ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
JOHN A. LILJEBERG, JR.,	)	
	)	No. 86-957
Petitioner	)	
v.	)	
	)	
HEALTH SERVICES ACQUISITION CORP.	)	

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JOHN A. LILJEBERG, JR., :

Petitioner, :

v. : No. 86-957

HEALTH SERVICES ACQUISITION CORP. :

Washington, D.C.

Wednesday, December 9, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 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 Respondents.

C O N T E N T S

PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE RENQUIST: We will hear argument, now, on 86-957, John Liljeberg v. Health Services Acquisition Corp. Mr. Farr, you may proceed whenever you are ready.

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

ON BEHALF OF PETITIONER

MR. FARR: Thank you, Mr. Chief Justice. May it please the Court:

At issue in this case is a decision of the Fifth Circuit holding that a litigant can undo all prior rulings of a judge, even final judgments, merely by showing after the fact an appearance of impropriety.

Our disagreement with this broad rule rests upon two principal points. First, and foremost, we think that the drastic remedy of retroactive relief simply should not be awarded for claims based on appearances of impropriety. An appearance of impropriety justifies prospective relief under the statute, but not the invalidation of prior orders.

Second, and more specifically, we think that retroactive relief is particular inappropriate in the case where the judge did not know of the grounds for possible recusal at the time of his rulings. In such a case, there is no possibility of actual prejudice infecting the judgment.

Now, before turning to these points in more detail, I

would like to note briefly the precise grounds on which the court below invalidated the judgment. The Court of Appeals accepted the fact that Judge Collins, who is a trustee of Loyola University, did not know when he ruled that Petitioner was one of several possible purchasers of Loyola University land.

By the way, I should point out that in Judge Collins' opinion on the merits, there is a discussion at some length of a parcel of land for building a hospital. That is not the land owned by Loyola University. That particular land was not mentioned at all in the case.

The appearance in this case, therefore, was based wholly on the notion that Judge Collins should have known about this because the matter had come up several times at Loyola Board meetings.

QUESTION: He testified that he did not know; didn't he, at the time?

MR. FARR: He did. He testified under oath, Justice Blackmun.

QUESTION: How could that be?

MR. FARR: That he would not know about this particular parcel?

QUESTION: Yes.

MR. FARR: I think that is actually not so surprising, Your Honor. As he testified, he had something like

four boxes full of minutes of Loyola Board meetings and this is a matter that came up a few times at the Board meetings. The most extended discussion, really, the only extended discussion was in January of 1980. And, for a year and a half after that, there was no discussion about this whatsoever. This was not an area in which he took any particular interest, as he testified. And, indeed, Cannon Five of the Code of Judicial Ethics, which was not enacted into the statute, affirmatively prohibits a judge from giving investment advice to a University or a charitable institution or a religious organization.

QUESTION: Mr. Farr, how large is the Board of Trustees?

MR. FARR: It is quite substantial. If you look at the membership, I don't know the exact number, but I think it is 30-35 members or something like that.

QUESTION: And is it divided into small committees with particular responsibilities?

MR. FARR: Typically for operations, Your Honor, that's what happens.

QUESTION: And what sort of committee handled this piece of real estate?

MR. FARR: There was a real estate committee which handled matters like this and Judge Collins was not on the real estate committee. He was on a student affairs committee. He was on a presidential search committee. But he was not on a

committee that had anything to do with the University and its investments.

QUESTION: And how often did the committee report to the full Board?

MR. FARR: I believe it just reported as it had need to. In the minutes that are reproduced in the appendix, Your Honor, there are indications of certain reports that they had made. And you might note, we didn't reproduce the entire minutes in there, but there are usually one or two paragraphs out of 10 or 11 pages worth of minutes.

QUESTION: What is the difference that he didn't remember the actual occurrence when he was on the Board. He knew he was on the Board.

MR. FARR: He knew he was on the Board.

QUESTION: And he knew that the case he was trying was a case against an organization that he was a member of the Board of Trustees.

MR. FARR: Let me clarify that.

QUESTION: He knew that; didn't he?

MR. FARR: Let me clarify. The case was not against Loyola University. Loyola University was --

QUESTION: Well, was it involved in it?

MR. FARR: It was not in any way a party to the case.

QUESTION: In the discovery?

MR. FARR: No. There was no discovery involving

Loyola University whatsoever. It was never mentioned in the case. So, there was nothing about the case, itself, that would have alerted Judge Collins to any possible grounds for recusal, unless he remembered the discussions that accompanied these Board minutes.

QUESTION: Well, I am sure -- I just can't understand how he didn't remember.

MR. FARR: Well, I think that that is a finding that Judge Schwartz made, looking at the particular history of the minutes, looking at his role, he said that he accepted Judge Collins' testimony which, of course, he made under oath, that he did not know about this particular interest.

QUESTION: But he did know that he was on the Board.

MR. FARR: Oh, of course, he knew he was on the Board, Your Honor.

QUESTION: And he did know that the Board was involved in the case.

MR. FARR: No. That he did not know, Your Honor. That is the point I am trying to make. In this particular case, there was nothing --

QUESTION: It wasn't prepared -- nobody -- there wasn't discovery. You said they had discovery. And they didn't find out that the Board was involved?

MR. FARR: Justice Marshall, the underlying case was about ownership of a corporation.

QUESTION: But in all of the argument, I just want to warn you, that it appears that what you are saying is that he didn't know about it.

MR. FARR: That's correct.

QUESTION: And he couldn't have known about it and he shouldn't have known about it.

MR. FARR: I am saying that he did not know about it. There was nothing about the case, itself, that would have alerted it to us.

QUESTION: Well, then, it wasn't important to the case; was it?

MR. FARR: In the particular situation --

QUESTION: It was or it wasn't?

MR. FARR: The Court of Appeals found that this was an interest of Loyola's that would have been -- that Loyola had an interest that would have been affected by the outcome of the case. But there was nothing about the case, itself, that would have alerted the presiding judge, which was Judge Collins, to that fact.

