ORIGINAL

SUPREME COURT
OF THE UNITED STATES

JOHN A. LILJEBERG, JR., :

Petitioner, :

v. : No. 86-957

HEALTH SERVICES ACQUISITION CORP. :

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Washington, D.C.

Monday, April 25, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:32 p.m.

APPEARANCES:

H. BARTOW FARR, III, ESQ., Washington, D.C., on behalf of the Petitioner.

WILLIAM M. LUCAS, JR., ESQ., New Orleans, Louisiana, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Farr, you may proceed whenever you are ready.

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.

ON BEHALF OF PETITIONER

MR. FARR: Mr. Chief Justice, and may it please the Court:

Our disagreement with the Fifth Circuit decision in this case rests upon two basic grounds. First, we think that final judgments should not be set aside because of after the fact recusal motions, unless there is a showing of actual judicial impropriety.

Second, we think that such relief is particularly inappropriate when at the time of judgment that the district judge did not even know of possible grounds for recusal. Because a judge without knowledge cannot possibly favor one side or the other, it is in fact is more unfair in this case to throw out the judgment than it is to give it effect.

Now I would like to just spend a few minutes at the outset on the facts of the case. The findings made by a separate district judge showed that at the time that he rendered his judgment and at the relevant time that the case was before him, that Judge Collins had no recollection of and no knowledge of any discussions between Petitioner and Loyola University regarding the possible purchase of some Loyola land.

The judge found that there were numerous individuals who had been discussing the possible purchase with Loyola, and that Judge Collins did not have any recollection that Petitioner was among them.

Now the Court will recall that this case did not involve Loyola University in any way. Loyola was not a party to the case. Its land was never mentioned in the case, and its interest was never mentioned in the case. There was some discussion of land in the opinion, but that is completely different land that has nothing to do with Loyola University.

Judge Collins was said to have known at an earlier time, because he was present at some board meetings where the matter was discussed and after his judgment, but the specific finding is that at the time of his judgment that he did not know.

Now I should take this opportunity to correct a statement that I did make at the first argument, which is that he did not have earlier knowledge either. The Court did find that he had had earlier knowledge, but said that at the time that the case was before him that he did not have any knowledge of these discussions.

QUESTION: Was the finding that he did not know or that he did not remember?

MR. FARR: I am sorry.

QUESTION: Was the finding that he did not know or

that he did not remember?

MR. FARR: Well, I think both. I think that the specific finding actually is stated in terms of knowledge. But I think that it is implicit in that that he would not have remembered any earlier information that he might have had by virtue of having attended the board meetings.

Now the Fifth Circuit did not reverse its finding. In fact, it reaffirmed that Judge Collins did not know at the time of his judgment about the discussions. What it held was simply that the judgment had to be set aside, because in effect he should have known.

Now in discussing this decision, I would like to begin with what I think is an obvious but important point. That the question here is not simply one of getting another judge at the beginning of the case, which is what Section 455 is basically aimed at.

The question here is one of setting aside a final judgment based on a motion that was made after the judgment was entered. Now usually, this Court has set a high threshold for claims raised for the first time after judgment. There are, of course, plain error rules on appeal and things like that. And for Rule 60(b)(6), which is the rule under which this particular motion has been made, usually the Court has required a showing of exceptional circumstances before it would find a basis for a judgment being set aside.

QUESTION: Mr. Farr, can I interrupt you. If you draw the line at when the judgment was entered.

Can you refresh my recollection, what was the date on which this judgment was entered?

MR. FARR: The judge signed the judgment on the 12th of March, and the judgment was entered formally on the 16th.

QUESTION: And what was the date when he found out about the possible appearance of impropriety arising?

MR. FARR: The date that the Court is using is the 24th of March, perhaps the 25th, but I think the 24th.

QUESTION: And my question is what in your view was the Trial Judge's duty under the statute at that point in time?

MR. FARR: I do not think that the judge in the case after the judgment essentially had been entered had any specific duty under the statute. I think, frankly, that it would have been better practice, since it was so close to the time of judgment, if he had informed the parties, but it would not make any difference to our position in this case even if he had.

QUESTION: And what would you say if a motion had been made on say the 26th or 27th of March, whatever the dates were?

MR. FARR: We would take exactly the same position, Justice Stevens.

QUESTION: That it was too late?

MR. FARR: That is right. I mean what we are talking about here is essentially a situation where he enters a judgment and he decides a case, and he has no reason to favor one party or the other. And although, as I say, that I think that it would have been better practice had he made that clear eight days later, it would not have made any difference to the decision.

QUESTION: And if he had happened to open his mail three of four days earlier. I guess that there were just a couple of days before he got those letters. And that would have been a critical difference too, I guess.

MR. FARR: Your Honor, I am not sure that it would have. I guess that it depends whether we are talking a couple of days meaning before he had entered judgment. I think in that case, because the case would have still have been before him, that he would have not entered a judgment. I think that at that point that he might well have had a duty to step aside and let another judge take over at that point.

QUESTION: I mean "might well", he would have knowledge, would he not?

MR. FARR: That is right. That would be my understanding of the statute. The only reason in fact that I used the phrase "might well" is that there is the unusual circumstance in this case that he did announce his ruling from the bench.

