Circuit Court for Prince George's County

Case No. CAL-14-26019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2221

September Term, 2016

CHRISTOPHER BIRD

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Wright,
Graeff,
Thieme, Raymond T. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: December 18, 2017

In this case, Christopher Bird, appellant/claimant ("Bird"), appeals a motion for a new trial which was granted by the Circuit Court for Prince George's County in favor of Washington Metropolitan Area Transit Authority ("WMATA"), the appellant/employer (hereinafter "WMATA"). Bird also contends that the circuit court's judgment was clouded, because he was a former board member of WMATA.

On appeal, Bird asks this Court two questions that we have reworded:[1]

> 1. Did the circuit court abuse it's discretion in granting the WMATA's motion for a new trial?
>
> 2. Did the circuit court err in failing to recuse itself from presiding over the case?

We answer both questions in the negative and affirm the circuit court's decision for the reasons below.

BACKGROUND

On May 24, 2007, Bird injured his lower back at work. Bird was bending over to install a copper coil and reached to get a bolt when he "felt a bad pop and a pain" in his back. At the time of the injury, Bird worked on both train repair and facility repair as an AA Electrician and was paid approximately $68,796.00 per year. Bird's job required him

[1] Bird presented his questions as follows:

> 1. Did the circuit court err when it found the evidence in the case could not support a finding of 85% permanent partial disability, despite Mr. Bird presenting evidence of such a loss?
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> 2. Did the circuit court err in failing to recuse itself from hearing Mr. Bird's case despite the trial court's previous professional relationship with the appellee?

to lift and carry motors which weighed up to 80 pounds, climb ladders, and crawl on the floor. Bird worked for the WMATA since 1982, and while working for the WMATA, he attained a "two-year degree in electronics" from Prince George's Community College.

Bird had a documented history of lower back pain since January 14, 1983, when he was 23 years old. In 1983, a doctor informed Bird that he had lumbar scoliosis due to congenital twisting of the spine. In 1990, at the age of 30, Bird complained that he had lower back pain radiating down the left leg, and he was diagnosed with scoliosis spondylolisthesis and degenerative disc disease. On July 18, 1990, an MRI of Bird's lumber spine revealed mild protrusion at L-4 to L-5 of the lower back and L-5 to S-1 at the base of the spine. On May 7, 1991, at the age of 31, he underwent an L-5, S-1 foraminotompy and discectomy surgery to his lower back. On March 11, 1997, another MRI revealed L-4, L-5 central annular bulges with lateral recesses of spinal stenosis.

Following the injury in May 2007, Bird went to physical therapy and received injections in his back in an attempt to alleviate the pain. Bird returned to work two weeks after the injury. However, during trial, Bird testified that he was still in pain and the pain got progressively worse, which caused him to see a surgeon in early 2009. Between May 2007 and early 2009, Bird maintained his job title and position, but Bird primarily cataloged and researched smaller parts that malfunctioned on WMATA trains, which he classified as "desk work."

Bird underwent back surgery in September 2009 and returned to work for the WMATA post-surgery in January 2010. Upon returning from surgery, WMATA assigned Bird to "door operations," which required him to lift "bulky items" over twenty

pounds and bend over and twist his body to stack the items on a shelf. Bird experienced difficulty performing these task and requested "something different, something lighter" because the tasks were bothering his back. During trial, Bird testified that he asked was there "other components he could work that were lighter but they [WMATA] would never honor [his] request." After 29 years with the WMATA, Bird retired in May of 2011.

Shortly after retiring from the WMATA, Bird started a position working in sales for Signtex, an industrial lighting company.[2] Bird worked for Signtex from 2011 to 2014. In 2014, Bird left Signtex to start a position as a business development manager for Graybar, another lighting company, making approximately $60,000.00 a year.

On August 21, 2014, a hearing was held before the Maryland Worker's Compensation Commission (WCC"). At this hearing, the WCC found that Bird suffered from 35% industrial loss of use of the body, 20% due to a work injury, and 15% due to pre-existing conditions. Bird appealed that decision to the Circuit Court for Prince George's County.