The piece of information he needed to alert him to possible grounds for recusal had come out of Board meetings. Some of which he had attended and some of which he hadn't and from the minutes of those Board meetings.

And Judge Schwartz, a separate district judge in Louisiana made an express finding that he accepted that Judge

Collins did not actually know at the time he was presiding in this case and making his rulings that Loyola had any interest whatsoever.

What the Court of Appeals did then was to say, "We accept the finding that he had no knowledge. But because he could have had knowledge, we are going to set the judgment aside anyway."

QUESTION: And should have.

MR. FARR: And should have in that particular case. That's correct.

QUESTION: It certainly is hard for a colleague to sit on this kind of a case involving another colleague's word; isn't it?

MR. FARR: Justice Blackmun, I think it obviously is an awkward matter. But let me point out several things. First of all, there is nothing uncommon about judges passing on the actual conduct of another judge.

QUESTION: Of a colleague?

MR. FARR: Excuse me?

QUESTION: Of a colleague?

MR. FARR: Of course. Under Section 372 of Title 28, Congress has set up a process for investigating disciplinary complaints against judges. And that precisely depends -- the complaints are referred to the chief judge of the district. They are reviewed by judges in the circuit of that district.

So, Congress clearly has an expectation through that statute, if none other, that when it is necessary, judges can and should pass on the conduct of their colleagues.

And in this particular case, I might just point out there are seven different judges who have said that they accepted Judge Collins' explanation as being true.

QUESTION: Well, Mr. Farr, did the judgment below rest on the premise that he could have known and should have known or on the premise that in any event, there was an appearance of bias.

MR. FARR: Well, in a sense, it rests on both, Justice Brennan. What he said, what the Court of Appeals' rationale is, as I understand it, is that because he should have known, someone looking at the case from outside and no knowing or not accepting that he didn't remember would have expected that he would remember. So, the two are in some sense linked, I think in the Court of Appeals.

QUESTION: Well, I think they are essential; aren't they? The only reason the appearance would have been the case, is if he should have known.

MR. FARR: Well, in fact, my belief, Justice White, is the only way there is an appearance is actually if he did know.

QUESTION: I know that is your position.

MR. FARR: But, at least, if the Court of Appeals'

decision, by its own terms, does at least involve the idea that he should have known that there is at least negligence involved here.

QUESTION: May I ask: How is the property described? I can imagine my sitting in a case that involves the real estate that my house is on. If it is only described by meets and bounds or something, I have no idea what the meets and bounds are.

MR. FARR: It was described as the Monroe tract. That is the term that is used.

QUESTION: So, it is something well enough known in the community that he would know what the Monroe tract was?

MR. FARR: Well, I don't think it is a household word, Justice Scalia. I think it is just something that that was the term that was used.

This is not property, I should point out, that is connected to Loyola University. This is just property like a lot of universities have that was given to the university.

QUESTION: What I am suggesting is that there are two elements involved in the "should have known" part of the inquiry. Element 1 is that he should have known that the University had an interest in this particular trace.

And Element 2 is that he should have known that that tract which the University had an interest in was also the tract that was under discussion in the case. Is it conceded

that the identification of the two is self-evident. And that anybody who had sat in on the University proceedings would know that this is the same tract?

MR. FARR: I think from that question I have failed to make one thing clear. The tract that was discussed in the case was not the tract that Loyola University owned. And the only thing that came up in the case that would have triggered the memory of Judge Collins would have been the mention of St. Jude Corporation, which was one of the potential buyers of the Monroe tract. But at the time that the case was going on, the tract that was being discussed in the case was some other tract that was bought by Hospital Corporation of American. It had nothing to do with Loyola University at all. So, there is nothing about that tract or the discussion of that in the case that would give him any hint that Loyola University --

QUESTION: How did the other tract come into this?

MR. FARR: What essentially happened, as a practical matter, is that Liljeberg, the Petitioner, thought he was going to have an agreement with HCA. And HCA had bought a tract, not the Loyola tract, a tract having nothing to do with Loyola.

When that agreement fell apart, when HCA said, "We're not going to enter into any agreement with you, then Liljeberg resumed negotiations with Loyola looking to some other tract. But that had nothing to do with what was in front of Judge Collins.

QUESTION: Well, how, again, did the lower courts reason that he should have disqualified himself in this case?

MR. FARR: Well, in fact, there is no way that he could have, as a practical matter, disqualified himself because of something he didn't know about. So, what they are really saying is that he should have known about it because St. Jude Corporation had been mentioned a couple of times at Board meetings at Loyola University as one of several possible purchasers of a Loyola tract of land. And, also, Mr. Liljeberg had been mentioned once several years before.

What they are saying is: That should have essentially put him on notice that when a corporation named St. Jude appeared in front of him and there was a debate over ownership of this corporation and who would have the rights to construct a hospital pursuant to a certificate of need, that should have triggered in his mind the memories of what happened at the Board meeting so that then he would have recognized it and recused himself.

And Judge Collins said, "If I had remembered this, if anything had triggered in my mind, I would have recused myself." But that just simply didn't happen.

QUESTION: Because of this, he should not have sat in a case in which St. Jude was a litigant. Is that the idea?

MR. FARR: He said that had he known that St. Jude -- had made the connection between the St. Jude that was a

litigant or the corporation that was in the case and the potential purchaser of land from Loyola and, since he wanted to build a hospital on it, winning the case was something that had an effect on whether he bought the land from Loyola.

If he had made that connection, which he simply didn't, he would have recused himself. And that is what he testified to.

QUESTION: Well, Mr. Farr, what effect does Section 455(c) have here, if indeed this is something that the judge properly should have informed himself about? If we get that far, if it fits, what effect does that sub-section have?

MR. FARR: Well, I think there are two questions about that, Justice O'Connor. First of all, if a judge -- if, in fact, this is an interest that a judge had an absolute obligation to know about under sub-section (c) --

QUESTION: If he is covered by sub-section (c) here.

MR. FARR: Just assuming that for moment, which I don't think is true, as I will explain in a second, then the question would be: Is retroactive relief still is that a proper remedy essentially to enforce his failure to know something that he should have known? Is that a proper punishment essentially for his negligence, facing the fact that it doesn't really fall on Judge Collins. It falls on the litigant who has prevailed in the case.

