STATE OF MICHIGAN

COURT OF APPEALS

A INVESTMENT, LLC, AERO ATTACK SYSTEMS, INC., AERO ATTACK SYSTEMS, INC., and AVRAHAM ROD SALINGER,

Plaintiffs-Appellees/Cross-Appellants,

v

CONTACT AVIATION, LLC, and RAPTOR AVIATION, INC.,

Defendants-Appellants/Cross-Appellees,

and

JOHN ROCKFORD SHIRK, FELICIA N SHIRK, and UNIQUE ONE AIRCRAFT INTERIORS, INC.,

Defendants/Cross-Appellees.

UNPUBLISHED
May 11, 2023

No. 358212
Oakland Circuit Court
LC No. 2019-175865-CB

Before: MARKEY, P.J., and MURRAY and FEENEY, JJ.

PER CURIAM.

Defendants-appellants/cross-appellees[1] Contact Aviation, LLC, and Raptor Aviation, Inc., appeal as of right the trial court's final order dismissing defendants' counterclaims as a discovery sanction, arguing that the purported discovery violations never occurred. Defendants further argue that the trial court abused its discretion by dismissing Raptor's counterclaim for its unintentional failure to amend its counterclaim to accurately reflect the amount of commission owed and by

[1] Felicia N Shirk was the owner of Contact (a Michigan Corporation), and her husband, John Rockford Shirk (Shirk), was the managing director and agent of Contact. Albert Heidinger owned Raptor (a Florida limited liability company). Plaintiffs' claims against Unique One were dismissed on August 26, 2019. The trial court also dismissed all claims against Felicia Shirk.

vacating defendants' possessory lien under the garage keepers act, contending that a constructive trust and equitable lien should be imposed to prevent an unconscionable or inequitable outcome. Defendants further argue that they were entitled to judgment on their breach of contract claim and that the trial court committed reversible error when it denied their motion to enforce the settlement agreement.

Plaintiffs-appellees/cross-appellants,[2] A Investment, LLC (AI), Aero Attack Systems, Inc. (AERO WI), Aero Attack Systems, Inc. (AERO BC), and Avraham Salinger, cross-appeal arguing that the trial court erred when it dismissed plaintiffs' claims for conversion, claim and delivery, and damages. Plaintiffs further argue that the trial court erred by failing to address their negligence and breach of fiduciary duty claims and that they were prejudiced by the trial court's alleged dislike of Salinger. We affirm.

I. FACTUAL BACKGROUND

Plaintiffs filed this action after AERO WI purchased a Dassault-Breguet Falcon 50 (Falcon) aircraft, and disputes arose over Raptor's sales commission and certain charges arising from Contact's repairs and storage costs of the Falcon.

A. SALINGER AND RAPTOR

In the latter part of 2017, Albert Heidinger, owner and operator of Raptor, an aircraft brokerage company based in Florida, conferred with Salinger about purchasing the Falcon from Echo Aviation (Echo) for $450,000. On January 15, 2018, Salinger, on behalf of AERO WI, and Raptor entered into a commission agreement for Raptor to negotiate the Falcon's sale price and terms with Echo. According to the agreement, Raptor would earn a 5% commission from the Falcon's sale price, roughly $22,500 after the closing. On January 17, 2018, Echo agreed to sell the Falcon to AERO WI for $450,000, and the parties entered into a purchase agreement.

According to defendants, Salinger funded a portion of the Falcon's purchase price with proceeds AERO BC earned from a prior dealing between Salinger and Raptor, where they purchased another charter plane, the Challenger, as an investment opportunity. Heidinger testified that the parties resold the Challenger for a profit, but due to an accounting error, Salinger was overpaid $2,500 from a portion of the proceeds actually belonging to Raptor. When Salinger, on behalf of AERO WI, contracted to purchase the Falcon on January 17, 2018, he utilized the Challenger proceeds as an initial down payment but lacked sufficient funding to pay the Falcon's balance. Allegedly, Raptor and Salinger agreed that AERO WI would use Raptor's $2,500 carry-over commission from the Challenger deal and its expected commission on the Falcon of $22,500 towards the Falcon's purchase and, in exchange, Raptor would place a $25,000 lien on the Falcon. Raptor filed its claim of lien on April 20, 2018, for $25,000, and Salinger subsequently paid $10,000 to Raptor.

[2] Salinger was the owner and manager of plaintiff entities: AI (a Wyoming Limited Liability Company), AERO WI (a Wisconsin Corporation), and AERO BC (a British Columbia Canada Corporation).

B. SALINGER AND CONTACT

After Salinger took possession of the Falcon from Echo in late January of 2018, Salinger chartered the aircraft to Contact's facility at the Oakland International Airport, intending to store the aircraft overnight before taking off to his next destination the following morning. However, on the night of arrival, Salinger and Felicia and John Shirk went to dinner and Salinger's plans changed course. Salinger decided to store the Falcon in Contact's hanger and conferred with the Shirks at dinner about Contact performing several upgrades and repairs to the Falcon.