QUESTION: Well, then he had no authority on the 60(b) motion, did he, or the new trial motion?

MR. FARR: What happened in fact when the Rule 60(b) motion was filed and it was filed approximately a year and a half after the time that we are talking about now, he sought to reassign it to another judge for decision. However, they sent it back to him. At that time, he was no longer a trustee of Loyola University.

QUESTION: But as of March 24th, he was mandatorily disqualified from this case under any view, was he not?

MR. FARR: That is correct.

QUESTION: And he had no authority to make any further rulings in the case.

MR. FARR: As long as he was a trustee of Loyola University, that is correct. At the time that the motion was made, the Rule 60(b) motion, in fact he was no longer a trustee of Loyola University. So for example, if the case had been filed the first time at that point, then he might well not have had an obligation to recuse himself.

QUESTION: Suppose that he did not remember the fact that his wife owned this property. Let us just assume that his wife owned the adjoining property. And as a result of his judgment, his wife is greatly enriched.

Is that grounds for recusal, mandatory recusal?

MR. FARR: If there was a finding that he did not

know about his wife's interest, Your Honor, I do not think that there would be grounds for recusal.

QUESTION: The same case?

MR. FARR: The same case. The specific statutory provision that we would be dealing with in terms of the wife's interest in Section (b)(4), which specifically requires that he know of the interest before he is disqualified.

Now the question then would be if he did not in fact know, if he sat in perfect good faith in ignorance of this interest that his wife had, and that was part of the factual findings of the case, would that then have been a disqualifying interest. I think not.

QUESTION: Suppose that you add the fact that he was negligent in not knowing, is there any difference?

MR. FARR: No. I think that the point that we are making here is that the remedy of throwing out a final judgment for something which is merely negligence is too strong a remedy. That there is no indication that in a situation like that that Congress intended that at any time that a judge inadvertently did not know about something that could be grounds for recusal if he had known about it, that the judgments automatically ought to be thrown out.

QUESTION: Well, does the court below have discretion to set aside the judgment; did the Fifth Circuit say that this was automatic, that it had no choice?

MR. FARR: Well, it accepted the finding, and then said that it found that there was an appearance of impropriety. Our position certainly is that we do not see how there is an appearance of impropriety, if a judge is sitting without knowledge of a possible disqualifying interest. Under those circumstances, what possible ground would he have to favor one side or the other.

In that particular case, there is not the kind of temptation, which in the words that the Court has used, which would lead him to hold the balance other than straight and true. It is only if he has knowledge.

QUESTION: Again the same argument if he is negligent?

MR. FARR: That is correct, that is correct. And we think that Congress in fact specifically framed Subsection (b) in terms of knowledge for just that reason. Because if you say that as long as you can show that a judge should have known of something, just to take the negligence standard.

QUESTION: You are not ignoring appearances, are you?

MR. FARR: Your Honor, I am not ignoring appearances. What I am saying is that here you have a specific finding that he did not know. And I think that that is a very important aspect of the question of how this appears.

QUESTION: Everybody but him.

MR. FARR: He understood that he was a trustee. What

he did not know that there was any interest in the case before.

QUESTION: I know, but it seems to me that appearances are there.

MR. FARR: Well, Your Honor, what I am submitting here is that when you are talking about a situation where he in fact did not have knowledge, you can only create the appearance essentially by doubting the fact that he did not have knowledge.

QUESTION: Mr. Farr, is that not the very point of the appearance of impropriety, that the public really does not know exactly what the judge's state of mind was, or whether he remembered, or deliberately forgot or what. And the appearance concept is designed to take care of in part of public perceptions of act when you do not in fact until months later have a finding of fact that he did not actually know.

MR. FARR: Can I make two points about that, Justice Stevens. First of all, of course, the appearance standard is something which is supposed to be used on going forward basis. That is the normal intent of it. And the expectation is --

QUESTION: On a what kind of standard? I did not understand.

MR. FARR: On a going forward basis, on a prospective basis. That the facts will be known, and that essentially will be a guideline for a judge to use in deciding whether to sit or

in fact to transfer the case to another judge.

And I think that the question here is a somewhat more difficult one, which is in a situation where he did not know, would we just apply the same rule.

QUESTION: Would you say that 455(a), which I think is the relevant provision here, can never be violated if the judge is not aware of a disqualifying fact. Judges do this. They have portfolios of stock, and they forget that they own a hundred shares of some stock, but the newspapers check this up.

Would you say that there was no violation of that section, if the judge has honestly forgot about it, if there was no appearance of impropriety?

MR. FARR: I would say so in the example that you have given me, Justice Stevens. I have not been able to think of an example in which I think if a judge honestly did not know of any reason to be partial, that that would legitimately create an appearance of partiality.

QUESTION: Wait a minute. Let us suppose in this case that he is a big booster for Loyola and has been, and everybody in town knows that he is a trustee of Loyola. And this is a big case and the caption is Loyola versus somebody else. And he for some very strange reason forgets that he is a trustee, and he continues to sit in that case. Do you not think that that would create an appearance of impropriety.