QUESTION: But in the long run, do you think it

conceivably would be better for judges to have a "should have known" rule applied to them than to go into the actuality of their knowledge and have it tried in each instance? That's kind of tough.

MR. FARR: That brings me to the second point which is that, to some extent, this is exactly what Congress faced and the Ethics Committee faced in drafting the code and the rules. And there are a couple of things. First of all, they didn't put "known" or "should have known" in Section (b)(4), where they specifically used the term, "knows" and there are several other provisions in Section (b)(5) where they could have very easily said, "knows" or "should know" and they didn't do it. So, to some extent, it is Congress that has put knowledge into play at least in the cases arising before.

QUESTION: But they also enacted sub-section (c).

MR. FARR: But sub-section (c), even if read at its strictest, would only impose a duty of absolute knowledge in a couple of instances: personal financial interest and fiduciary financial interest. It has only a reasonable efforts clause, for example, regarding the interests of a spouse, a reasonable efforts clause regarding the interests of a minor child and doesn't have any requirement for anybody else.

QUESTION: Well, is this a fiduciary financial interest; do you think?

MR. FARR: It is not as the code intends it. And

think this is what is important.

QUESTION: Why?

MR. FARR: If you look at Section 5 of the Judicial Code, which is not incorporated in the statute, to begin with, that has a specific section which is headed, "Fiduciary Interest," and speaks of the very strict limitations on a sitting judge serving as a private fiduciary. And you can only be a fiduciary of a family trust. You cannot be a fiduciary of a trust for any of your close friends, for example, or anything like that.

Cannon Five also makes distinctions between private trusts and charitable organizations, universities, religious organizations. And it is specifically intended and I think the statute pulls this in at least in part in sub-section (d) to try to give judges broader latitude to serve as public trustees. It simply does not fit that scheme.

QUESTION: Well, you think we are not bound by the language of Section 455 in defining financial interests, then?

MR. FARR: No. I mean I think that you are bound to interpret the language in 455. I am not suggesting that it is irrelevant. All I am saying is that it should be read in context with section (b)(4) which talks of specific kinds of interest on which you are automatically recused in connection with the legislative history and in connection with the Cannon.

QUESTION: Well, doesn't an interest in real estate

qualify as something other than securities, for example?

MR. FARR: Well, I think it is not -- this is something that, unfortunately, the legislative history is not entirely clear on. There are financial interests and then there are economic interests that aren't financial interests. I think it is quite clear if you take it all together that investments other than, let's say, a very narrow definition of securities, stocks and bonds, which are owned by a university are not in any way the kinds of things that Congress intended that a judge have to keep track of --

QUESTION: No, but maybe real estate is.

MR. FARR: Well, that is a subject that is not specifically spoken to. I would point out that many universities own literally hundreds of parcels of real estate that are left to them in wills, that are given to them by donors, and to say that a judge who sat on a case had to know every single real estate holding of a university and how it would be effected, and that would be the absolute duty under Section 455(c), because that basically says you have to know. It doesn't say you should know or anything like that. It says you have to.

If that was true, then judges simply would not realistically be able to sit as trustees of those organizations and that is exactly the reverse of what Congress and the drafters of the code had in mind. They wanted to permit great

latitude for judges to be able to sit as trustees of those institutions.

QUESTION: Well, I think that is maybe overstating it. It seemed to me when they used the language that they don't have to -- the judge doesn't have to be concerned about the ownership of a such an institution in securities, that we have to think that it did, then, include other interests.

MR. FARR: Justice O'Connor, I agree that there is a way that you can, like Rubic's Cube, work all the way through the statute to come out to put the pieces together that way. But in all honesty, that result has nothing to do with what I think it was clear at least the drafters of the code were trying to get at. The idea that they had was that for private trustees, your interests, if you were a private trustee for a family member, essentially that interest is the same interest as if you had a personal interest. You are expected to know about it. And you are supposed to act in the same way to disqualify yourself as if you owned it, yourself.

That is not what they intended for trustees of public universities. If the construction that we are talking about right now was actually the right construction, it would mean that a judge who was a trustee of a university or a religious organization would have to know more about the holdings of that organization and he would have to know about those of his or her spouse. That just doesn't make any sense, quite frankly,

in the statutory scheme. If Congress was totally silent about public trustees, or if the drafters had been, it would be perhaps a reasonable reading. But under the circumstances, I submit it really is not.

QUESTION: Mr. Farr, can I ask you a question about your basic position in the case?

MR. FARR: Yes, Your Honor.

QUESTION: If we assume for the moment that there is a violation of 455(a), and I know you even argue that may not be justified, but assume that is so. Is it your position that there is never a case in which this would be a permissible remedy? No matter how strong the basis for believing his impartiality might be questioned? Because the statute, itself, doesn't address the question of remedy. And I guess we are primarily concerned with remedy here.

MR. FARR: That's right. That, of course, is the rule the 7th Circuit appears to have adopted.

QUESTION: Well, that is reading that case rather broadly.

MR. FARR: In several other cases, I just might add, since then they have said if you raise -- in a couple of cases where there have been claims raised under sub-section (b) on appeal, they have considered those. And, then they've said, "Now, we turn the ones under (a) and we don't review them under appeal, because we don't give retroactive relief."

QUESTION: But I am really asking your position. Your position is that although the Congress didn't say so that we, in effect, should read in an absolute prohibition against retroactive relief in 455(a)?

MR. FARR: It seems to me -- I naturally hesitate to proclaim something quite that absolutely. I think that clearly should be the general rule. Whether there is some case where the involvement of the judge in whatever it is is so serious that it raises the same concerns that you would have under due process or perhaps under (b), I suppose there might be latitude for that.

QUESTION: For example, would there be latitude if, say, the day after he released his findings, they discovered the alleged conflict -- the disqualifying fact. And they had gone in right away on a motion for a new trial and motion to disqualify and have another judge taken another look? Would you take the same view that it is just simply too late?