On February 23, 2016, the case proceeded to trial. During the trial, Bird testified about the work injury and both sides presented testimony from doctors about Bird's permanent impairment. Dr. Joel Fechter, called by Bird, testified that Bird had a total of 48% permanent impairment to the whole body related to his lumbar spine. Dr. Fechter opined that 30.5% was related to the May 24, 2007 work injury, and 17.5% was related to

[2] During trial, Bird testified, "I retired on a Friday. I went to work on a Monday."

Bird's prior back condition. Dr. Peter Oroszlan, called by WMATA, testified that Bird had 18% permanent impairment to the whole body related to his lumbar spine. Dr. Oroszlan opined that 0% was related to the May 24, 2007 injury, and 10% of the impairment existed before the work injury.

The jury found that Bird suffered an 85% industrial loss of use of the body, 70% due to the work injury, and 15% due to pre-existing conditions. The WMATA filed a timely motion for new trial, and on April 15, 2016, a motion hearing was held. The circuit court granted the WMATA's motion, from which this appeal arises. In the order of the court granting the WMATA's motion, the court stated:

> Based upon the Motion and the evidence presented at the trial in this matter, this Court finds that the jury could not have reasonably concluded that there was 85% total industrial loss of use with 70% related to the work injury. There was not sufficient evidence for which the jury could have based their findings of 70% industrial loss of use for the Claimant [Bird].

A new jury trial was held on November 21, 2016. During the second jury trial, the jury found that Bird suffered from a 30.5% industrial loss of use of body due to the work injury.

Additional facts will be included as they become relevant to our discussion below.

DISCUSSION

I. New Trial

The first question before us is whether the circuit court abused its discretion in granting the WMATA's motion for a new trial. Bird avers that the court erred in granting the motion for new trial and conflates the motion for new trial with a motion for a judgment notwithstanding the verdict ("JNOV"). Bird asks us to determine if there was

sufficient evidence to justify the court's decision to set aside a jury verdict, when the task assigned is only to determine if the court abused its discretion in granting the motion for new trial. In conflating the two types of motions, Bird argues it was an abuse of the court's discretion to substitute its view of the evidence for the jury's view, because a JNOV is only permissible when there is not sufficient evidence from which the jury could have reached its conclusion. Bird contends that there was sufficient evidence from which the jury, acting as the fact-finder, could have relied on in reaching its verdict, because there was evidence in the record to support the jury's conclusion that he suffered a loss in wage earning capacity and opportunities available to him in his post-injury position.

The WMATA responds that the circuit court did not abuse its discretion in granting a new trial because the court was correct in finding that no reasonable jury could have concluded that there was 85% of total industrial loss with 70% being related to the work injury. The WMATA argues that at trial, Bird offered speculative and vague testimony about the loss of any business opportunity and provided no medical evidence to support the claim. The WMATA further notes that Bird left his job because he found employment elsewhere, making only 13% less than what he made while working for the WMATA. The WMATA also contends that it was always Bird's plan to retire, and the work injury did not impact that decision.

This Court has drawn a clear distinction between the authority of the circuit court under Md. Rule 2-533 (Motion for New Trial) and Md. Rule 2-532 (JNOV).[3] In *Kleban*

[3] Md. Rule 2-532, Motion for New Trial provides, in pertinent parts:

v. Eghrari-Sabet, 174 Md. App. 60 (2007), we held that granting a new trial under Rule 2-533 does not invade the fact finding province of the jury.

