**IN THE**
**SUPREME COURT OF THE REPUBLIC OF PALAU**
**APPELLATE DIVISION**

**ROSAURO CURA,**
*Appellant*,
**v.**
**MIA MOMEN,**
*Appellee.*

Cite as: 2022 Palau 6
Civil Appeal No. 21-020
Appeal from Small Claim Action No. 21-068

Decided: June 21, 2022

Counsel for Appellants…… Lalii Chin-Sakuma
Counsel for Appellees……. *Pro se*

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
JOHN K. RECHUCHER, Associate Justice
KATHERINE A. MARAMAN, Associate Justice

Appeal from the Court of Common Pleas, the Honorable Lourdes F. Materne, Associate Justice, presiding.

**OPINION**

PER CURIAM:

[¶ 1] Following a bench trial, the judge in the Court of Common Pleas entered Judgment in favor of Mia Momen in the amount of $785.00. In so doing, the judge expressed and relied in part upon her unfavorable impression of Cura's credibility, formed at a prior proceeding. We make no findings of misconduct, actual bias, or actual partiality on the part of the judge. We conclude that the judge should have either recused herself pursuant to Judicial Canon 2.5. or informed the parties that she was going to take judicial notice of the relevant prior proceeding. This would allow them to either waive any potential conflict or move to recuse. Accordingly,

we VACATE the Judgment and REMAND the case to the Court of Common Pleas with instructions that it be re-assigned to a different judge.

## BACKGROUND

[¶ 2] Appellee Mia Momen (*Momen*) filed a small claims complaint against Appellant Rosauro Cura (*Cura*) on August 20, 2021. In it, Momen claimed that Cura owed him $760.00 in unpaid salary and $25.00 in court costs.

[¶ 3] At the trial held on September 28, 2021, before the Honorable Lourdes F. Materne, Momen testified initially, but the court called Natalie Mizutani (*Mizutani*) to testify as to Momen's claim once it became clear that Momen was not fluent enough in English to testify. Tr. 3:13-18. Mizutani testified that she is the owner of N.M. Construction and employs both Momen and Cura. Tr. 3:26-27. She also testified that she helped Momen prepare the small claim complaint. Tr. 8: 20-22. Momen was among five workers at N.M. Construction who did not receive pay for their work. Three of these workers pursued action via Division of Labor proceedings. Tr. 7:17-22. There, the Labor office ordered Cura to pay the unpaid employees. Tr. 18:16-17.

[¶ 4] Mizutani testified that while she owns N.M. Construction, Cura is in charge: "[h]e brought employees to work, and he took the money." Tr. 4:6. She admitted that she understands it is a "front business." Tr. 6:18-20. Cura would bring checks to Mizutani, she would sign them, and then Cura would cash the checks and pay workers in cash. Tr. 7:3-11.

[¶ 5] Contrary to Mizutani's testimony, Cura testified he never had access to the N.M. Construction bank accounts, never signed check, and the two never had an understanding that he would personally pay the company's employees. Tr. 16:11-25. Further, when Cura paid the employees following the Labor office order, he did so from the N.M. Construction account. Tr. 18:24-28.

[¶ 6] Cura's wife, Amelia Daneta, testified that she *did* have access to the N.M. Construction bank accounts, but that Mizutani revoked her access in 2017. Tr. 12:4, 13:7, 15:14. Ms. Daneta also testified, contrary to Cura's statements, that, following the Labor office order, Cura paid the workers personally. Tr. 14:5-6.

[¶ 7] At the conclusion of the trial, Justice Materne orally ruled from the bench in favor of Momen, electing to believe Mizutani, who testified in favor of Momen, and not Cura. In explaining why she believed Mizutani and not Cura, Justice Materne pointed to testimonial evidence that other unpaid employees went to the Division of Labor and they ordered Cura to pay the workers, a fact that Ms. Daneta

"verified." Tr. 19:17. Justice Materne also referred to the overall "credible" nature of Mizutani's testimony. And finally, Justice Materne considered and relied on information that was not in evidence but which she had gained from her past judicial involvement with Cura regarding a similar small claim case. In doing so, Justice Materne stated:

> [T]his not the first time that Mr. Cura has come before the court for small claims and for construction, something like this. He goes and he works for someone and he is in charge and then there is a problem and then they come to court. This is not the first time for Mr. Cura to be sued. His whole scheme is not new, involving Mr. Cura. That is why I said I will, I believe Ms. Mizutani . . .

Tr. 19:8-14. After making these observations, Justice Materne entered judgment from the bench in favor of Momen, and ordered Cura to pay the $785.00.

## DISCUSSION

[¶ 8] Cura raises two assignments of error in this appeal. First, he contends that the court erred in finding him liable because he had no contract with Momen and was not his employer. Second, he claims that for the Court to find in favor of Momen, we would have to accept and enforce an illegal "front business" arrangement. Because we address *sua sponte* the propriety of the judge in presiding over the case where doing so created the appearance of partiality, we do not reach these allegations of error.

[¶ 9] At the outset, the Court notes that the issue addressed in this Opinion was neither raised below nor on appeal. Typically, the Appellate Division limits review to arguments raised below and in the appellant's opening brief. *See, e.g. Kumer Clan v. Koror State Pub. Lands Auth.*, 20 ROP 102, 105 (2013). However, this Court has held that issues under the Code of Judicial Conduct pertaining to judicial impartiality are not waivable. *Etpison v. Rechucher*, 2020 Palau 14, ¶ 15. Not only does the Court have a "*sua sponte* authority, but also a responsibility to safeguard against violations of Judicial Canon 2.5." *Id.* at ¶ 16. The issue of judicial impartiality is not for the parties alone to address. *Id.* at ¶ 15.