MR. FARR: The view to me is not that it is too late. It is simply that that is not enough to invalidate everything that went before. I mean it is not a timeliness argument so much as it is those particular grounds. There is simply no justification --

QUESTION: I was asking the other way around. If it were much more timely so that it would be perhaps less of an upsetting of something.

MR. FARR: But what I am saying is that the timeliness doesn't make any difference to me.

QUESTION: It doesn't enter into it.

MR. FARR: What I am saying is that when you have a judgment, you have had all the proceedings, you have had all the judge's rulings, and the trial for all it could be could take five years. In this particular case, it didn't; but it could. That even the day after when somebody comes in and says, "Well, I've just now uncovered an appearance of impropriety that I didn't know about the day before you ruled against me. I would like to set everything aside." I don't think it ought to be set aside unless it rises to a level of much more.

QUESTION: Mr. Farr, in this case, what do you do with that statement by the judge that had he known, he would have disqualified himself?

MR. FARR: Well, that is exactly the distinction I am trying to make, Justice Marshall. Between prospective recusal and retroactive recusal. I think there are certain grounds, the grounds set out in 455 as a whole, (a) and (b), are sufficient to justify prospective recusal. When you simply say, "I'm not going to sit on the case. The case is going to be reassigned to another judge in this same building." There is not much of an effect in doing that. And that is what Congress wanted to encourage. And the supporters of the bill

said, "There are plenty of Federal judges. What is the point of having a judge sit on a case when he knows of grounds to recuse himself?"

QUESTION: Mr. Farr, what about this as a limiting principle for what you are urging in front of us? The statute doesn't really talk about appearance of impropriety. It talks about when impartiality might reasonably be questioned.

Now, had this judge died before this matter came to light and had it been impossible to make the inquiry as to whether he actually knew, you could say -- you could reasonably question his impartiality.

But, here, you had a proceeding. He testified. The court found that he did not know. There is now no basis on which you could say his impartiality could reasonably be questioned. He didn't even know of the real estate. So, you would come out with a different result where the proceeding continued to have an infection to it. Where even after all the hearings were done, you really didn't know whether this judge was impartial or not. Wouldn't you allow it to be set aside, then?

MR. FARR: I'm sorry.

QUESTION: If he had died. If he had died, because then you would still -- you have a judgment that you don't really know it was an impartial judgment. Here you are telling us we do know it was an impartial judgment because we know that

he didn't even know about this connection.

MR. FARR: Let me say two things, Justice Scalia. First of all, I think that the first point of what you said really comes out of the appearances test, which is a person knowing all the circumstances.

QUESTION: It isn't an appearances test. That is exactly the point I am trying to make to you. It is whether his impartiality can reasonably be questioned.

MR. FARR: Well, the name they do give it generally is --

QUESTION: I know. I am suggesting that is misleading.

MR. FARR: All I am saying is that if you accept the finding in this case, his impartiality cannot reasonably be questioned. Now, if there was a situation where you were unable to hear his side of the story for some reason so that you just had the allegation, quite frankly, I am not sure that I would automatically throw out a judgment based on mere allegations. I think it would depend on the credibility and so on and so forth.

QUESTION: But assume the court said he should have known that and the fellow was dead, you would probably say that he probably did know it.

MR. FARR: I think that is possibly right. If you simply, at that stage, cut off the inquiry. But what I am

suggesting and I think Justice Scalia makes a good point in this is that you don't cut off the inquiry at that point. And it is not just a question of knowledge. You could have an allegation, for example, somebody could come forward with a third-party affidavit saying, "I gave a bribe to the judge on behalf of this person's opponent." And he says, "I would like to have the judgment thrown out on that basis."

Well, if in fact the allegation is true, the judgment should be thrown out. But if the allegation isn't true, then simply you would be setting aside a judgment based on somebody's charge that something might have happened or something as in this case when you move it over into knowledge, something should have happened.

QUESTION: Isn't it possible, Mr. Farr, that even if we were to decide that a judgment should perhaps be effected retroactively, we would need to consider Rule 60(a) and (b) to see how long afterwards it could be effected retroactively.

MR. FARR: Well, I do think that's right. I mean there are questions at what particular point this is raised. Certainly, our argument, quite frankly, is that whenever this had been raised, had it been the day after or had it been during appeal or, as it was here, a year and a half after the judgment, itself, that the rules should be the same. But I think it is even more so the later the time is and the more unsettling the effects. I mean this trial was six years ago.

The hospital has been built since then and those are exactly the principles of finality that have been recognized in civil and criminal cases which do, in fact, help public confidence in the judicial systems, not to have things being constantly relitigated.

If I could, I would like to just save my remaining few minutes for rebuttal.

CHIEF JUSTICE RENQUIST: Very well, Mr. Farr.

We will hear now from you, Mr. Lucas.

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

ON BEHALF OF RESPONDENT

MR. LUCAS: Mr. Chief Justice, and may it please the Court: First, I would like to clear up one thing. Judge Collins was found by both lower courts to have had knowledge. He did have knowledge. He had knowledge on January 24, 1980. He had knowledge on September 25, 1981 and, more importantly, he had knowledge on December 12, 1981, which was 18 days before the complaint was filed --

QUESTION: How does that bear on Judge Schwartz's finding, Mr. Lucas?

MR. LUCAS: He found knowledge and said that Judge Collins forgot. In other words, he said he had the knowledge.

QUESTION: So, when you say, "knowledge," you don't mean the same thing as actually was thinking about it at the time.

MR. LUCAS: That's correct.

QUESTION: You mean a kind of constructive thing.

MR. LUCAS: No. Actual.

QUESTION: Actual knowledge of what?

MR. LUCAS: At the time, he had actual knowledge of the fact that Loyola University was negotiating with Mr. Liljeberg and the St. Jude interest to sell them a piece of land --

QUESTION: But he did forget at the time. There was a finding that he had forgotten when he sat on the case.

MR. LUCAS: Yes, Justice White.

QUESTION: Do you accept that?

MR. LUCAS: Do I accept that?

QUESTION: Yes.

