parties' property was split equally. Accordingly, the trial court's award of the \$9,500 to plaintiff was equitable under the circumstances.

Defendant also contends on appeal that the trial court committed legal error by failing to properly resolve the issue of the existence of a \$50,000 account with the proper degree of finality. The judgment of divorce reflects that the trial court did not specifically determine whether the account existed. However, we find that such error was harmless in light of the fact that the trial court made a determination of the property rights of the parties regarding the account. *Fletcher, supra*, 447 Mich at 889.

MCR 3.211(B)(3) provides that a judgment of divorce must include "a determination of the property rights of the parties." The trial court complied with MCR 3.211(B)(3) because the trial court divided the property and did not reserve the division of the account to a later date. See *Yeo v Yeo*, 214 Mich App 598, 600-601; 543 NW2d 62 (1995). Furthermore, were this Court to remand the issue for a finding of fact with regard to whether the account existed, the trial court's ultimate dispositional ruling would not be affected. If it were determined that such an account existed, defendant is not prejudiced as he receives half of the account under the judgment. If it were ever determined that defendant fraudulently concealed the existence of the \$50,000 account, the trial court properly awarded the entire account to plaintiff. See *Sands v Sands*, 442 Mich 30, 32-33, 36; 497 NW2d 493 (1993).

Finally, defendant argues that the trial court's assignment of the entirety of the debt owed to defendant's parents to defendant was inequitable. We disagree. Defendant claimed that the parties owed his parents \$78,000, which defendant argues should be shared equally by plaintiff. However, the assignment of this debt to defendant was not unfair or inequitable where defendant presented no documentation with plaintiff's signature evidencing an obligation to repay defendant's parents any amount of money and where plaintiff claimed there were no loans from defendant's parents. Furthermore, there was no evidence presented that this alleged debt to defendant's parents was marital debt. In fact, defendant admitted that he incurred the debt. Plaintiff testified that she was not aware of any debts owed defendant's parents and that the parties did not have a relationship with defendant's parents during their marriage. Plaintiff only became aware of the debt at the evidentiary hearing. As a result, the trial court found defendant's assertion of the existence of such debt highly suspect and determined that such debt, if it existed, should be paid by defendant. Again, this Court gives deference to the trial court's ability to judge the credibility of the witnesses. *Fletcher, supra*, 229 Mich App at 25.

X. Conflict of Interest

Last, defendant claims that Judge Servitto abused her discretion when she failed to recuse herself based on the apparent conflict of interest created by plaintiff's counsel having formerly represented Judge Servitto in her divorce proceedings. Again, we disagree. Generally, a showing of actual, personal bias for or against a party or attorney is required to disqualify a judge and the challenged personal bias "must have its origin in events or sources of information gleaned outside the judicial proceedings." *Cain v Dep't of Corrections*, 451 Mich 470, 494-496;

548 NW2d 210 (1996). Further, the party challenging a judge on the basis of bias or prejudice “must overcome a heavy presumption of judicial impartiality.” *Id.* at 497.

In this case, defendant has failed to make a showing of actual bias on the part of Judge Servitto. The sole allegation of bias asserted by defendant is that plaintiff's attorney formerly represented Judge Servitto in her divorce action. However, defendant has pointed to no conduct by Judge Servitto demonstrating prejudice or bias other than that Judge Servitto ruled against defendant on contested issues, such as interim spousal support. However, repeated rulings against a litigant, even if erroneous, are not grounds for disqualification and cannot constitute bias or prejudice. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Thus, the assertion that plaintiff's attorney had formerly represented Judge Servitto in a divorce action is insufficient to overcome the “heavy presumption of judicial impartiality” in the absence of a more specific demonstration of bias or prejudice. *Cain, supra*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Christopher M. Murray