The only reason that I thought that you could argue

that there was not one here is that the impropriety did not at all consist about the fact, that is was very hidden, even the other side did not realize that this land or that this company had a bid in on land, and if the company went under that the land would not be bought by that company, and that the land belonged to Loyola.I can understand that that is no appearance of impropriety, because the public at large would not know that.

But the other example that I just gave you, would that not be an appearance of impropriety?

MR. FARR: But of course, in that case, Justice Scalia, I cannot imagine that there would be a determination that he did not about it. To begin with, just to give you a technical answer.

QUESTION: It is my hypothetical. I mean there is a determination that he did not know about it.

MR. FARR: And that finding is made on the basis of a record as accepted by the Court of Appeals.

QUESTION: Then there is no appearance of impropriety?

MR. FARR: I think that in a situation where he does not know about the particular grounds to give rise to recusal that the appearance can only be achieved essentially by not accepting the finding. But the problem is that while that may be a situation that happens in lots of cases where people

looking at it say here is a particular finding that a judge has made and I personally do not accept it, if you follow that course with Section 455(a) or even 455(b), you are going to open up all sorts of situations where the findings are controlling.

QUESTION: Yes. But under your view, as I understand you, you really will not know whether there was an appearance of impropriety until you have had a finding of fact on the judge's state of knowledge.

MR. FARR: Well, Justice Stevens, I think that that occurs in lots of cases, whether it is something that the judge knew, or whether it is something that the judge did, or something that the judge said.

QUESTION: Well, I am not disagreeing with you that that is not true, but that is a little different from one's normal concept of what an appearance of impropriety is. It seems to me that the appearance either exists or it does not exist, and sometimes there is a wholly innocent explanation for it. But it seems to me that that does not really affect the public perception. The public sometimes is suspicious of us, even though they really should not be.

MR. FARR: Except, I think, that 455(a) talks in terms of reasonable suspicion. Now I suppose that the public may be suspicious, even after a judge has said that there is no basis here for believing that this judge did anything wrong.

The public looks at it and says, gee, if we had been the judge, we think that something looks worse than that, we are troubled about that.

QUESTION: Mr. Farr, how does Subsection (c) enter into this. It says that the judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort, and so forth.

Does that enter into the picture at all?

MR. FARR: I do not think that it enters into this picture, Justice O'Connor, and let me try to explain why. At the first argument, I indicated why I thought that that particular section did not really apply here. Because Section (b)(4) says knows, not should know. And there is nothing in (c) about a conclusive presumption.

But I would like to supplement that answer by pointing to the particular language of Subsection (c). Because I think that under any reading of Subsection (c) that the knowledge that we are talking about here is not the kind of knowledge that he would be conclusively presumed to know under (c), even if it does have the conclusive presumption.

What Judge Collins is said not to have known in this case is the names of possible purchasers of land from Loyola University. And if you look at what he is required to know under (c) or what he is required to inform himself about are fiduciary financial interests. And financial interests are

defined in terms of ownership of a legal or an equitable interest.

QUESTION: Well, then what about the hypothetical that you were asked about the spouse owning shares of stock, I mean he deals with a case involving that company, do you not think that (c) suggests that he should know that his wife owns the stock?

MR. FARR: Let me say that (c), of course, in the hypothetical of his wife, that there is a reasonable efforts clause under (c), not a specific knowledge clause. The legislative history gives an example which Justice Traynor gave of the difficulty of asking one's spouse about his or her investments, and indicates that they particularly had a lower threshold in that situation.

But anyway to answer your question, Justice O'Connor, I think that there might be a possible reading under (c) which says that the way that we are going to enforce the provisions of Subsection (c) is to assume that a judge knows at least about what he is required to inform himself about, and perhaps what he is supposed to make reasonable efforts about.

But even if that were so, that still would not mean that he would have to know not just what he owned, what his wife owned, what any private trust that he served as a trustee owned or any university, but also anybody who might buy that.

QUESTION: But in the case of other than this one

then, do you concede that (c) affects (a) in the sense at least to the extent that the judge is supposed to inform himself about his own personal interests?

MR. FARR: I guess that I think that it is possible, Justice O'Connor. I do not believe that I need to win those cases, so I think that the easy thing to do would be just to say yes. But I am quite honestly not sure that even in that situation that the remedy of invalidating a final judgment of all prior rulings would be proper, just because he did not carry out the duty under (c). (c) essentially is an ethical requirement. It is in the Code of Judicial Ethics.

QUESTION: Was there a finding that he did comport with his duties under (c) in this case?

MR. FARR: Your Honor, there was no specific finding about that at all.

QUESTION: It seems to me that there could not very well have been. He is a fiduciary, and he has an obligation to make sure of what his beneficiaries' interests are. And this was not a small potatoes deal, as I understood it.

Did not Loyola stand to have its adjacent land increase tremendously in value if this hospital went through?

MR. FARR: That was the finding of the Court, that this was an important interest to Loyola. But let me explain again the situation.

QUESTION: And does not the judge have the duty to

inquire as a fiduciary into all of the interests of Loyola, just to make sure that this does not happen?

MR. FARR: Well, what I would like to point out here is that even if the judge had carried out that duty to its fullest degree, at least that I think is contemplated by (c), had learned everything that Loyola owned, that still would not have been enough to put him on notice necessarily about the case that was in front of him.