MR. LUCAS: I think first, if I may answer you in this way, first, I don't think it is a question of whether I accept. It is whether the people sitting in this courtroom and the public at large accept it based on appearances.

QUESTION: Now, do you think people sitting in a courtroom ought to be, should be able to say, "Well, we just don't believe him." And think the judge who found that he had forgotten just was wrong.

MR. LUCAS: Let me answer you this way. I think that the Fifth Circuit laid down a very narrow test for the invalidation of a judgment in a case such as this. And that

test was one of whether the reasonable person would firmly expect -- I think the key words are, "firmly expect," that the judge had knowledge of the impropriety. And that there was, thus, an appearance of impartiality, a lack of partiality.

QUESTION: There is a finding to the contrary. There is a finding by Judge Schwartz -- Justice White asked you a few minutes ago whether or not you accepted it. I don't think you have yet answered that question.

MR. LUCAS: I cannot rationalize in my own mind why a man as bright -- and I don't say that he wasn't telling the truth, if that is what you are asking.

QUESTION: The Fifth Circuit didn't set that finding aside as clearly erroneous.

MR. LUCAS: No, it did not.

QUESTION: So, we have to accept here; do we not?

QUESTION: Did you even claim it was clearly erroneous in the Court of Appeals?

MR. LUCAS: No, sir, I did not. I did not. I think the truth of the matter is that there is no way that the lower courts, there is no way that this honorable Court, there's no way of anyone other than Judge Collins being able to decide what Judge Collins knew, when he knew it, when he forgot, what he forgot and when he remembered, again.

QUESTION: Those questions are involved in many, many kinds of law suits dealing with fraud, notice. And,

traditionally, those things are set for trial before a judge, like Judge Schwartz who makes findings. Judge Schwartz made a finding here. It was not challenged in the Fifth Circuit. It seems to me we have to accept that.

MR. LUCAS: I think it is a question, I think that is one factor in the overall picture.

QUESTION: No. It is a central factor. The trouble, Mr. Lucas, is if you accept it, then you have accepted the proposition that his impartiality could not reasonably be questioned unless, unless you assert that it is reasonable to think that the judge who made that finding was lying. Or you have to assert the proposition that you can reasonably just either lying or erroneous -- that you can reasonably disbelieve the judgment of a court.

You have a court who said, "This man did not know." Now, he may have been negligent before, but he was impartial when he decided the case. That is the finding we have and that is what sub-section (a) requires: his impartiality might reasonably be questioned.

Now, how could his impartiality in light of all that has happened since reasonably be questioned unless you choose not to believe the court's judgment.

MR. LUCAS: For two reasons. First, he had knowledge. Let's begin with that proposition, if we may, Justice Scalia.

QUESTION: At one time.

MR. LUCAS: At one time. Knowledge held to have been forgotten. Now, I would like to refer the Court as we did in our brief --

QUESTION: I am not too sure of that. I understand that there is a good possibility that these things came up and he never even heard about it, while he was on the Board.

MR. LUCAS: I think the facts belie that, Justice Marshall.

QUESTION: Is there anything that said he was at a Board meeting where this matter was discussed?

MR. LUCAS: Yes, Your Honor.

QUESTION: At a particular Board meeting?

MR. LUCAS: Three particular Board meetings.

QUESTION: Now, those are the ones you are talking about that shows --

MR. LUCAS: Yes, sir.

QUESTION: He might have been asleep.

MR. LUCAS: His testimony at his deposition was that it was his habit to read the minutes of the previous Board meeting and the agenda for the upcoming Board meeting, both of which were mailed to him in advance of the coming Board meeting.

And on December 11th, 29 days from the date that he attended a Board meeting at which it was unanimously passed

a resolution was unanimously passed, which means Judge Collins presumably voted for it, to authorize the Vice President of Business and Finance of Loyola University to continue negotiations. Twenty-nine days later at page 1 of the joint appendix, you will note that the judge entered an order, all attorneys were present in his chambers where he denied an injunction that the defendants had filed. That was 29 days from the time he attended the Board meeting and voted on November the 12th concerning St. Jude and Liljeberg. The case was a declaratory judgment action. It did not involve property, per se. It involved who owned a particular corporation which had been granted this certification of need, which we call an 1122 certificate in Louisiana.

Now, there is another factor present, too, in terms of knowledge that I don't think we can ignore. And that is the whole doctrine of the fact that perceptions are important. Justice Frankfort identified this in Public Utilities Commission v. Pollack. In Pepsico V. McMillen, which is a 7th Circuit case which was decided in 1985, they spoke of some unconscious level. In other words, the idea being, "Once we acquire knowledge, who is to say to what extent that unconscious state has an effect on our judgments, on our decisions?"

In other words, these are perceptions that knowledge creates once we have acquired it. And I think that is a

significant factor, certainly.

QUESTION: Was your motion to reopen here, was that under 60(a) or 60(b)?

MR. LUCAS: Yes, Mr. Chief Justice, it's under 60(b).

QUESTION: And for what time limit would you say governed that motion?

MR. LUCAS: As we all know, the Congress didn't set a time limit, which I think throws us into a situation where our procedural vehicle is 60(b). 60. And, of course, there it is based upon reasonableness.

Now, we know from other cases, we know that in the U.S. v. Brown case, a judgment was vacated six years after it was rendered. Roberts v. Bailar, four years.

QUESTION: What courts were those decided in?

MR. LUCAS: I know that Brown was the Fifth Circuit. Roberts v. Bailar was 6th.

QUESTION: Do you know anything from this Court since the Ackermann and Clapraw cases? Well, supposing a year or so after the case had become final, you had decided there had been a very erroneous jury instruction given in that case, do you think you could then come in under Rule 60(b) and say, "You know, let's have a new trial because this instruction was clearly wrong."

MR. LUCAS: No. I think you are dealing with a much larger purpose here. You are dealing with the question of how

do we, as judges and lawyers and justices, how do we want the public to perceive our judicial system if there is even an appearance of impropriety.