[¶ 10] The Code of Judicial Conduct that applies to all judges in Palau states that "[i]mpartiality is essential to the proper discharge of the judicial office." ROP Code of Judicial Conduct, Canon 2 (2011). More specifically, Canon 2.5 states that "a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which *it may appear* to a reasonable observer that the judge is unable to decide the matter

impartially." *Id.* (emphasis added). The rule of judicial impartiality exists to protect the right to a fair trial, the interests of the parties involved, as well as the public perception of judicial legitimacy and impartiality. "The perceived impartiality of a judge is an essential ingredient to a judiciary's legitimacy." *Etpison,* 2020 Palau at ¶ 15; *see also Yano v. Yano,* 20 ROP 24, 26 (2012) (finding that even where a judge concludes that s/he is able to decide the matter impartially, the question must also be asked whether her/his "impartiality would be questioned by a reasonable observer").

[¶ 11] The goal of Canon 2.5, like that of its U.S. equivalent in 28 U.S.C. § 455(a),[1] is "to avoid even the appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (internal quote omitted). It "does so by establishing an objective standard designed to promote public confidence in the impartiality of the judicial process." *Ligon v. City of New York*, 736 F.3d 118, 123 (2d Cir. 2013) (internal quotation marks omitted); *see also Liteky v. United States*, 510 U.S. 540, 553 n. 2 (1994) (finding that "the judge does not have to be subjectively biased or prejudiced, so long as he *appears* to be so.") "T]he public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted[,]" requires that "justice must [also] satisfy the appearance of justice." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993). (quoting *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776, 782 (3d Cir. 1992)). Therefore, "if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' . . . then the judge must recuse." *United States v. Antar,* 53 F.3d 568, 574 (3d Cir. 1995) (quoting *In re Larson,* 43 F.3d 410, 415 (8th Cir. 1994).

[¶ 12] In a bench trial, the Appellate Division relies on the trial judge to impartially decide "each and every substantive issue at trial." *Alexander,* 10 F.3d at 163. When an allegation of bias relates to factual issues, the Appellate Division must take special care. *See Catchpole v. Brannon,* 36 Cal. App. 4th 237, 247 (1995); *Alexander,* 10 F.3d at 163 (holding that even where the court found no *actual* bias on the part of the judge, a reasonable person may question his impartiality, and therefore "our independent review of the record in this case impels our conclusion that the outcome of this case 'would be shrouded [in] suspicion' if [the judge] were to continue to preside as the trier of fact.") (internal quotation omitted).

[¶ 13] Here, the judge, in finding Cura not credible, commented:

[1] 28 U.S. Code § 445 covers the disqualification of justices, judges, and magistrate judges. § 455(a) states, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2018).

> . . . this is not the first time that Mr. Cura has come before the court for small claims and for construction, something like this. He goes and he works for someone and he is in charge and then there is a problem and then they come to court. This is not the first time for Mr. Cura to be sued. His whole scheme is not new, involving Mr. Cura. That is why I said I will, I believe Ms. Mizutani . . .

Tr. 19:8-14. The foregoing remarks show that in making her credibility determination, Justice Materne relied on evidence of Cura's "scheme" and history of appearing before the court, which are not in evidence in the present case. They are facts known only to the judge. Though she also lists other considerations that *are* in evidence, the judge's remarks indicate that her credibility finding was based in part on her unfavorable impression of Cura's credibility formed at a prior proceeding. To rely, albeit in part, on facts gained at a prior proceeding to form her opinion on Cura's credibility provides a basis for the judge's recusal. *See, e.g.*, *Parenteau v. Jacobson*, 32 Mass. App. Ct. 97, 103–04 (1992) (finding recusal was required because of unfavorable impression of Defendant's credibility formed while presiding at prior proceedings).

[¶ 14] We emphasize that we make no findings of misconduct, actual bias, or actual partiality on the part of Justice Materne. We also wish to underscore that the mere fact that a judge has already presided over a proceeding or trial of a defendant that involved the same or similar conduct does not, in itself, constitute reasonable grounds for questioning the judge impartiality in a subsequent proceeding or trial involving the same defendant. *See Blizard v. Frechette*, 601 F.2d 1217, 1220–21 (1st Cir. 1979) (finding that although the knowledge of a Defendant gained during a judicial proceeding *may* present grounds for a reasonable person to question a judge's impartiality, mere exposure to prejudicial information does not, in itself, establish the requisite factual basis). Such a procedure would bring the justice system to a halt. As the court in *United States v. Cowden*, 545 F.2d 257, 25–66 (1st Cir. 1976) explained:

> While judges attempt to shield themselves from needless exposure to matters outside the record, they are necessarily exposed to them in the course of ruling on the admission of evidence; and the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case.

[¶ 15] Here, however, the judge did more than merely preside over Cura's trial that involved the same or similar conduct. She proceeded to determine Cura's credibility, the critical issue in this case, with reference to a previously-formed unfavorable opinion on that issue in a prior proceeding. The judge's conduct, we conclude, could create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge or even necessarily in the mind of the litigant, but in the mind of an objective reasonable person.

[¶ 16] We therefore conclude, based on our review of the record, that the judge's comments regarding Cura's credibility, based in part on evidence derived from a prior judicial proceeding, could cause a reasonable observer to harbor doubts about her impartiality. To avoid the appearance of partiality, the judge should have recused herself pursuant to Canon 2.5 or disclosed to the parties her prior unfavorable impression of Cura's credibility, via judicial notice of any relevant prior proceeding, and allowed them to either waive any conflict or move to recuse.

## CONCLUSION

[¶ 17] For the reasons set forth above, we **VACATE** the Judgment of the lower court and **REMAND** the case with instructions that it be re-assigned to a different judge.