On January 31, 2018, Contact memorialized Salinger's requests in an email to Salinger, providing cost estimates for cockpit seat repairs, forward cabinet repair, and refurbishing the cabin armrests. In response, on February 1, 2018, Salinger sent back to Contact a list of "things needing to be done for the Falcon," expanding the work Contact quoted in its initial email.[3] Shirk and Salinger gave conflicting testimony at trial regarding whether Salinger's email established an agreement for Contact to perform work on the Falcon or a mere request to receive quotes from Contact. Shirk also testified that because Salinger instructed Contact to hire a reupholstery shop within a few days of that email, Contact began performing work on several other items listed in Salinger's email. Contact began washing and waxing the Falcon's exterior, providing paint touch-ups, and removing the carpet for cleaning. Contact immediately hired a reupholstery shop, Unique One Aircraft Interiors, Inc., to remove the seats to prepare them for the sheepskin reupholstery. When Unique removed the seats from the aircraft, broken and defective equipment was discovered, rendering the Falcon unairworthy. Contact ceased all work on the Falcon in early February of 2018 following Salinger's failure to pay an initial deposit of $7,500. Salinger and Contact agreed to store the Falcon inside Contact's hangar for $100 per day, set to accumulate on the days Contact was not performing work on the aircraft.

The record shows that Contact sent numerous requests to Salinger for the deposit payment to reengage in work and for approval to perform additional work on the Falcon. In response to Contact's requests, Salinger consistently promised to pay but provided no direction to Contact to perform any work. Meanwhile, the hangar rent accumulated. The record shows that Salinger paid $20,000 to Contact by three wire transfers, including $5,000 on May 30, 2018, $5,000 on June 12, 2018, and $10,000 on June 27, 2018.

It was not until April 23, 2019, that Contact sent an official invoice to Salinger detailing the work allegedly performed by Contact on the Falcon and the amount owed to Unique for

[3] Salinger's February 1, 2018, email to Contact itemized the following tasks: seat repairs and reupholstery of seats with sheepskins provided by Salinger; refurbishing the cabin armrests; fixing the left entrance door; removing the square wood panel at the left front door; repairing two window shades; provide neoprene strip under the wood table; empty lavatory; make water system in lavatory functional; repairing wood delamination at the front door; checking the functionality of microwave; provide velcro hook and fur on the carpet; steam cleaning the carpet; replacing the missing wood flat on the lower lavatory door; polishing the leading edges of wings and engine inlets; and washing and waxing the aircraft. Salinger explicitly asked to receive a quote for only one task: removing the carpet below the toilet.

reupholstery, totaling $15,364.30. When Contact's invoice went unpaid, Contact proceeded to sell the Falcon by public auction. The Falcon was sold by public auction on July 15, 2019. However, plaintiffs filed suit on August 14, 2019, and two days later, the court issued an ex-parte order restricting the sale, removing the Falcon from Contact's facility and moving it to Maven by Midfield.

II. PROCEDURAL HISTORY

Plaintiffs' complaint asserted claims for common-law and statutory conversion, claim and delivery, entitlement to equitable relief for the injunction as to the sale, piercing the corporate veil, and negligence against Contact, Shirk, and Felicia Shirk, and further asserted breach of fiduciary duty by Raptor.[4]

Several months after the plaintiffs filed their complaint, the parties entered a settlement agreement and stipulated to dismiss the action without prejudice. The settlement agreement was conditioned on, among other things, plaintiffs' inspection of the Falcon to ensure the authenticity and functionality of the Falcon's avionics equipment, that is, that nothing had been changed or damaged while in Contact's care. However, after plaintiffs inspected the Falcon, they filed a motion to set aside the settlement agreement and reinstate the case, arguing that the inspection revealed that defendants had removed or replaced the avionics equipment from the aircraft and that several avionics components were inoperable. The trial court granted plaintiffs' motion, setting aside the settlement agreement and reinstating the case. Defendants subsequently filed their counterclaim, asserting Raptor's breach of contract claim and Contact's claims for breach of contract, entitlement to damages in the amount of $82,728.53, and for claim and delivery and enforcement of its lien rights.

The trial court issued its scheduling order on September 28, 2020, requiring the parties to file their initial disclosures by October of 2020, expert witness lists by November 30, 2020, lay witnesses by December 20, 2020, and complete discovery by February 28, 2021. Defendants failed to file their initial disclosures, and both parties' expert witness lists were untimely. On February 23, 2021, the trial court issued an amended scheduling order, which, in relevant part, ordered the completion of discovery by April 30, 2021, and that a concise theory of the case be filed and depositions completed no later than June 7, 2021. The record shows that defendants failed to submit a concise theory of the case.

On March 16, 2021, plaintiffs served their interrogatories, requests for the production of documents, and requests for admission on defendants. Although defendants timely answered

[4] On July 1, 2021, the trial court dismissed plaintiffs' piercing the corporate veil allegations, finding no material evidence to suggest that Shirk and Felicia Shirk used Contact as a mere instrumentality or lacked adherence to company governance. Moreover, plaintiffs filed their amended complaint on July 1, 2020, asserting the same counts found in their original complaint but further asserting quiet title as to Raptor. The trial court found that plaintiffs abandoned their quiet title claim for failing to properly brief it, cite any authority, or engage in any meaningful analysis to support their argument. Plaintiffs do not raise issues regarding piercing the corporate veil or quiet title on appeal.

plaintiffs' requests for admission, defendants neglected to respond to plaintiffs' interrogatories and requests to produce. Plaintiffs subsequently filed their motion to compel discovery, arguing that defendants failed to respond to their interrogatories and requests for production and provided inadequate responses to their request for admissions. The trial court granted plaintiffs' motion to compel defendants' discovery responses, awarded sanctions of $750, and ordered defendants to amend their answers to plaintiffs' requests for admission and respond to the interrogatories and requests for production by May 19, 2021. The trial court found that almost every "denial" of the requests to admit was defective and that defendants' "litany of excuses and deflections" was untimely submitted and rejected.