QUESTION: Well, supposing I come in and make the kind of motion and I say, "Well, certainly we don't want the public perceiving our system is one which gives flatly wrong jury instructions on major points in the case."

I suppose my opponent would argue, "There comes a time when a judgment has to become final. And why shouldn't that apply in this case, too?

MR. LUCAS: Because this is governed purely by 455(a). There is no 455(a) applying in the case of the jury.

QUESTION: No, but 455(a) does not say what should be done. You agree that 60(a) and 60(b) govern requests for relief of this sort.

MR. LUCAS: Yes. That's the vehicle to do it, yes.

Now, one other fact I would like to mention. In the deposition of Mr. Steeg, who was Chairman of the Board of Loyola University, he testified that in his opinion there wasn't a single member of the Board of Loyola who wasn't aware of the Liljeberg offer. He is the Chairman of the Board of Trustees.

The Monroe tract: I believe Justice Scalia was asking counsel for Petitioner about the Monroe tract. The

Monroe tract is an extremely tract. It is well known in the area outside of New Orleans, owned by Loyola University. I dare say I don't know how many hundreds or thousands it is, but in this case, alone, the hospital was built on an 81-acre site and the area that was going to be rezoned was 115-acre site and there are many more hundreds of acres, if not thousands. It is a significant tract. It is not the kind of thing that if you were sitting on the Board of Trustees, like you are selling a lot on the corner in the middle of a block. It is not that kind of thing. It is very large.

QUESTION: But is it correct, as Mr. Farr told us, that this is a different tract from the one that was the subject matter of the litigation?

MR. LUCAS: Let me clarify that because it gets a bit confusing. First of all, it was Hospital Affiliates International, not HCA, that was involved in the purchase of another tract of land that was approved by the Department of the State that issues these approvals for the building of a hospital.

Then the certificate issued. And the certificate came out in the name of St. Jude Hospital of Kenna, LA., Inc. Without bothering the Court with all the documents involved, the issue then was: Who owned that hospital? I mean who owned that corporation which in turn owned the certificate?

The court ruled that Mr. Liljeberg owned it and

Mr. Liljeberg needed a place to put his hospital because the piece of property we had was in a different location. And, therefore, he bought a second piece of the land that was not involved in this litigation directly.

QUESTION: What you are saying, I gather, is that if he had lost the litigation instead of winning it, then he would not have been an eligible purchaser for the Loyola property.

MR. LUCAS: That is correct.

QUESTION: So, it did actually effect Loyola's ability to make the transaction they ultimately made with them.

MR. LUCAS: That's correct. Had Mr. Liljeberg lost that law suit, more importantly, Loyola would not have been able to gain an increment of $9 million in the value of their surrounding property which Mr. Liljeberg was obligated to rezone in order to acquire the property on which to build his hospital. Very significant.

Hospital Affiliates International merged into HCA after that. I might add that the merger and the issuance of the certificate of need came down the same day. I don't think there is any significance to that, though.

I think that if we look at what Petitioner is saying, well, first let me direct my remarks to Petitioner's argument about prospective knowledge. I mean knowledge and then prospective recusal.

I would direct the Court's attention and say that we

fully agree with petitioner to page 26 of his original brief when he says, "We think that the earliest point should be when the judge actually knows of the facts requiring recusal." We submit that that date was January 24, 1980, long before -- long before this case.

QUESTION: The section really, construed that way, the section means that if you ever know anything, you are not entitled to forget it.

MR. LUCAS: No, Justice White.

QUESTION: Well, for purposes of application of the section.

MR. LUCAS: Again, the public has to firmly expect that the judge would have forgotten. For instance, that --

QUESTION: Well, then your answer should be, yes. You construe the statute as meaning that even if you have forgotten it is irrelevant because people are entitled to believe that you didn't.

MR. LUCAS: No, sir. I'm not for an invalidation of a judgment. I think there is a distinction between invalidation of a judgment and recusal. I think the cases seem to indicate that if a reasonable man harbors doubts, there is possibility of recusal for an appearance of impropriety, but not for an invalidation of judgment. For an invalidation of a judgment, as I read the Fifth Circuit opinion, the reasonable person, the objective observer must firmly expect -- not

speculate -- they say that specifically. Not speculate. Firmly expect that the judge, because in January 1980, he had knowledge, firmly expect that he wouldn't forget it.

MR. LUCAS: I don't want to limit this to January 24, 1980 in this case, because this was a continuous.

QUESTION: Yes, but that is when you say that's the date.

MR. LUCAS: That's when he first acquired it. Petitioner says when he first acquired knowledge. And I am saying to the Court that when Judge Collins first acquired knowledge, it was January 24, 1980. There were repeated instances of meetings, communications which he read after that time. This is a continuous thing. Not an isolated one.

QUESTION: This strikes me as really quite unrealistic. The Chief Justice is by statute the Chancellor of the Smithsonian, a trustee of the National Gallery. I attend numerous Board meetings, just speaking from my own experience. And the idea that you carry around in your mind after you leave those meetings everything on the agenda certainly doesn't square with my experience.

MR. LUCAS: I agree, Mr. Chief Justice. I agree, Mr. Chief Justice. And we are not suggesting that. We are certainly not suggesting.

QUESTION: Well, then, what do you mean when you say it is a continuous thing?

MR. LUCAS: Perhaps I didn't express myself well. There were continuous meetings that Judge Collins attended. There were continuous meetings that Judge Collins received. Continuous in the sense that it wasn't just January. It wasn't just December 24, 1980.

QUESTION: Yes, but your submission is that even if when he judged the case, he had absolutely forgotten it. Absolutely, which people do; nevertheless, you win the case.

MR. LUCAS: If the average --

QUESTION: Well, that is your position.

MR. LUCAS: Yes, it is, Justice White. If the average reasonable person, and this is what the court meant --

QUESTION: Wouldn't believe that he had forgotten it.

MR. LUCAS: That's correct.

QUESTION: Despite what a judge has found?

MR. LUCAS: That's correct. That is correct. Based on the facts of this case, if you please. Not just any case, but based on the strong compelling facts of this case. This is what the courts found.