I mean obviously if Loyola University had been a party or its land had been mentioned in the case, then you could say, well, he is supposed to know that they owned the land, and then he should recognize when it was mentioned.

But what we are talking about here is a series of board meetings. We are really talking about I guess three board meetings over a period of several years, in which the name of the petitioner and the corporation that he owns are mentioned on a couple of occasions.

QUESTION: But not only that, but the hospital project. You would think that that would stick in his mind.

MR. FARR: Well, except that was one of numerous things that they were talking about doing with this particular piece of land. I think that to some extent that you have to put yourself in the position that a trustee is in in these board meetings, where you are talking about numerous items that come up, for example. And any report by the real estate

committee, for example, is one of ten, a dozen, or twenty things that are discussed at a meeting.

And even then, the idea of using this as a hospital was one idea. The idea of using it as a shopping center was another idea. There is a part in the minutes about somebody wanting to use it for parking.

QUESTION: That was what I was going to mention. There were minutes of all of these meetings.

MR. FARR: There were minutes.

QUESTION: Which he was supposed to have read.

MR. FARR: He said that what he did is that he scanned the minutes.

QUESTION: Anybody in the public assumes that a trustee reads the minutes.

MR. FARR: He said that he scans the minutes of the meeting, but that he took no particular interest in these financial dealings. And one of the things that I think is important to note --

QUESTION: How can you convince the public of that, that a judge does not understand what he is reading?

MR. FARR: Well, the public has to understand the position that a judge is in, particularly as a fiduciary of an institution like a university. The Code of Judicial Ethics in fact prohibits a judge from taking an active interest in the financial affairs of Loyola University. He is not allowed to

do that ethically. He can a trustee for certain kinds of private trusts, and he can serve in a fiduciary capability for a public institution, but he cannot take an active role in the financing.

QUESTION: Well, did he in this case make his position clear?

MR. FARR: He did not take an active role in Loyola's finances. In fact, that is precisely what he said.

QUESTION: Did he make that clear to the public, did he make that clear to the public or anybody else?

MR. FARR: He testified under oath to that effect; yes, he did.

QUESTION: He made it clear to whom?

MR. FARR: When a Rule 60 motion was filed a year and a half afterwards.

QUESTION: That is not what I am talking about. You said that under the law that he has to do this.

But did he do that, did he make it clear that he was not interested in the fiduciary doings of that place, did he?

MR. FARR: Your Honor, I am not sure that I understand your question quite honestly.

QUESTION: Did he say that I pursuant to the laws of the State of California am not allowed to participate in the fiduciary business of this corporation?

MR. FARR: Your Honor, I do not know that he did

that. But I do know that he did not serve on the real estate committee, that he did not serve on the investment committee, that he did not serve on the executive committee.

QUESTION: Did he disqualify himself from every vote on every financial transaction that came before the board of trustees?

MR. FARR: The Code of Ethics allows you to vote as a general trustee on financial matters. What it does not allow you to do, however, is to actually participate in making the financial decisions. And I think that what is happening is that in a sense that we are looking to impose.

QUESTION: Do you think that it is appropriate for a judge to vote on a financial matter which is also appearing before his court?

MR. FARR: Do I think that it is appropriate?

QUESTION: Do you think that it is appropriate for a judge to vote on a financial matter and financial transaction that is being reviewed in his court?

MR. FARR: No, I do not. I think that if he knows that there is a financial matter either at the board meeting or in his court, that he should not vote on it if it is in his court, or that he should recuse himself if the matter is before him in his courtroom. But those are cases, of course, where we are talking about knowledge. And what we are talking about here is a situation where Judge Collins could not reasonably

have had any reason to favor one party or another. And the question really then is is it appropriate --

QUESTION: Was that finding made by the lower court?

MR. FARR: Pardon me.

QUESTION: Was that finding made by the lower court?

MR. FARR: Not that specific finding. But the finding that he had no knowledge, it seems to me, that it follows naturally from that that if you do not know about any reason to be partial, that there is no reason that you would favor one party over the other. And the court below accepted his testimony to the effect that he did not know at the time that he sat on the case.

Now I would just like to make one brief point, and then save the remainder of my time, if I may. The type of thing that we are talking about, the issue of allegations about a judge and what is determined, and then what the public believes, does come up in several different kinds of cases.

And in response to Justice Stevens' question, I wanted to say that there are cases, for example, where there is an allegation made that a judge made an out of court statement to a third party which indicates some sort of bias or prejudice.

And in each of those cases, there is then a question as to whether in fact the judge made the statement. And there have been fact findings. There is a case in the Seventh

Circuit, Balastrue; the Ninth Circuit, Conford; and the Fifth Circuit, Brown, which are examples of this.

Sometimes the fact finding is not favorable to the judge. That was the situation in the Brown case. And sometimes it is. But it is that finding, whether he said it or what he said, that is then used as the basis for application of the statutory provision.

QUESTION: Yes, but Mr. Farr, the facts that give rise to the violation of 455(a), if there was a violation of 455(a), would exist before the finding occurred. Whereas the ones that you described depend on whether the statement was made, which is an objective fact yes or no.