On May 7, 2021, defendants filed their motion to compel the depositions of Salinger and plaintiffs' expert, Blake Goat. In response, plaintiffs admitted that they canceled Salinger's deposition, arguing that it would be inequitable to take the deposition before defendants decided to comply with their discovery requests and the trial court's May 10, 2021, discovery order. The trial court agreed with plaintiffs and subsequently issued an order denying defendants' motion to compel the depositions, and in citing to defendants' concession on the record that its motion was filed in violation of the court rules, it awarded plaintiffs' sanctions of $750 for reasonable attorney fees and costs.

After receiving defendants' discovery responses, plaintiffs filed their motion to strike defendants' answers, affirmative defenses, and counterclaim, asking the court to enter a default against defendants and deem all requests for admissions admitted. Plaintiffs argued that defendants only amended two discovery responses, failed to provide any meaningful responses, and failed to amend their responses to any requests for the production of documents or the requests for admission in violation of the trial court's May 10, 2021 order. Further, defendants failed to pay sanctions until defendants filed their response to plaintiffs' motion to strike. Similarly, the day after plaintiffs filed their motion to strike, defendants filed their interrogatory responses. The trial court took plaintiffs' motion to strike under advisement and entered its decision in conjunction with its final judgment.

A. TRIAL TESTIMONY AND TRIAL COURT FINDINGS

The first of nine trial days began on June 28, 2021. Salinger explained his dispute with Raptor by testifying that Heidinger made material misrepresentations regarding the Falcon's purchase. Salinger testified that because Heidinger advised him that the Falcon could be registered under AERO WI, a Wisconsin company owned by AERO BC, a Canadian company, the Falcon was registered and recorded to AERO WI on May 23, 2018. Salinger explained that contrary to what Heidinger told him, because federal law requires that at least 2/3 of a company's management must be United States citizens for the company to legally own an American aircraft, the Falcon's registration under AERO WI was illegitimate.[5]

[5] Salinger, seemingly of his own accord, later sold the Falcon, on behalf of AERO WI, to AI in October of 2018. Salinger testified that he organized AI as a trust company and intended to hire management positions comprised of United States citizens so AI could legally own the Falcon.

The disputes between Salinger and Contact were also explored at trial. While Shirk and Salinger both testified about their agreement to store the Falcon in Contact's hangar for $100 per day, Salinger denied ever requesting or agreeing to Contact's work proposals to provide services or repairs on the Falcon. Salinger explained that when he emailed Contact on February 1, 2018, with a list of "things needing to be done for the Falcon," he only intended for Contact to quote him for the proposed work. Moreover, Salinger testified at length to Contact's alleged mishandling of the Falcon while in its possession. Salinger testified that the Falcon's exterior and engine were damaged when Contact moved the Falcon outside without covering its engines during inclement weather. Salinger further testified that Contact swapped out the Falcon's avionics and damaged the aircraft's interior. Specifically, Salinger reported that after the trial court issued the August 2019 order to remove the Falcon from Contact's facility, he hired security guards to oversee the Falcon before its transfer to Maven. Salinger testified that he witnessed Shirk taking a "radio of some sort" out of the Falcon during a video call with his security guard. Salinger also contended that he completed a remote video interior check, which revealed the Falcon's disordered interior and dented headliner. Furthermore, during trial, Salinger inspected the avionics equipment by comparing the Falcon's original equipment list to the TOGS report,[6] allegedly revealing that Contact had swapped out 16 pieces of avionics equipment. However, Shirk testified that the original equipment list was outdated and an unreliable source for determining the Falcon's equipment history.

Although much of the trial covered the substantive issues, there was also a good deal of testimony about defendants' failure to provide discovery. The trial testimony of Heidinger and Shirk revealed that defendants failed to produce copious documents during discovery and that misrepresentations were made regarding amounts owed to Raptor. The record shows that before trial, defendants never disclosed in their discovery responses or acknowledged in their counterclaim that Salinger made a prior payment of $10,000 to Raptor. In fact, it was not until the second day of trial that Heidinger admitted that Salinger previously paid $10,000 to Raptor as partial payment toward its commission. On the third day of trial, Heidinger testified that he provided Salinger with a computerized maintenance summary of the Falcon, referred to as a CAMP report. Yet, the record reveals that defendants did not produce the CAMP report before trial. Heidinger explained that, in response to the Court's May 10, 2021 order, he emailed defense counsel over 200 attachments, including the CAMP report, but that Heidinger only recently discovered that his email "had gotten lost in cyberspace." Despite Heidinger's recent discovery that his emails were never sent to defense counsel, Heidinger admitted that he never raised the issue to the court because "the judge would not allow additional documents to be admitted at this point once trial ha[d] started." Heidinger admitted at trial that he did not produce, nor intended to produce, any documentation related to the Challenger deal because he did not think it was relevant, but later acknowledged that a portion of Raptor's claimed commission was carried over from the

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However, Salinger testified that the FAA nullified AERO WI's transfer of the Falcon to AI because AI did not have the requisite group of United States citizen members.

[6] On September 9, 2019, TOGS Aircraft, LLC, performed a cursory equipment audit of the Falcon's avionics and radios that could be accessed without removing any panels. The components were compared to the original equipment list from RVR Charter dated March 8, 2013.

Challenger deal and alleged that Salinger used the proceeds from the Challenger deal to purchase the Falcon.