> a) When Permitted. In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion.
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> * * *
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> e) Disposition. If a verdict has been returned, the court may deny the motion, or it may grant the motion, set aside any judgment entered on the verdict, and direct the entry of a new judgment. If a verdict has not been returned, the court may grant the motion and direct the entry of judgment or order a new trial. If a party's motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial, if any, should the judgment thereafter be reversed on appeal.
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> f) Effect of Reversal on Appeal.
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> (1) When Judgment Notwithstanding the Verdict Granted. If a motion for judgment notwithstanding the verdict is granted and the appellate court reverses, it may (A) enter judgment on the original verdict, (B) remand the case for a new trial in accordance with a conditional order of the trial court, or (C) itself order a new trial. If the trial court has conditionally denied a motion for new trial, the appellee may assert error in that denial and, if the judgment notwithstanding the verdict is reversed, subsequent proceedings shall be in accordance with the order of the appellate court.
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> (2) When Judgment Notwithstanding the Verdict Denied. If a motion for judgment notwithstanding the verdict has been denied and the appellate court reverses, it may (A) enter judgment as if the motion had been granted or (B) itself order a new trial. If the motion for judgment notwithstanding the verdict has been denied, the prevailing party may, as appellee, assert grounds entitling that party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion. If the appellate court reverses the judgment, nothing in this Rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted.

> While the court's power to revise a jury verdict is no more than its authority to grant a new trial, given that the authority to grant a new trial is virtually boundless, the result is that [Md.] Rule 2-533 delineates the outer limits of the court's authority, which is not inconsistent with the more restrictive view of the court's revisory power under [Md.] Rule 2-535. Substitution of the court's judgment may well result in invading the fact finding province of the jury under [Md.] Rule 2-535. The grant of a new trial presents no such result.

Id. at 83.

> In granting a new trial, [the Court] does not assume that the verdict is, but that it may be, wrong. It says to the parties, we are strongly apprehensive that the result is not in accordance with the evidence. We think it expedient to submit the case to another jury, and leave it to them to say whether or not our fears are well-founded . . . . It is settled, then, that the court which tried the cause, may, in a proper case, of which it shall be the judge, set aside the verdict and grant a new trial, under circumstances which at first blush would seem to trench upon the rights of the jury. It can look through the evidence upon which the jury have [sic] passed, and then consider the verdict. It can compare them, and, if the one is clearly irreconcilable with the other, can so pronounce, *and order the case to be submitted to another jury*.

Standiford v. Standiford, 89 Md. App. 326, 340 (1991) (internal citations omitted) (emphasis added).

Bird is correct in arguing that had a JNOV order been issued, than we would rely on the substantial evidence standard to determine if it was appropriate for the court to intervene and alter the jury's verdict. *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.,* 283 Md. 296, 326 (1978) (A JNOV under Md. Rule 2-532 "tests the legal sufficiency of the evidence"). However, because the circuit court granted a new trial we review that decision under the abuse of discretion standard.

Md. Rule 2-533, Motion for New Trial provides, in pertinent parts:

> a) Time for Filing. Any party may file a motion for new trial within ten days after entry of judgment. A party whose verdict has been set aside on a motion for judgment notwithstanding the verdict or a party whose judgment has been amended on a motion to amend the judgment may file a motion for new trial within ten days after entry of the judgment notwithstanding the verdict or the amended judgment. A motion for new trial filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
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> * * *
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> b) Grounds. All grounds advanced in support of the motion shall be filed in writing within the time prescribed for the filing of the motion, and no other grounds shall thereafter be assigned without leave of court.
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> c) Disposition. The court may set aside all or part of any judgment entered and grant a new trial to all or any of the parties and on all of the issues, or some of the issues if the issues are fairly severable. If a partial new trial is granted, the judge may direct the entry of judgment as to the remaining parties or issues or stay the entry of judgment until after the new trial. When a motion for new trial is joined with a motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial if the judgment is thereafter reversed on appeal.