What you in effect are saying is that later on you want to know the subjective state of mind of the judge here to determine whether there is an appearance. And I would suggest that the appearance might well have existed, even though he did not realize that there was a disqualifying fact.

MR. FARR: Well, I guess that I do at some point part company on that.

QUESTION: Is it your position that 455(a) was not violated, or that the vacation of a judgment is an impermissible remedy for a violation of 455(a)?

MR. FARR: It is both.

QUESTION: It is both.

MR. FARR: Our initial position, as I meant to

indicate, was that this is not a permissible remedy or not an acceptable remedy, simply for an appearance of impropriety, when you are talking about a motion filed after the fact. That is what the Seventh Circuit's rule is.

What I am saying in addition though is that because of the finding of lack of knowledge, I think that if you credit that, there is not even an appearance of partiality in this case.

Thank you. I will reserve my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.

We will hear now from you, Mr. Lucas.

ORAL ARGUMENT OF WILLIAM M. LUCAS, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. LUCAS: Mr. Chief Justice, and may it please the Court:

We submit to Your Honors that the single most important finding of fact by the Fifth Circuit was its finding that the public would not believe the Judge Collins forgot. I f the public would not believe that Judge Collins forgot, it would therefore believe that his impartiality might reasonably be questioned. And it would therefore believe that the judgment was tainted. And the requirements of 455(a) would then have been met. And that was basically, I believe, the foundation of the Fifth Circuit's holding. The Fifth Circuit also said that the judge erred in failing to recuse himself.

QUESTION: Excuse me. That would show that he should disqualify himself in any proceeding in which his impartiality might reasonably have been questioned. And this says might reaonably be questioned. The proceeding was over. At the time that it was conducted, there was no reason for the public to question his impartiality.

What you are saying is that the public will not believe that his colleagues' finding that he did not know about it was true later.

MR. LUCAS: At the time of the hearing, I believe that the public would question his impartiality, yes. If the public knew that he was a member of the board then.

QUESTION: The public did not know. But the public did not know. At the time of the proceeding, even the parties did not know, who were much more familiar with all of the land involved in the case and all of that. It is hard to believe that the public would have known.

MR. LUCAS: The public, I believe, for purposes of 455(a) is presumed to know objective facts. The objective facts were that before that hearing and during that trial, this man, this judge, was a member of the board of trustees of Loyola University. At that time, the public is expected to know that, yes. I do not think that it matters when he learned it, Justice Scalia.

QUESTION: The public is deemed to know every little

detail, even though he is unaware of those details, and even though he has no obligation to inform himself of those details?

MR. LUCAS: No, I do not think that the public is deemed to know every little detail, and that is where the importance comes in. I think that the public is to know that if Loyola owns a 530 acre tract of land, which is what this is, the equivalent of about seventeen square city blocks, that if it is going to sell a piece of that land and it is going to have rezoned 115 acres around it which will increase the value by $9 million, I think those facts that the public would expect to be important and would know.

QUESTION: The public did not know the connection between this company and that land any more than the judge here did.

Do you seriously contend that at the time that the judgment was rendered that there was an appearance of impropriety?

MR. LUCAS: Yes.

QUESTION: There was.

To whom was this appearance manifest, since your client did not find out about it until how much later? Maybe you are guilty of laches then.

MR. LUCAS: Well, then, too, maybe the court is guilty of not having revealed it, as it is required to do and mandated to do. When it knew it, it did not tell the parties.

It did not tell the attorneys. I do not think that under those circumstances that we should look back and say.

In other words, it seems to me, Justice Scalia, that if a judge could just keep to himself some interest that would require his recusal under 455(a), if he could just keep it to himself under after the judgment is rendered, all is well.

QUESTION: Because then he would come under another provision where he has personal bias or prejudice, or where he actually knows of a financial interest. But here, you are just saying that he did not know of it. I mean that is quite different. Here you are saying that this judgment was bad, because it appeared that he was biased. And I find it hard to say that at the time of the judgment that there was any appearance of impropriety.

MR. LUCAS: Justice Scalia, we do not say that he did not know. The judge himself said that he did not remember. He knew on January 24, 1980. The court found that as a finding of fact. He knew on September 25, 1981. He knew on November 12, 1981, and that is an important date. Because on that date, he attended a meeting, and he voted on a motion that was passed unanimously or presumably he voted. He was there, and the motion passed unanimously, to resume negotiations with Mr. Liljeberg.

Eighteen days later, the suit was filed. And twenty-nine days later, he denied a TRO and refused a stay and

injunction that suit, twenty-nine days after that meeting.

QUESTION: You tried this and lost, did you not?

MR. LUCAS: Sir?

QUESTION: Did you not argue this to the District Court?

MR. LUCAS: And lost on the merits.

QUESTION: And lost on the merits.

MR. LUCAS: Yes, sir.

QUESTION: We do not want to try that again here.

Do we not have to accept the fact that he did not know, is that not the posture in which this case is going forward?

MR. LUCAS: No, I do not think. I think that what is before the Court is the Fifth Circuit, Judge Collins particularly saying that he did not remember. I think that there is a difference between he did not remember and he did not know. He did know initially. Now we are in the area of did he know and then forget. That is really what we are saying.