During trial, Shirk testified that Salinger requested his assistance in a matter unrelated to the instant suit, specifically requesting Shirk to sign an affidavit stating that Salinger invested $450,000 in the Falcon. Defendants never submitted the affidavit during discovery nor acknowledged its existence in their exhibit list but attempted to admit the affidavit into evidence on the second to last day of trial. Similarly, without any prior disclosure, defendants attempted to introduce a photograph of the Falcon's seats to refute Salinger's testimony regarding the Falcon's seat conditions. Shirk also admitted that he did not produce Contact's Quickbook accounting statements because he did not believe them to be important.

Two weeks after the trial's conclusion, the trial court entered its final order, dismissing every claim made by the parties. The trial court dismissed plaintiffs' claims for conversion and claim and delivery, finding that plaintiffs failed to provide a factual basis. The court found that Contact did not harm or damage the Falcon's interior or avionics, noting Salinger's testimony regarding Contact having swapped out the Falcon's avionics as incredible "as the pertinent sections of the logbooks which would be necessary to prove such a claim was never used to substantiate this claim and were not introduced into evidence." The trial court further dismissed plaintiffs' claim of damages, finding that Salinger's testimony was speculative and wishful thinking.

Unlike the trial court's dismissal of plaintiffs' case on the merits, the court dismissed defendants' counterclaim as a discovery sanction, finding that defendants engaged in repeated, flagrant violations of discovery rules and discovery orders. The court found that the following factors warranted the dismissal of defendants' counterclaim:

> (1) the failure to respond to discovery requests extend over a substantial period of time, (2) the scheduling order and May 10 Order to compel were violated, (3) the time between the violation and the motion for dismissal has been short, (4) willfulness has been proven - or at very least deep neglect, (5) attempts to cure have finally been made in the middle or near the end of trial (with the exception of the photograph, which was simply sprung into the trial without any prior disclosure, and the expert, in which no attempt to cure was ever made), and (6) some of the information was known by the Plaintiffs, but of course they had no knowledge that it would be used at trial - the epitome of trial by ambush.

The trial court noted that despite having extended the discovery period and its discovery orders, defendants consistently failed to comply and made untimely or material misrepresentations in their responses to plaintiffs' discovery requests. The trial court cited several of defendants' discovery violations, including defendants' failure to disclose or produce over 200 emails, the affidavit, the CAMP report, photographs of the Falcon, and documents related to Contact's charges and Quickbook statements. The court found that defendants willfully violated the court's May 10, 2021, discovery order by failing to produce discovery by May 19, 2021, let alone by trial, and that defendants engaged in trial by ambush tactics through late disclosure of discovery during trial. Additionally, the trial court found that Raptor made material misrepresentations to the court during discovery and in its counterclaim. The court found that although Raptor knew that Salinger paid $10,000 toward the Falcon's commission, Raptor unequivocally pled $22,500 in damages in its

counterclaim and failed to reveal or acknowledge Salinger's prior payment in its counterclaim or throughout discovery, as it was not until trial that Heidinger admitted to having received the payment.

Addressing plaintiffs' motion to strike, the court found that dismissing defendants' counterclaim was an appropriate sanction, as defendants' discovery violations were prejudicial to plaintiffs' defense. However, the court denied the additional relief requested by plaintiffs, including its requests to strike defendants' answers and affirmative defendants, enter default, and deem all requests for admission as admitted. The court explained that while defendants' violations were prejudicial, there was no material prejudice to plaintiffs' case, finding that the violations were almost entirely unrelated to plaintiffs' claims and that plaintiffs' claims fell apart due to Salinger's incredible testimony.

III. STANDARD OF REVIEW

This Court reviews a trial court's factual findings for clear error. *Bayberry Group, Inc v Crystal Beach Condo Ass'n*, 334 Mich App 385, 392; 964 NW2d 846 (2020) (quotation marks and citations omitted). "Findings of fact by the trial court may not be set aside unless clearly erroneous," and when reviewing factual findings, this Court must give regard to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

This Court reviews de novo a trial court's conclusions of law. *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). Questions regarding the application or interpretation of law are also subject to review de novo. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005). "Whether a duty exists is a question of law for the court to decide." *Id*.

When considering arguments of judicial bias, this Court reviews the trial court's factual findings and discretionary rulings for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996); *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). This Court also reviews for an abuse of discretion a trial court's decision to dismiss an action or impose discovery sanctions. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005); *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable outcomes." *Swain v Morse*, 332 Mich App 510, 518 n 8; 957 NW2d 396 (2020) (citation omitted).

IV. CONVERSION AND CLAIM AND DELIVERY BY CONTACT

The trial court did not err in dismissing plaintiffs' claims for common-law and statutory conversion and claim and delivery as plaintiffs failed to provide a factual basis for their claims that the Falcon's avionics were removed, seized, or swapped out.

Under the common-law, conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Magley v M & W, Inc*, 325 Mich App 307, 314; 926 NW2d 1 (2018) (quotation marks and citation omitted).

Therefore, to maintain a claim for common-law conversion, a claimant must establish the following elements: (1) the distinct act of dominion; (2) wrongfully exerted; and (3) over another's personal property. To establish a claim for statutory conversion, the claimant must satisfy the common-law conversion elements and the additional elements identified under the statute. *Id*. at 314 n 3, citing *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 356; 871 NW2d 136 (2015). Statutory conversion provides that a claimant may recover "3 times the amount of actual damages sustained, plus costs and reasonable attorney fees" if damaged as a result of either of the following:

> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [MCL 600.2919a.]