QUESTION: Your are willing to accept as eliminating your right to get the case set aside, just a belief by the public, the generality of belief by the public that he might have forgotten it or that he would have forgotten it, but you are not willing to accept for the same purpose a finding by a Federal judge that he in fact forgot it.

MR. LUCAS: I think that is what the statute says, Justice Scalia. All we are doing is interpreting this statute.

QUESTION: Well, in a case like this, then, knowledge or not, it is just what you should try out is: What would a reasonable person in the community have believed. And I am not sure that that would even be a triable issue. The judge just ought to rule on it, like the Court of Appeals or the Fifth Circuit did.

MR. LUCAS: Well, let's accept one fact to begin with. This was a rare occurrence, because most judges do recuse themselves. Most judges say, "I have a conflict here." Most judges -- when Judge Collins had actual knowledge by his own admission on the 24th --

QUESTION: He recused himself. Sure, he did.

MR. LUCAS: No, sir. On January 24th, when he had actual knowledge --

QUESTION: Yes, but he felt there wasn't any longer any conflict then.

MR. LUCAS: The case was still --

QUESTION: He was wrong.

MR. LUCAS: The case was still under his control because it was two days before the judgment was entered. I'm sorry. It's March 24th.

QUESTION: And this wasn't in the discovery?

MR. LUCAS: Discovery didn't take place until after

we learned of this fact and then filed the motions to vacate. Yes.

QUESTION: No discovery before that?

MR. LUCAS: No reason to discover because we didn't know it until 10 months after the Court of Appeals decision was filed.

QUESTION: Well, that is the reason for discovery is to discovery.

MR. LUCAS: That's right. We had no reason to believe that Judge -- we didn't know that Judge Collins was on the Board of Loyola.

QUESTION: Were you interested in what transactions went on about your property?

MR. LUCAS: Justice Marshall, the property was not involved in this case. All that was involved was the ownership of a corporation. We had no knowledge that Judge Collins was a member of the Board of Trustees or that Loyola was involved.

QUESTION: I didn't say that. But weren't you looking up -- there was nothing involved in minutes that required you to read the minutes?

MR. LUCAS: I had never seen the minutes. We didn't even know about Loyola. Because at the time, you understand, the tract involved was a different tract, not the Loyola tract. It was a tract that HAI had acquired prior to its merger with HCA.

QUESTION: You didn't find out until after you lost?

MR. LUCAS: That's correct. Ten months after we lost.

QUESTION: One little detail about the case I am puzzled about. The judge who tried the question of whether Judge Collins knew the facts. He tried it on the basis of deposition; didn't he?

MR. LUCAS: Yes.

QUESTION: Or did the judge actually testify in front of the other judge?

MR. LUCAS: We agreed to submit it on depositions, yes. Judge Collins' deposition, Mr. Steeg's deposition and the deposition of the Chairman, Vice President in Charge of Business and Finance for Loyola University. Those three.

QUESTION: I see.

QUESTION: Mr. Lucas, I take it that you are satisfied that we address only Section 455(a) as governing this case?

MR. LUCAS: Justice O'Connor, I was interested in the question you addressed to Mr. Farr with regard to 455(b)(4). It is our opinion, the first court on remand -- the first Fifth Circuit panel on remand, cited (d)(4)ii, saying that this was securities. I don't think it is securities. And if it is not securities, then there would have been -- then it would apply. It is real estate, not securities.

QUESTION: What you have argued this afternoon is a 455(a).

MR. LUCAS: That's our main point, Justice O'Connor. That's our main point; but I am not prepared to say that that wouldn't apply and we would certainly urge it on the theory that real estate is not securities. Securities referring to stocks, bonds, notes.

QUESTION: Mr. Lucas, although rule 60(b) doesn't set any time limit for sub-part (6) which reads: "Any other reason justifying relief from the judgment."

It does for (1), (2) and (3). (3) for example, includes fraud. But even if the judgment had been obtained by fraud, and it does set a time limit for that, which is one year. Can you think of any reason why there should be more than one year for -- why just a year for fraud?

And then the other things, (4), (5) and (6), the judgment is void. There is no time limit for that, but a void judgment is a void judgment anyway. It could be attacked collaterally. So, there is no reason to set a time limit on that.

The judgment has been satisfied, relieved or discharged. Likewise, it is just inoperative once it has been satisfied. So, why should we set more than a year for this, although for fraud by one of the parties, we would only allow it to be challenged within a year afterwards.

MR. LUCAS: Justice Scalia, I can only answer you in this fashion. We all know that the Justice Department suggested to Congress that a time limit be put in. Congress, in its wisdom, legislated without a time limit. It is impossible to say why they did it, but they did it. No time limit was affixed to 455(a). That is the only answer I can really, truthfully give you.

QUESTION: Well, 455(a) also doesn't say anything about setting aside judgments. It wasn't addressing the subject of setting aside judgments.

MR. LUCAS: Well, that, of course, is a procedural matter, the setting aside of the judgment.

QUESTION: It is not a procedural, it has to do with what Congress was addressing. There is no reason to expect a time limit to be set forth in 455 because it is not addressing the setting aside of judgments.

QUESTION: I thought you agreed that your effort to set aside a judgment was made under rule 60(a) and (b).

MR. LUCAS: That's correct, Mr. Chief Justice.

QUESTION: May I ask you just the opposite of the question I asked Mr. Farr. He wouldn't say -- he wasn't quite prepared to say you could never set aside a judgment under 455(a). Do you take the position that we should always set aside a judgment when there is a violation of 455?

MR. LUCAS: When there is a violation of 455(a)?

QUESTION: Yes.

MR. LUCAS: Yes. I take the position that the judgment is not void, but voidable.

QUESTION: And every such judgment, no matter how trivial. Say, the judge forgot he owned two shares of stock.

MR. LUCAS: Oh, no. No, Justice Stevens. Absolutely not. The key words are "firmly expect." Whether a "reasonable person would firmly expect" that the judge lacked impartiality. They have got to firmly expect it. It is going to take a strong set of facts.