QUESTION: When did you or your client find out that he was on the board?

MR. LUCAS: We found out, sir, ten months after the judgment was rendered by the Fifth Circuit Court of Appeals.

QUESTION: You mean that you tried that case against the corporation, and you never examined its minutes; did you

ever examine the minutes of Loyola?

MR. LUCAS: Loyola was not a party to the suit, Your Honor.

QUESTION: I know, but it was involved.

MR. LUCAS: No, it was not involved. It was not involved in the suit. The suit was over the ownership of a corporation, which in turn owned a certificate of need to build a hospital, a hospital which was going to be built if Mr. Liljeberg was successful on Loyola property.

QUESTION: But was it property of Loyola?

MR. LUCAS: On which it would be built; yes, sir.

QUESTION: And you did not look at the minutes?

MR. LUCAS: Did not even know of any connection between Loyola and Mr. Liljeberg.

QUESTION: Wait a minute, do not say that you did not even know that there were minutes.

MR. LUCAS: No, sir. Did not know of any connection between Mr. Liljeberg and Loyola.

QUESTION: But you never looked at the minutes, you said. I just think that it is strange.

If you had looked at the minutes, you would have known that he was a trustee, would you not?

MR. LUCAS: Well, sir, I am perhaps not making myself clear. I had no reason to look at Loyola's minutes. Because Loyola was not a party to the suit, and I have no idea at that

time that a hospital would be built on Loyola's property. It could have been built anywhere. So there was no reason to suspect. Loyola played no part in this case.

QUESTION: You no more than the general public had any reason to believe that there was any impropriety. I mean that seems to me very telling. And yet you assert that there was an appearance of impropriety, although you did not see any.

MR. LUCAS: I can see impropriety in the fact that the judge knew on March 24th, two days before he lost jurisdiction of this case, and did not inform anyone and did not tell anyone. He had a mandatory duty to recuse himself at that point.

QUESTION: That might be actual bias or actual impropriety, but it would not be an appearance of impropriety, which is what I thought that we were talking about.

QUESTION: The discovery did not disclose that St. Jude was negotiating with Loyola as a prospective seller of the land?

MR. LUCAS: No, sir, it did not. The discovery on the merits of the case, you mean?

QUESTION: Yes.

MR. LUCAS: No, sir, it did not.

QUESTION: You just assumed that a hospital would be built somewhere?

MR. LUCAS: Where the hospital was going to be built

was really of no concern. You see, this was a contest between HSAC, which is a subsidiary of Hospital Corporation of America, and Mr. Liljeberg, who was negotiating with other companies. HSAC had land on which to build the hospital, and which the state had approved the site for the hospital. So where the hospital was going to be built was really of no concern to us, even if Mr. Liljeberg won. We were concerned with him not winning.

QUESTION: When the judge failed to disclose his interest on March 24th, how did that prejudice you. I take it that counsel for the Petitioner and Appellant argues that it really did not make any difference at that point, that the trial was over anyway.

MR. LUCAS: Well, again, looking back on it, a number of things could have happened. Number one, the judge on his own motion under Rule 59 could have declared a new trial right then and there. On the night of March 25th, the last date, on March 25th of 1982, the last date that it was still under Judge Collins' jurisdiction, he attended a meeting at which the details, the details of this land transaction were discussed. Those minutes are before Your Honors.

No phone calls, certainly not to me, and certainly not to anyone else that I know about, to say, even on March 26th, 27th, or 28th, hey, I hear you are appealing this case, I think that you ought to know. And the onus is not on the

lawyers, Your Honors, as I read the statute and jurisprudence. The onus is on the judge.

QUESTION: What conclusion do we draw from that, (a) that it would have been easier to make your motion, but does it tell anything about what the substantive ruling on the motion would have been. We are back in the same box that we are in now, that is to say that the trial is over.

MR. LUCAS: No. Except, of course, one of the arguments that is raised is the question, the opposing counsel's question is timeliness. And of course, it is directly involved there. We were in a position where it was ten months after the court ruled.

QUESTION: What about the merits?

MR. LUCAS: The merits?

QUESTION: The merits about the recusal motion or the new trial motion.

Those are the same, are they not, on March 24th or ten months later, or are they?

MR. LUCAS: Yes, I think that they are, sir. I think so, sir.

Now one of the points that this Court, of course, is well aware of is that a judge should not act as a judge in his own case. And this Court in Aetna v. Lavoie established that principle.

Also the law does not look at just actual bias, but

it looks at the question of the appearance of bias or the appearance of impropriety. And this was an important holding by the Court in the Commonwealth Coatings case back in 1968. In fact, it was that case that was used as a source of 455(a) in the Senate and House hearings.

Therefore, in the absence of a designation of a remedy in Section 455, the remedy applied by this Court in Commonwealth Coatings is reasonable. I was asked before at the earlier hearing as to the basis for any remedy under 455. And I think that the basis for that remedy is the Commonwealth Coatings case.

I do not think that I or anyone else will ever know what is only known to Judge Collins. I think that a terrible situation would face this Court and this nation under this statute if we ever got into a position where a judge stands in the position of the person being tried.