An action for conversion may not be maintained if a defendant's right to possession was greater than that of a plaintiff. *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 468; 350 NW2d 280 (1984), mod on other ground on reh 135 Mich App 777 (1984). Nor will liability attach if defendant was privileged to dispossess plaintiff of his chattel. *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960) (citation omitted).

An action for claim and delivery seeks to recover possession of goods that have been unlawfully taken or detained, and damages sustained by the unlawful taking or detention. MCR 3.105(A)(1) and (2). See also MCL 600.2920(1)(c) ("An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.").

The record supports the trial court's determination that the Falcon's avionics were not removed, seized, or swapped out. Salinger testified at trial about Contact's unlawful removal and destruction of the Falcon during Contact's possessory period. However, the trial court found that Salinger's testimony about witnessing Shirk remove avionics from the Falcon was incredible, and absent from the record is any evidence corroborating Salinger's story. Plaintiffs did not call the security guards as witnesses, and aside from Salinger's brief testimony of having witnessed Shirk remove something from the Falcon, that event was neither mentioned nor explored thereafter.

The trial court also found that Salinger failed to use the pertinent sections of the logbooks necessary to substantiate plaintiffs' claims that Contact swapped out the Falcon's avionics. Almost one year after the August of 2019 court order to remove the Falcon from Contact's facility, Salinger, in the midst of trial, performed a remote video equipment inspection on the Falcon. Salinger testified that he compared the Falcon's avionics with the Falcon's original equipment list and TOGS report, and noted discrepancies with 16 pieces of avionics equipment. Although the original equipment list was not produced as evidence, the record evidence shows that the list was outdated and unreliable for the purposes of determining the Falcon's equipment history. According to the TOGS report, the original equipment list was dated March 8, 2013, more than

eight years before Salinger inspected the aircraft in June of 2021. Heidinger testified that the aircraft's logbook was the controlling document to determine the Falcon's avionics and equipment history. Shirk corroborated Heidinger's testimony when he explained that the logbooks contain an aircraft's history, requiring periodic updates to reflect maintenance and services performed on the aircraft. Plaintiffs failed to produce the logbooks into evidence. In light of these findings, for which there was supporting evidence in the record, the trial court did not err in dismissing plaintiffs' claims for conversion and claim and delivery.

V. NEGLIGENCE BY CONTACT

Plaintiffs argue that Contact is liable for damages caused by its negligence arising out of their bailment relationship when plaintiffs gave Contact the temporary possession of the Falcon to perform services and repairs on the aircraft.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) the defendants breach of that duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Ass'n*, 470 Mich 460, 463; 683 NW2d 587 (2004). Bailments are "a relationship wherein a person gives to another the temporary use and possession of property other than money, the latter agreeing to return the property to the former at a later time." *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 480; 413 NW2d 433 (1987). A bailment that is beneficial for both parties arises when "a person gives to another the temporary use and possession of property, other than money, for a reward, the latter agreeing to return the same to the former at a future time." *Godfrey v Flint*, 284 Mich 291, 295-296; 279 NW 516 (1938) (quotation marks and citation omitted). Where the bailment is for mutual benefit, the bailee is bound to exercise ordinary care of the bailor's property and is liable for ordinary negligence. *Id*. at 297-298 (quotation marks and citations omitted).

For a plaintiff to be entitled to damages, the loss must be subject to a reasonable degree of certainty. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). "It is the uncertainty as to the fact of legal damages that is fatal to recovery, but not uncertainty as to the amount." *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965). Generally, "remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

Contact was called upon to exercise ordinary care and diligence, as the bailment relationship was one for the mutual advantage of the parties. It is undisputed that Salinger parked the Falcon at Contact's facility for Contact to perform service and repairs to the aircraft to plaintiffs' benefit, and, in exchange, plaintiffs would compensate Contact. Plaintiffs contend that Contact refused to return the Falcon to plaintiffs when requested. Although the law presumes negligence when property is not returned, *Fraam v Grand Rapids & I Ry Co*, 161 Mich 556, 560; 126 NW 851 (1910), plaintiffs cited no evidence that Contact refused to return the Falcon. In contrast, the record shows that plaintiffs intended to store the Falcon at Contact's facility.

Plaintiffs further argue that Contact breached its duty owed to plaintiffs when it disregarded the agreement for Contact to spool[7] the Falcon's engines monthly, for which plaintiffs gave advance payment to Contact for the maintenance. Despite plaintiffs' contentions, the record, including Salinger's testimony, is silent as to any agreement to monthly spool the Falcon's engines. Similarly absent from the record is any invoice sent by Contact or payment made by Salinger to evidence plaintiffs' advance payment to Contact for monthly spooling.[8] Based on this evidence, we cannot conclude that the trial court erred in concluding that Contact was not negligent for failing to maintain the Falcon's engines pursuant to an agreement that the trial court found did not exist.

Furthermore, the trial court did not clearly err by finding that plaintiffs failed to prove with a reasonable degree of certainty that they sustained damages. Plaintiffs have not proved damage to the Falcon's engine resulting from Contact's purported failure to spool the aircraft's engines. Instead, plaintiffs simply contend, based upon Salinger's testimony, that failure to spool the engines *could* result in flattening turbine bearings. Because the trial court found Salinger's testimony incredible and afforded it no weight, uncertainty as to the existence of damages remained. See *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989) ("Uncertainty as to the existence of damages rather than the amount of damages will bar recovery.").