I think we cited in our brief to you, we found 38 cases in 10 years in the whole Fifth Circuit: four cases a year.

QUESTION: Where does the phrase, "firmly expect," come from?

MR. LUCAS: It comes form the interpretation -- it comes from Hall v. SBA, the Fifth Circuit decision.

QUESTION: It is not in the statute, then?

MR. LUCAS: No. It is not in the statute. It is not in the statute. Hall v. SBA, which was followed in Liljeberg and I don't recall. It may have also been in Patacia. But I think Hall was the one.

QUESTION: But, of course at the time this case was going on here and at the time the judgment was rendered, the public wouldn't have firmly expected that there was any

impropriety because the public knew no more than you did about the connection to Loyola; right?

So, what you are saying is now would the public firmly expect? You want to apply it retroactively; right?

MR. LUCAS: Right.

QUESTION: But if you apply it retroactively, then it seems to me only fair to take into account that we now have a determination by a Federal judge who says, "The man didn't know about."

And with that, you say even with that judgment, the public would firmly expect that he wasn't impartial. I mean it seems to me you have to be retroactive or not retroactive, but don't suck back part of what we later know and not all of what later know.

MR. LUCAS: Let me answer you question in this manner. First of all, you keep talking about the judge didn't know. The judge did know. He did know.

QUESTION: I understand that.

MR. LUCAS: The court found that he knew. Now, that was a finding of fact of the court. He knew. He knew, but he forgot.

QUESTION: He had known. Let's keep our tenses correct. He had known.

MR. LUCAS: All right. He had known, but he forgot.

QUESTION: All right.

MR. LUCAS: He had known, but he forgot.

Now, in terms of the evidence an important part of this statute is objectively ascertainable facts. In other words, if the public, given objectively ascertainable facts, which are what? Which are that Judge Collins was in attendance at a number of Board meetings, three in a very short period of time, that he attended one Board meeting that was held in close proximity to the time he first ruled in this case. Not his judgment in this case, not the trial of this case. But he denied an injunction. The second entry on page 1 of the joint appendix. A very short period of time.

Then he read all of these things. And Mr. Steeg said that every member of the Board of Trustees -- these are all facts, which if presented to the public, to the average reasonable person, to the objective observer, would make them believe, firmly expect -- not just believe, not just speculate: firmly expect that that judge was impartial.

QUESTION: Had they known all of this, which they didn't. Mr. Lucas, there is one other thing. You keep emphasizing the prior knowledge and saying he had known. As I read Judge Clark's opinion, I didn't notice this before, he seems to hold that they had constructive knowledge.

MR. LUCAS: They did.

QUESTION: He calls this the constructive knowledge rule.

MR. LUCAS: Yes.

QUESTION: And so that as a matter of law the case should be treated as though he had actual knowledge.

MR. LUCAS: That's correct.

QUESTION: Because the facts tending to indicate knowledge are so strong that most people would disbelieve the judge. And rather than trying to actually decide whether the judge was entirely candid or not, it would be better to adopt a constructive knowledge rule. Judge Clark doesn't make the same concession that you make.

MR. LUCAS: I think, though, Justice Stevens, Judge Clark did not speak in terms of a general type of constructive knowledge. A very limited type of constructive knowledge.

QUESTION: But your firmly expect language is the test for determining whether there are enough facts to justify a finding of constructive knowledge which he, in effect, seems to make.

MR. LUCAS: That is correct. And he knew he had knowledge before the judgment was final and did not make it known to the attorneys. That was on the 24th of March 1982 and the case was under his control until the 26th of March 1982. Had he made it known, the motion to vacate could have been filed then. I mean the motion for recusal could have been filed then. Or it could have been raised on appeal. It wouldn't have reached this stage.

In summation, I would simply like to say that the facts of this case exude an aroma of the appearance of impropriety. We feel that 455(a) was intended to cover factual situations such as this case presents. And, accordingly, we respectfully request that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

CHIEF JUSTICE RENQUIST: Thank you, Mr. Lucas.

Mr. Farr, you have two minutes remaining.

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

ON BEHALF OF PETITIONER - REBUTTAL

MR. FARR: Thank you, Mr. Chief Justice. Just very briefly: I would like to just address the question of exactly what the fact findings in this case are. On page 28-A of the Petition for Certiorari, this is the District Court finding by Judge Schwartz. It says, "Judge Collins did not have actual knowledge of Loyola's potential interest in the HSA-Liljeberg controversy until March 24, 1982."

On page 30, he then discusses that previous to that time at several of the Board meetings that there was available to the judge information and that would be sufficient to charge him with constructive knowledge. But the only finding of actual knowledge made by Judge Schwartz is on page 28-A and it says that he had that at March 24, 1982, after all of his rulings in the case had been made. The very rulings that Respondent wants to set aside.

QUESTION: But I suppose you would be making the same argument if it were perfectly clear that he at one time knew it, but had just forgotten.

MR. FARR: If, indeed there had been a finding, we would be making the same argument. But I just think it is important for the record to point out that there was no such finding of actual knowledge at that time. It was simply that he was present at Board meetings and had access to minutes from which he could have gotten knowledge, but no finding that he actually had that knowledge.

Now, the one other point I would just very briefly like to address is the (b)(4) point which was referred to by counsel. (b)(4), as I said before, specifically -- regardless of the question of the definition of securities under (b)(3) specifically requires knowledge. And it seems to me that on the face of that provision that there is no constructive knowledge standard there.

What is being done here is to take that specific language that Congress included in (b)(4) and try in (a) to make a negligence standard out of it, to say that even if you didn't know, but should have known, we still would be entitled to the same relief. It has nothing to do, I should point out, with prospective recusals. There is no way in the world a judge can actually step aside and let another judge handle the case, which is really what Congress was aiming at, if he

doesn't know of any grounds to do so.

CHIEF JUSTICE RENQUIST: Thank you, Mr. Farr.

The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-957

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

HEARING DATE: DECEMBER 9, 1987

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 UNITED STATES SUPREME COURT, and that this is a true and accurate transcript of the case.

Date: December 9, 1987

Margaret Daly
Official Reporter

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