And I would cite the Court to U.S. v. Brown in the purview of a fair trial, that it is the judge himself who is on trial. If we ever get to a situation where the judge can say I forgot or I do not remember and completely exculpate himself from any finding of impartiality, then I think that we would do violence under those circumstances to the congressional intent of 455(a).

I think that the cases have clearly established that we must rely upon on objectively ascertainable evidence rather

than the judge's memory or the judge's professing of not remembering.

QUESTION: Mr. Lucas, such a holding would not stretch as far as you are suggesting. I mean if the thing that he claims not to have remembered is something obvious to all of the public and he is the only one in the world who did not remember, then you could say whether he remembered it or not, that there was an appearance of impropriety, because the whole public knew that this land was involved in litigation and that he was a trustee of Loyola.

But it is a much narrower situation when you say that it is a little thing that the public would not know about, and that it is that he claims not to remember. What is so bad about letting that be adjudged by a separate court. And if the court is persuaded that he did not remember it, there has neither been an appearance of impropriety nor any actual impropriety.

MR. LUCAS: Well, Justice Scalia, I think that we get back to the question of is it a little thing or is it a big thing. Here, it was a big thing. Here, it was a case of a judge who attended three meetings where this matter was discussed apparently in detail. And the suggestion has made that he only heard it one, or two, or three times.

QUESTION: Well, you are mistaking what I mean by a little or big thing. I mean a thing that is evident at the

time of the trial. This was not evident at the time of the trial. Your client did not pick it up. It was a very remote connection. Now maybe he should have remembered it, but he did not, or at least it was found that he did not.

MR. LUCAS: But I believe that it is presumed that the public knew whatever the facts were at that time, not later. Whether the public finds out later or not is inconsequential. So we look at the facts at that time. The facts at that time were that he had any number of meetings and he got any number of minutes.

QUESTION: I think that is the essence of what we are debating about here. Whether you use what the public reasonably knew at the time, or what ever detail of the fact was at the time. I think that you are right that if you say that that is the basis on which you do it, then there was an appearance of impropriety.

MR. LUCAS: I think that is it.

QUESTION: Were there findings on when both parties knew, when Liljeberg knew?

MR. LUCAS: I am sorry.

QUESTION: Were there any findings as to when Liljeberg knew of the judge's trustee position?

MR. LUCAS: That never entered the case, and that is another point. Presumably, he was negotiating for quite awhile, as later developed at depositions taken after the

motion to vacate was filed, yes. That was never revealed to us. He was negotiating the whole time.

QUESTION: May I ask you along that line, Mr. Lucas, something that has always puzzled me. In the minutes of the January 22nd meeting.

What was the date of the trial, it was right at about the time?

MR. LUCAS: The trial was January 21 and 22; yes, sir.

QUESTION: The minutes of the real estate committee on January 22 refer to the negotiations with St. Jude Hospital Corporation, and that Mr. Eckholdt report that the Federal Courts have determined that the certificate of need will be awarded to the St. Jude Corporation. That quite obviously refers to the judge's oral rule from the bench in this case.

But is there anything in the record that tells us how the Loyola trustees came to be aware of that fact?

MR. LUCAS: No, sir, I do not know.

QUESTION: Or whether they perhaps warned the judge that he should not be sitting in a case like this or anything like that?

MR. LUCAS: No, I do not know.

QUESTION: That did not come out in discovery?

MR. LUCAS: I do not know. Obviously, they were keeping track of the case.

QUESTION: The Loyola people were keeping track of the case?

MR. LUCAS: Yes. But again, I must stress the fact that we did not know. When I say we, HSAC did not know of Loyola's connection with this proceeding until ten months after the Court of Appeals, the U.S. Fifth Circuit.

I would also like to point out one thing that I think also is very worthy of consideration. And that is that 455 applies to criminal cases as well as applying to civil cases. I think that if we were to give the interpretation that Petitioners wish to give to 455, then in U.S. v. Brown, the Defendant would still be in jail, or at least he would have served out his sentence.

Because despite the fact that there was a great impropriety in that case, the judgment had already been rendered. It was some time eight years later between the time that the man was tried and the time of the reversal. He would still be in jail. Because it was not a case of actual bias, he could not proceed that way. It was a remark that the judge made that did not come to light until after the trial, four years I believe it was after the trial was over.

So if we give the construction to this statute that once judgment is rendered that that is it, or once an appeal is exhausted that that is it, then I submit to Your Honors that an injustice in the criminal field as well as the civil could well

take place.

QUESTION: Do you think that if you apply a preponderance of the evidence standard in a criminal case to determine whether the judge in fact knew of the biasing factor, do you not think that you would have to apply a beyond a reasonable doubt standard?

MR. LUCAS: I do not know, Your Honor. I confess that I am out of my field when we are talking about criminal law.

QUESTION: If there is more than a fifty percent chance that the judge was not biased, we are going to let the person go to jail. I doubt that.

MR. LUCAS: This judge in effect acted as a judge in his own case, once simply by saying I do not remember or I forget is taken as the basis for saying that he would not be responsible under 455(a). To the contrary, the Fifth Circuit finding that the public would not believe that he was impartial said that he because of constructive knowledge, things that he should have known, that he had a duty to inquire into, Justice O'Connor, under (c), requires that he be found to have had the requisite knowledge to indicate his impartiality under 455(a).