The trial court also did not err in finding that plaintiffs' claims that Contact damaged the Falcon's interior and exterior were purely speculative, uncertain, and unrecoverable. Plaintiffs argue that Contact damaged the Falcon's interior, but they do not cite any documentary evidence or trial testimony that explains where or how the damage occurred. Furthermore, plaintiffs argue that Contact negligently moved the Falcon outside without covering its engines during inclement weather, resulting in damage to the aircraft's exterior and engines. However, whether the Falcon was damaged, how any damage occurred, where the damage was, and the extent of the damage to the Falcon, if any, was not addressed by any evidence. As a result of this uncertainty, plaintiffs' negligence claims related to physical damage to the aircraft were properly barred. *Denha*, 179 Mich App at 550.

The trial court also did not err in finding that plaintiffs did not prove the existence of damages related to plaintiffs' claims for lost income. Salinger opined at trial that he could charge $5,500 per hour, generating at least $60,000 per month, by chartering the Falcon. Thus, according to Salinger, plaintiffs lost over a million dollars in rental income because of defendants' unlawful

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[7] Shirk testified that the engine preservation technique of "spooling the engines" entails powering up the engine or connecting the aircraft to an external power source to create oil pressure throughout the engine and raising the oil throughout the bearings to lubricate the moving parts.

[8] Although there was no evidence of an agreement for monthly spooling, the record does show that Contact nevertheless undertook the responsibility of periodically providing this maintenance. On September 16, 2019, Contact issued an itemized statement to Salinger indicating that spooling was completed in 2018 from March to April, June to July, September to October, and December. And again in 2019 from February to March and June to July. Shirk testified that he had spooled the engines without charge to preserve the Falcon's engines and for Contact's ability to guarantee the engines.

detention of the Falcon. Salinger's testimony that he only purchased the Falcon to operate the aircraft as a charter rental out of Michigan is contradicted by his email to Contact on May 9, 2019, stating that the Falcon's purchase was intended to be "a buy and sell event" and only as an alternative would he charter the Falcon between Vancouver and Las Vegas because he had a deal with a casino. Salinger's testimony is further contradicted by the commission agreement between AERO WI and Raptor, which provided that Raptor would not only broker AERO WI's purchase of the Falcon but also its resale after upgrades and other work to the aircraft was completed. The commissioned agreement demonstrated that Salinger anticipated the Falcon's subsequent sale. Additionally, plaintiffs cited no evidence showing they wanted to remove the Falcon from Contact's facility before litigation. Shirk testified that he never received requests from Salinger to retrieve the Falcon or notice from Salinger that he needed his aircraft for charter.

The record shows that the Falcon was deemed unairworthy shortly after the Falcon arrived at Contact's facility when Contact discovered nonfunctioning parts requiring repair before the Falcon could take flight. Therefore, the Falcon could only have been chartered once the necessary repairs were made. Based on this evidence, the trial court did not err by finding that plaintiffs' claims for damages related to Contact's purported negligence were speculative and unrecoverable. See *Health Call of Detroit*, 268 Mich App at 96 (providing "that lost profits are recoverable as damages on proper proof"), citing *Body Rustproofing, Inc v Mich Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

VI. BREACH OF FIDUCIARY DUTY BY RAPTOR

With respect to Raptor, plaintiffs argue that Raptor breached its fiduciary duty by enticing plaintiffs to purchase the Falcon based on a material misrepresentation of plaintiffs' ability to register the Falcon in the United States.

A claim for breach of fiduciary duty sounds in principles of tort law. *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 666; 954 NW2d 231 (2020) (citation omitted). Brokers have a fiduciary relationship with their clients. *Brotman v Roelofs*, 70 Mich App 719, 729; 246 NW2d 368 (1976). See also *Stephenson v Golden*, 279 Mich 710, 735; 276 NW 849 (1937) ("A broker is an agent with special and limited authority, one who is employed by another to negotiate for specific property with the custody of which he has no concern."). "To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty." *Highfield Beach at Lake Mich*, 331 Mich App at 666. A fiduciary relationship may arise "from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). When a fiduciary relationship arises, a fiduciary is under a duty to act for the benefit of the principal with regard to matters within the scope of the relationship. *Prentis Family Foundation*, 266 Mich App at 43. The plaintiff must present substantial evidence establishing more than a mere probability that defendants' unreasonable conduct caused the injury. *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957). Damages may be obtained when a "position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio*, 211 Mich App at 508. A plaintiff must "prov[e] damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." *Health Call of Detroit*, 268 Mich App at 96.

Plaintiffs contend that federal law prevented the Falcon's registration under AERO WI, a Wisconsin company, because AERO BC, a Canadian company, owns AERO WI. Federal law limits registration of an aircraft, in part, to United States citizens, lawful permanent residents, or foreign corporations that are organized and doing business under the laws of the United States or using the plane primarily in the United States. 49 USC 44102(a)(1)(A) through (C). 49 USC 40102(a)(15)(C) defines "citizen of the United States," with respect to registering an aircraft to a business entity, to mean "a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States." On this basis, plaintiffs argue that Raptor falsely advised Salinger that AERO WI could register the Falcon even though AERO WI cannot meet the federal statutes' prerequisites to lawfully register an aircraft.

Although we agree with plaintiffs that a broker-client fiduciary relationship existed between Raptor and plaintiffs, *Brotman*, 70 Mich App at 729, plaintiffs failed to support their claim at trial, as the evidence presented by plaintiffs that Raptor advised them that AERO WI could register the Falcon in the United States was found to be not credible. Salinger testified at trial that Raptor advised him that the Falcon could be registered to AERO WI. However, the trial court found that Salinger's testimony was, in large part, incredible and afforded it no weight. And, contrary to Salinger's testimony, Heidinger testified that he informed Salinger of the law preventing a foreign company's ownership of an aircraft and that, in response, Salinger represented to Heidinger that he had an American company that qualified to register the Falcon.