"It is fundamental that the grant or refusal of a new trial is within the sound discretion of the trial court and is not reversible on appeal, at least when the trial court fairly exercised its discretion, and except for the most compelling reasons." *Mack Trucks, Inc. v. Webber*, 29 Md. App. 256, 270 (1975). "The breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending on the nature of the factors being considered." *Butkiewicz v. State*, 127 Md. App. 412, 422 (1999). *See also Maryland Coal & Realty Co. v. Eckhart,* 25 Md. App. 605, 616-17

(1975); *Washington, B. & A. Elec. R. Co. v. Kimmey*, 141 Md. 243 (1922); 58 Am. Jur. 2d New Trial § 7.

We review this broad discretion, afforded by statute and in case law, under the abuse of discretion standard. *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 477 (2013). "A trial court abuses its discretion only when no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Francis v. Johnson*, 219 Md. App. 531, 562 (2014) (citing *King v. State*, 407 Md. 682, 697 (2009)) (internal quotation omitted).

Fundamentally, Bird's arguments concerning a JNOV and the substantial evidence test are not pertinent to the discussion before this Court. We must only decide if the circuit court abused its discretion in granting the WMATA's motion for a new trial, by its finding that the jury could not have reasonably concluded that there was 85% total industrial loss with 70% related to the work injury.

Md. Code (1991, 2008 Repl. Vol.) § 9-627(k) of the Labor & Employment Article ("L &E") defines industrial loss as "the percentage by which the industrial use of the covered employee's body was impaired as a result of the accidental personal injury or occupational disease." "A finding of industrial loss under [L&E § 9-627(k)] cited is equivalent to a finding of loss of earning capacity, *i.e.*, the employee's ability to earn wages after the accident." *Giant Food, Inc. v. Coffey*, 52 Md. App. 572, 578 (1982). "[T]he test used to determine the degree of disability is whether a claimant's injuries allow him to return to and adequately perform his prior job with the employer, and whether the workplace injury caused a reduction of wages." *Washington Metro Area*

Transit Auth. v. Washington, 210 Md. App. 439, 450 (2013). The finder of fact considers the nature of the physical disability, the age, experience, occupation, and training of the disabled covered employee when the accidental personal injury or occupational disease occurred to determine the industrial loss of use of the body. L&E § 9-627(k).

While it is in the fact finder's purview to make a finding of industrial loss, the circuit court has broad discretion in granting a motion for a new trial if the jury's verdict is deemed "grossly excessive," "shocks the conscience" of the court, or is "inordinate or outrageously excessive, or even simply excessive." *Hebron Volunteer Fire Dep't, Inc. v. Whitelock*, 166 Md. App. 619, 628 (2006) (internal quotation omitted); *Brooks v. Jenkins*, 220 Md. App. 444, 474 (2014).

After hearing all the evidence, including Bird's testimony, the testimony of the doctors and all the medical records, and considering the amount returned by the jury, the circuit court found that the award in this case could not reasonably be concluded, and we see no abuse of discretion in making that finding. In cases where the verdict is found to be "excessive" or "shocks the conscience," the court may order a new trial and is not required to provide a remittitur. *Conklin v. Schillinger*, 255 Md. 50, 66-70 (1969) (also noting that "excessive," "grossly excessive," and "shock the conscience" have the same legal effect and "all mean the same thing"). The language that "the jury could not reasonably be concluded" has the same meaning as "excessive."

In the current case, Bird insists that the jury verdict was not excessive, because the work related injury limited the opportunities available to him in post-injury employment, his ability to earn a living wage post-injury, and the activities that he could do with his

family and friends. Setting aside if these claims are true, the WMATA did not terminate Bird, and when he came back from surgery after the injury, he maintained the same position and pay. Bird voluntarily chose to retire from the WMATA, and upon retiring, started another job immediately as a sales person for an industrial lighting company where he used his experience as an electrician. At the time of trial, Bird testified that he continued to work for another electrical supply company making approximately $60,000.00, about 13% less than his WMATA salary. There is nothing in the record to suggest that this decrease in pay was because of a physical limitation caused by the work injury. Bird's employment history suggests consistent employment and earning capacity.