The record clearly establishes that Justice Collins attended board meetings on these three occasions that I mentioned. Again I wish to particularly stress the November 21, 1981 board meeting, twenty-nine days before he

ruled on a preliminary matter in this case, which you will find on page one of the joint appendix, within twenty-nine days.

We, and when I say we, the members of the public have to ask ourselves if we were on a board of trustees that was getting ready to sell a piece of property that had discussed at a number of meetings that we attended, that was one of the principal assets of this institution that we serve, and the surrounding land was going to be increased in value by $9 million, and we voted on the motion to renew the negotiations with these people, Liljeberg and St. Jude, would be twenty-nine days later remember that.

I think that we would. And I think that under that construction, that the court properly found that the public would not believe Judge Collins forgot. Thus, it is not a question really of whether he knew or he did not know, or whether he forgot or he did not forget. It is a question of whether the public would find that based upon the relevant objective facts that it appeared that the judge was not impartial.

From the beginning, this Court has said that justice must satisfy the appearance of justice. And that the imprimatur must be placed on a sound judicial system that has the support of the people. And I believe that that was the purpose of 455(a).

455(a) is not to be applied in a speculative manner,

not just any situation. Not just something, Justice Scalia, that it seems to me involves something quite minor should be used to try to set aside a judgment. I certainly do not think that that was the meaning that was ever intended to be given to it.

But in a situation of extreme facts, strong facts, compelling facts, as we have in this case, that is the only vehicle by which we can preserve our right to a fair trial, if you will, a fair trial in a fair tribunal, which after all is the purpose of the statute.

Thank you for your attention.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lucas.

Mr. Farr, you have three minutes remaining.

ORAL ARGUMENT OF H. BARTOW FARR, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. FARR: Thank you, Mr. Chief Justice.

Counsel talked briefly about Aetna Life Insurance v. Lavoie. And I think that the decision of this Court in that case points out what I think is a very important part of this case, which is that there is a difference between a judge who sits knowing of a possible interest and a judge who sits when he does not know it.

In Lavoie, the Court did hold that one of the Justices of the Alabama Supreme Court should be disqualified, because he sat knowing of an interest. The Court was also

asked, however, to disqualify all of the other judges of the Court because they were class members. And in discussing that claim, this Court pointed out that they were not even aware of any interest in the case when they sat on it up until the time of the rehearing. And the Court assumed, and I think correctly, that they could not have had any reason to be biased, at least up to the time that they knew about it.

I think that what this case really is coming down to from the gist of Respondent's argument is the question as to whether you believe Judge Collins or not, and he says that reasonable people in this case will not believe him.

And if in fact he did something wrong, certainly the judgment should be thrown out. But the question is what facts do you have to follow through on in order to reach that conclusion.

You have to assume, first of all, that Judge Collins sat in a case violating his judicial oath, knowing that a university that he served as a trustee had an interest, and yet sat to favor that interest. When it was called to his attention eighteen months later in a motion, he falsely denied that he knew about it.

QUESTION: Yes, but it was called to his attention very much more promptly than eighteen months.

MR. FARR: It was called to his attention. But at that time, as he testified, he said that the case was disposed

of.

QUESTION: Do you not agree at that point that he had a duty to do something more than he did?

MR. FARR: I agree at that time that it would have been better practice.

QUESTION: Do you not think that he had a duty to do something more than he did?

MR. FARR: I do not agree, Justice Stevens.

QUESTION: You do not think that he had a duty to disclose to the parties what the true facts were?

MR. FARR: As the Fifth Circuit said in addressing that issue, it would have been better had he done so.

QUESTION: I understand that everybody knows that it would have been better.

If it just would have been better, then you are saying that he had no duty to disclose at that point?

MR. FARR: At that point, I do not believe that he had a duty to do so. But let me return. Even if he did, I think at that point that it just would have been a matter of recusing himself from any motions, and there were none made at that time.

But let me again go back to these facts. The motion was made to Judge Collins. Judge Collins said I did not know about it. His deposition is taken under oath, and he says I did not know about it.

Judge Schwartz makes a finding that says that he did not know about it. And three judges on the Fifth Circuit say we accept that finding, we do not believe that Judge Collins knew about it either.

QUESTION: And in each of those instances, you can substitute the word "remember" for the word "no"?

MR. FARR: That is correct, that is correct.

QUESTION: It is rather for one Federal Judge to call another one a liar, is it not?

MR. FARR: Well, as I have indicated before, Your Honor, there is a procedure set up for disciplining judges, which Congress set up six years after it amended 455 that depends on judges taking responsibility for the conduct of other judges.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.

The case is submitted.

(Whereupon, at 2:25 p.m., the case in the above-entitled matter, was submitted.)

REPORTER'S CERTIFICATE

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CASE TITLE: JOHN A. LILJEBERG, JR. v. HEALTH SERVICES ACQUISITION CORP.

HEARING DATE: April 25, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date: April 25, 1988

Margaret Daly

Official Reporter

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