Additionally, the scope of Raptor and AERO WI's broker-client relationship was outlined in the commission agreement, which included no terms requiring Raptor to partake, assist, or advise plaintiffs about transferring the Falcon's title, as the agreement consisted of two provisions detailing only the amount of commission owed in the event of purchase or resale. Heidinger further testified that he was neither involved in the titling process nor did Salinger denote any concerns or request any assistance with titling the Falcon under AERO WI. Although there may be a legitimate question of the ability to register a plane by a corporation owned by a Canadian company, see 49 USC 44102(a), the trial court did not err in finding that there was no factual support for the breach of fiduciary duty claim because no credible evidence showed that Raptor represented to Salinger that AERO WI could register the Falcon[9] Thus, the trial court did not err

[9] We question whether Raptor even had a fiduciary duty to advise Salinger about the Falcon's title transfer. Plaintiffs' claim relies on Salinger's testimony that Raptor allegedly advised him that the Falcon could be registered to AERO WI. While fiduciary relationships typically involve "relationships of inequality," where "complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue," *In re Estate of Karmey*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003), there was only a trivial gap between the avionics knowledge held by Salinger and Raptor. Salinger provided extensive testimony of his vast experience and history related to the avionics field. Even more significantly, it was revealed at trial that Salinger had owned two aircrafts that were titled in the

by dismissing plaintiffs' breach of fiduciary duty claim against Raptor, as plaintiffs failed to present evidence of Raptor's alleged breach.

VII. JUDICIAL BIAS

Plaintiffs assert that the judge presiding over the trial exhibited a sarcastic and condescending tone toward Salinger during the course of the trial, which established "concrete evidence" of judicial bias.

The Due Process Clause requires an unbiased and impartial decisionmaker. *Cain*, 451 Mich at 497. Absent proof of actual personal bias or prejudice, a judge will not normally be disqualified. *Schellenberg v Rochester, Lodge No 2225, of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). To succeed, a defendant must demonstrate that the bias is both personal and extrajudicial, or, in other words, "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain*, 451 Mich at 495. A judge's opinions formed on the basis of facts introduced or events that occur during the course of the proceedings do not constitute a basis for bias or prejudice unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Cain*, 451 Mich at 496 (quotation marks and citation omitted); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Moreover, judicial disqualification based on due process is not easily met and absent a showing of actual bias, is justified only where " 'experience teaches that the probability of actual bias. . . is too high to be constitutionally tolerable.' " *Cain*, 451 Mich at 514, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975).

Likewise, "[a] judge's ordinary efforts at courtroom administration," even if "stern and short-tempered," are "immune" from charges of bias and partiality. *Liteky v United States*, 510 US 540, 556; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Although a judge's remarks during the course of a trial may be "critical," "disapproving," or "hostile" to a party, usually they will not support a partiality charge. *Id*. at 555. A party seeking disqualification of a judge based on bias or prejudice bears the burden of proof and must overcome the strong presumption of judicial impartiality. MCR 2.003(B); *Cain*, 451 Mich at 497.

After carefully reviewing the record, we conclude that plaintiffs have not overcome the strong presumption of judicial impartiality. Plaintiffs assert that the trial court's alleged sarcastic and condescending tone during the course of the trial and in his judgment, which was partially unfavorable to plaintiffs, established "concrete evidence" of bias. Plaintiffs direct us to the court's opinion, where he made findings of fact regarding Salinger's credibility:

United States. Furthermore, Heidinger testified that when he informed Salinger of the law preventing a foreign company's ownership of an aircraft; in response, Salinger represented that he had an American company that qualified to register the Falcon. Thus, to the extent that plaintiffs assert that they relied on Raptor's alleged misrepresentations that AERO WI could register the aircraft when deciding to purchase the Falcon, their claims are contradicted by Salinger's experience, prior ownership, and dealings with foreign-owned American aircrafts.

> **Avraham Rod Salinger - Owner & Manager of the company Plaintiffs.** Salinger's ego, bursts of indignation, and flights of fancy were hardly persuasive. His testimony with regard to physical damage to the Falcon 50 (involving avionics, headliner, and other assorted assertions) was ungrounded, and his testimony regarding lost income of over $1.44 million from a nonexistent charter service was nothing more than speculative, wishful thinking. With few exceptions, his testimony was incredible and given no weight.

It is "the [trier of fact's] responsibility to determine the credibility and weight of the trial testimony." *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). Plaintiffs' dissatisfaction with the court's assessment of Salinger's credibility addresses findings made by the court during trial. *Berger*, 277 Mich App at 710-711. A judge's opinions formed during the trial process, and the findings made in its rulings, do not constitute valid grounds for alleging bias unless they display a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Cain*, 451 Mich at 496 (quotation marks and citation omitted); *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011). Judicial remarks that are critical or disapproving are generally not sufficient to support a partiality charge, *Liteky*, 510 US at 555, and plaintiffs could not seek disqualification simply because they are unhappy with the final verdict, *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009) ("Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous."). We are not convinced that the trial court exhibited any improper bias against Salinger, as the record simply does not suggest that it displayed a deep-seated antagonism toward Salinger that would have made fair judgment impossible. Indeed, the trial court made similar determinations of Shirk and Heidinger's credibility by finding much of their testimony incredible.