Bird testified that the work related injury ruined his retirement goal of owning an electrician business, but there is no evidence in the record of how much Bird was going to be able to earn in that profession. Additionally, "permanent disability is not based solely on loss of wages, but is based on actual incapacity to perform the tasks usually encountered in one's employment, and on physical impairment of the body that may or may not be incapacitating." *Queen v. Queen*, 308 Md. 574, 585-86 (1987). After Bird retired, he continued to use his expertise as an electrician at two private companies working in the fields of sales and business development. Post injury, there were tasks Bird could perform at the WMATA, and Bird's work history demonstrates that his education and expertise in electrical work afforded him many opportunities beyond being an electrician. While Bird's wages decreased, he presented no evidence that the decrease was a result of the injury.

It was reasonable for the circuit court to find that a jury could not have reasonably concluded that there was 85% total industrial loss of use with 70% related to the work, because there was not sufficient evidence for which the jury could have based their findings of 70% industrial loss of use due to the injury. The jury award in this case is more than 50% of what both medical experts opined.

Dr. Fechter testified that he examined Bird to determine Bird's impairment. Relying on the "AMA Guide," Dr. Fechter concluded that Bird was entitled to 30% permanent impairment to the whole body.[4] Dr. Fechter also concluded that there was an 18% loss attributed collectively to pain, weakness, and loss of function. In total, Dr. Fechter only concluded that there was 48% permanent impairment to the whole body, and attributed only 30.5% of the impairment to the work injury.

Dr. Oroszlan testified that he conducted a physical examination of Bird, and reviewed his medical history since 1990 regarding his lumbar spine. Dr. Oroszlan testified that Bird had 18% permanent impairment to the whole body, and that 10% of the impairment pre-existed the work injury. Dr. Oroszlan attributed 0% of Bird's impairment to the work injury, and opined that Bird's permanent impairment was the result of his "fairly progressive and well documented history" of issues with his lumbar spine.

Bird correctly reminds us that a jury can find that an injured worker's disability exceeds the rating of the evaluating physician, and to hold that courts are compelled to

[4] While it is unclear from the record, appellant stated in his brief that Dr. Fechter relied on the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition.

remain within the parameters of the medical evaluations would impermissibly shift the legal determination to physicians. *Gly Const. Co. v. Davis*, 60 Md. App. 602, 607 (1984). Our holding in this case in no way suggests that juries should be restrained to doctor's recommendations. On the contrary, our holding reaffirms that this Court will only find the circuit court abused its discretion in granting a new trial when no reasonable person would take the view adopted by the court, or when the court acted without reference to any guiding rules or principles.

Here, it clear that the circuit court granted the motion for a new trial because it found that the jury could not reasonable conclude that Bird suffered 70% industrial loss of use due to the injury. This would make the jury verdict excessive. Consequently, there was a proper basis upon which to grant a new trial.

II. Recusal

Finally, Bird avers, for the first time on appeal, that the circuit court judge should have recused himself from the trial of this matter. Bird avers the judge that presided over the case had a conflict of interest because the judge was a member of the WMATA's board of directors from 1991-2003.[5] WMATA argues that there is no evidence of bias by the court and that this issue is improperly before this court, because it was not preserved for appeal.

[5] Appellant asserted that this fact was never disclosed; but as appellant noted in his brief, this information was publically listed on the Maryland State Archives website. http://msa.maryland.gov/msa/mdmanual/31cc/html/msa15840.html.

We review whether a judge should have recused himself or herself under the abuse of discretion standard. *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990). Judges are presumed to be impartial and the burden to overcome the presumption of impartiality rests with the person seeking recusal. *Karanikas v. Cartwright*, 209 Md. App. 571, 579 (2013). Bald allegations are insufficient to overcome this presumption. *Reed v. Baltimore Life Ins. Co.*, 127 Md. App. 536, 556 (1999). This Court has articulated four elements that must be presented in a record on appeal to enable a reviewing court to resolve the issue of whether or not a judge should have recused himself or herself:

> (1) facts are set forth in reasonable detail sufficient to show the purported bias of the trial judge; (2) the facts in support of the claim must be made in the presence of opposing counsel and the judge who is the subject of the charges; (3) counsel must not be ambivalent in setting forth his or her position regarding the charges; and (4) the relief sought must be stated with particularity and clarity.