The trial court's basis for dismissing plaintiffs' claims was directly related to the fact that plaintiffs failed to substantiate their claims with anything more than Salinger's testimony, which the court found not credible. While Salinger's testimony was unrefuted, "[t]he [trier of fact] has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted, and we must defer to the [fact-finder] on issues of witness credibility." *Guerrero*, 280 Mich App at 669 (citations omitted). See also *Taylor v Mobley*, 279 Mich App 309, 314 n 5; 760 NW2d 234 (2008) ("[T]he [trier of fact's] prerogative to disbelieve testimony, including uncontroverted testimony, is well established.").

VIII. DISCOVERY SANCTIONS

Defendants argue that the trial court abused its discretion by dismissing their counterclaim as a discovery sanction for discovery violations that never occurred.[10] Specifically, defendants argue that the trial court dismissed their counterclaim for their alleged failure to comply with the

[10] Defendants misstate on appeal that the trial court dismissed only Contact's counterclaim as a discovery sanction. The record shows that the trial court found that dismissal was an appropriate sanction for *all* defendants, not only Contact. The trial court found that defendants chose to defend the action with the same lawyer, using the same trial strategy, answered discovery requests jointly, filed joint trial briefs, uniformly defended the motions to compel, and engaged in violations of discovery and the Court's May 10 order together.

court's May 10, 2021 order compelling discovery, despite the court having already sanctioned defendants pursuant to that order.

" '[T]rial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action.' " *Swain*, 332 Mich App at 521 (alteration in original), quoting *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). The court's power is "vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" and "must be exercised with restraint and discretion." *Swain*, 332 Mich App at 521-522 (quotation marks and citations omitted). It must be clear from the record that the trial court "gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010) (quotation marks and citation omitted). The relevant factors to consider include, but are not limited to, the following:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose [evidence]), (3) the prejudice to the defendant, (4) actual notice to the defendant of the [evidence] and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (citations omitted).]

Generally, "[s]evere sanctions such as default or dismissal are predicated on a flagrant or wanton refusal to facilitate discovery that typically involves repeated violations of a court order." *Swain*, 332 Mich App at 518.

The record reveals defendants' history of recalcitrance and deliberate noncompliance with discovery and discovery orders, dating back as early as the trial court's scheduling order on September 22, 2020, when defendants untimely submitted their expert witness list and neglected to file their initial disclosures. Even after the court amended its scheduling order on February 23, 2021, extending the discovery deadline to April 30, 2021, defendants also neglected to file a concise theory of the case. At the closing of the extended discovery period, defendants had only responded to plaintiffs' requests for admission but not to plaintiffs' interrogatories or requests for production. The trial court found that defendants continued to violate the discovery rules and the court's orders, despite the court providing defendants with a meaningful opportunity to comply. On May 10, 2021, the trial court ordered defendants' compliance with discovery, awarding sanctions of $750, finding that defendants submitted defective responses to plaintiffs' requests for admission. Still, defendants never conceded to Salinger's $10,000 payment to Raptor in defendants' discovery responses, and defendants deliberately delayed paying the ordered sanctions until May 27, 2021. The court further found that several of defendants' interrogatory responses were inaccurate.

Defendants' willful discovery violations were further exposed after trial commenced. Defendants testified to various documents that were never produced during discovery, including when Heidinger admitted that over 200 emails mysteriously "had gotten lost in cyberspace."

Heidinger admitted that he never notified the court that the emails were never sent to defense counsel because "the judge would not allow additional documents to be admitted at this point once trial ha[d] started." Shirk also testified that certain discovery was not produced because the electronic files were "lost." Heidinger and Shirk never reported their discovery deficiencies resulting from their separate technical issues during discovery, and the court only learned of these matters during their testimony at trial. Defendants, at their own accord and without justification, further decided to knowingly omit material documents simply because they did not think them to be relevant or important. Although a portion of Raptor's commission included a carry-over balance from the Challenger deal, defendants did not produce, nor did they ever intend to produce, any documentation related to the Challenger deal. Similarly, Shirk admitted at trial that he did not produce Contact's Quickbook accounting statements because he did not believe them to be important, even though Contact's claims on appeal are to recover damages for unpaid invoices.

The record reflects that the trial court carefully considered all the factors and the options before concluding that dismissal was just and proper. Over the course of more than one year, the trial court afforded defendants several opportunities to comply with discovery. However, even after the trial court's discovery orders and extension of the discovery period, defendants still refused to comply, as defendants repeatedly submitted defective discovery responses and refused to disclose material evidence before trial, including Salinger's prior payment to Raptor and photographs of the Falcon. The record supports the trial court's findings that defendants engaged in trial by ambush tactics through their attempted late disclosures of discovery during trial. Indeed, defendants' disregard for the discovery rules and court's orders continued up to the penultimate day of trial, when defendants asked the court to admit evidence never disclosed during discovery or included in defendants' witness or exhibit list, including photographs of the Falcon, an affidavit, and the testimony of an expert witness.

Importantly, the trial court had already ordered lesser sanctions—two monetary ones for $750, which defendants untimely paid—and limited the sanctions to only these claims brought by defendants. The trial court properly considered the *Dean* factors in coming to its conclusion. Based on these accusations, we are not persuaded that the trial court abused its discretion by dismissing defendants' counterclaim as a discovery sanction.[11]

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Kathleen A. Feeney

[11] Defendants also argue the merits of their remaining claims on appeal. However, because we determined that the dismissal of defendants' counterclaim was a proper discovery sanction, defendants' remaining arguments are moot.