Id. at 554.

Bird's argument does not meet any of the elements set forth in *Reed*. Bird cites not one specific example during the first trial, motions hearing, or second trial of when the circuit court judge was bias against him. Instead, Bird asserts that by being on the WMATA board the judge has an inherent bias that would lead him to disfavor the jury award and grant the motion for new trial. Bird states that twelve years before the judge presiding over this case he was on the WMATA board. Bird then makes a leap of logic to contend that the judge would be bias, because the WMATA board contemplates policies to keep the organization's cost down. This historical and dated fact alone does

not even begin to elucidate a present bias in order to overcome the presumption of judicial impartiality.

To add insult to injury, we see no indication in the record of the proceedings before the circuit court where Bird suggested that the judge might be bias or filed a timely motion to initiate recusal procedures and preserve this issue for our review. *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516 (2015). In *Conwell* we stated:

> To initiate recusal procedures and preserve the recusal issue for appeal, "a party must file a timely motion" with the trial judge that the party seeks to recuse. *Miller v. Kirkpatrick,* 377 Md. 335, 358 (2003); *see also Surratt v. Prince George's County*, 320 Md. 439, 468 (1990) ("[I]n order to trigger the recusal procedure we here prescribe, a motion must be timely filed."). A timely motion is one that is "filed 'as soon as the basis for it becomes known and relevant,'" *Miller*, 377 Md. at 358 (*quoting Surratt*, 320 Md. at 469), and "is not one that represents 'the possible withholding of a recusal motion as a weapon to use only in the event of some unfavorable ruling.'" *Id*. Therefore, "a litigant who fails to make a motion to recuse before a presiding judge in circuit court . . . waiv[es] the objection on appeal." *Halici v. City of Gaithersburg*, 180 Md. App. 238, 255 n. 6 (2008) (citing *Miller*, 377 Md. at 358, 833 A.2d 536); *see also* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *compare Traverso v. State*, 83 Md. App. 389, 394 (1990) (finding that "no issue concerning the recusal [of the trial judge] has been preserved for [appellate review]" because the appellant "never asked the trial judge to recuse himself"), *with Miles v. State*, 88 Md. App. 360, 368 (1991) (finding the filing of an affidavit to the circuit court asserting bias and prejudice of a trial judge to be "sufficient to preserve the recusal issue").

Id. 516-17. Here, no such motion was made; therefore, the issue was not properly preserved for our review and should not be addressed.

In a final attempt to save his failing argument, Bird contends that, even if this objection was not raised below, a judge should recuse himself, either by motion or *sua sponte*, in order to avoid the appearance of impropriety, and he instructs us to review

Jefferson-El v. State, 330, Md. 99, 108 (1993). Bird's reliance on *Jefferson El v. State* is misplaced. First, in *Jefferson-El*, the Court of Appeals was reviewing a motion for recusal and makes no mention of a requirement that judges must recuse themselves *sua sponte*. Additionally, in *Jefferson-El* the moving party made a motion below that referenced a specific instance where the trial judge made disparaging remarks about them in a previous trial. Here, there is no evidence that rises to that level of specificity because there was no motion made during the circuit court proceedings.

Bird's complaint in its purest form is that the judge must have been biased, because if he were not biased then he would have denied WMATA's motions. In reviewing the proceeding before the circuit court, we find nothing that would persuade us that Bird has successfully shouldered his burden to overcome the presumption of judicial impartiality, and there is nothing that would even hint to the circuit court judge that he should recuse himself *sua sponte*.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTYAFFIRMED. COSTS TO BE PAID BY THE APPELLANT.